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Reference

**SHARING OF  
RADIONUCLIDE  
INFORMATION  
WITH STATES**

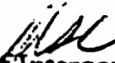


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**PRODUCED FOR  
THE OFFICES OF THE STATE ATTORNEYS GENERAL  
AND DOE FIELD OFFICE PERSONNEL**

To: DOE Field Office Personnel  
Members of the NAAG/DOE Workgroup

From: Christine Milliken   
Executive Director and General Counsel  
National Association of Attorneys General

Martha Crosland   
Director, Office of Intergovernmental and Public Accountability  
U.S. Department of Energy

Date: September, 1998

Re: Announcement and Issuance of Guidance:  
*Sharing of Radionuclide Information with States*

After years of hard-work and discussion the U.S. Department of Energy and the National Association of Attorneys General are pleased to announce the completion and issuance of a joint effort, the enclosed guidance. "*Sharing of Radionuclide Information with States.*" This truly important occasion marks the first time that DOE and the National Association of Attorneys General have combined their efforts to produce a jointly created guidance document.

This effort was enhanced through a cooperative agreement between the U.S. Department of Energy and the National Association of Attorneys General (NAAG). A working group, which was formed of both DOE personnel and Assistant Attorneys General, was established to formulate procedures for DOE personnel to use as guidance when responding to state requests for radionuclide information. The guidance can be used to respond to requests from all states where DOE facilities are located as well as states affected by DOE activities or facilities.

*Sharing of Radionuclide Information with States* lays out the scheme whereby DOE intends to work cooperatively with states to accommodate radionuclide information requests as a matter of comity and in the interests of open communication. It does not, however waive any legal defenses either party may have against a state's efforts to impose mandatory requirements to provide radionuclide information. This guidance will help to improve the state-federal relationship and provide a smooth response to state requests.

We jointly believe the NAAG/DOE effort that produced this guidance will assist both the states and DOE with more effective communication and hope that this guidance will serve as a first step towards greater understanding of state and federal needs for timely information.

July, 1998

## **GUIDANCE SHARING OF RADIONUCLIDE INFORMATION WITH STATES**

### **I. Background**

The Office of Environmental Policy and Assistance had a cooperative agreement with the National Association of Attorneys General to improve communication among the States and DOE on environmental compliance issues related to DOE facilities. This work is continuing under an agreement with the Office of Environmental Management. NAAG, in its role as the membership organization of the Attorneys General of the 50 states, Commonwealth, Territories, and the District of Columbia, assists the legal officers in fulfilling the responsibilities of their offices. Therefore, NAAG is particularly well-suited to facilitate communication among DOE and the States.

Discussions associated with these agreements has led to the identification of several issues that DOE and NAAG considered important and warranted further evaluation. One of these issues is the States' position that DOE should establish a policy to provide radionuclide information as requested by individual States.

The States believe that there are cases where DOE has not been forthcoming in providing radionuclide information. NAAG has provided DOE the results of a survey on State experiences in receiving radionuclide information from DOE. The eight States responding to the survey (Idaho, Kentucky, Nevada, New Mexico, Ohio, Oregon, Tennessee, Washington) indicated that DOE generally provides, on a voluntary basis, radionuclide information requested. However, in some cases, the provision of data has been delayed or resisted by DOE. Moreover, DOE has occasionally resisted States' attempts to require the submission of such information unless statutory authority is clear. This resistance has, in a few cases, resulted in litigation or administrative appeal. In an effort to minimize such instances, it is important to remember that DOE currently has policies which address the sharing of environment, safety and health information with stakeholders. However, based on discussions with NAAG and the States, there appears to be some need to clarify these policies as they relate to the provision of radionuclide information.

The purpose of this guidance is to restate DOE's current policies and to provide assistance to DOE personnel sharing radionuclide information. This guidance will apply equally to requests from States where DOE facilities are located and from other States affected by DOE activities or facilities. This guidance is not applicable to a request for radionuclide information where a State has authority.

### **II. Existing Policy**

Then Secretary of Energy Hazel O'Leary issued a memorandum, "Environment Safety and Health Policy for the Department of Energy Complex" on July 20, 1993 (copy attached). The purpose of this memorandum was to set forth the Department's vision of personal commitment, mutual trust, open

communication, continuous improvement and full involvement of all interested parties. The guiding principles emphasized DOE's strong commitment to the health and safety of our workers and the public and the protection of the environment. One of these guiding principles is "to encourage and promote the sharing of environment, safety and health information and resources." On July 29, 1994, then Secretary O'Leary issued another memorandum, "Implementation of the Department's Public Participation Policy" (copy attached). One of the critical policy elements contained in this guidance is that the "Department will foster candid information exchanges and ongoing two-way communications using a variety of mediums."

### III. Guidance

Consistent with the policies discussed above, DOE intends to work cooperatively with the States to accommodate their requests for radionuclide information as a matter of comity and in accordance with the following guidance and conditions set forth below:

This guidance and any DOE actions taken in reliance on this guidance does not waive, or eliminate any legal defenses or arguments DOE may have against a state's effort to impose mandatory State requirements to provide radionuclide information. Further, this guidance does not act to waive, eliminate or preempt any legal privileges or other bases DOE may have regarding the release of such information, nor will it create any legally binding commitments. This guidance is intended solely to clarify DOE's policy on providing the release and exchange of radionuclide information in an effort to limit instances in which DOE might object to providing radionuclide information.

In those instances where a DOE field office is unable to reach agreement with a State, the issue should be raised to the appropriate Headquarters Program Office and the Office of General Counsel for assistance.

#### A. Existing And New Information

Upon request by a State, DOE will make radionuclide information promptly available, when the requested information exists.

When information requested by the State does not exist or is not readily compatible for a State's use, DOE personnel should use their best efforts to develop the information and should resolve the issue on a case by case basis, taking into consideration cost, available resources, and the extent the result will be informative on an issue of public interest. DOE will first explore alternative ways of satisfying the State's request for information. In order to do so, DOE personnel should request that the State provide DOE with the reasons the requested information is needed and the uses to which it will be put. DOE personnel should keep in mind that the goal is to provide the requested information.

If DOE determines that it is unreasonable to generate the information requested, DOE should continue to work with the State to address its concerns. For example, in cases where it has been determined by DOE that it is cost prohibitive for DOE to generate the information, sharing the cost of generating the information with the States should be explored.

## B. Mandatory v. Voluntary Provision

In the spirit of cooperation, DOE should focus discussions with the States on accommodating each other's needs and constraints and should attempt to avoid arguments concerning statutory or regulatory authority. In particular, DOE personnel should work to structure their interactions with the States such that issues of regulatory authority need not be addressed.

On some occasions the State's request for radionuclide information may come in the form of a mandatory requirement contained in a permit, agreement, etc. On those occasions, DOE personnel, in consultation with field office counsel, should attempt to resolve the issue by agreeing to voluntarily provide the information, as a matter of comity. In the event that the proposed resolution is unacceptable to the State, DOE field office personnel should determine whether to accept or challenge the requirement and/or reach an acceptable compromise with the State.

Although DOE's policy is to work with the States to accommodate their requests for radionuclide information by voluntarily providing this information in accordance with this guidance, it should be recognized that this policy does not eliminate any legal arguments DOE may have against a State's attempt to impose mandatory requirements to provide radionuclide information in the absence of a regulatory or legislative mandate to do so. However, it is hoped that by providing information on a voluntary basis the instances where States would unilaterally seek to impose mandatory requirements would be minimized.

## C. Classified Information

When the information requested by a State is available, but cannot be released because the information is classified or controlled as provided by law, such as section 120(j) of CERCLA, or section 2168 of 42 United States Code (Dissemination of Unclassified Controlled Nuclear Information), DOE should consult with the appropriate classification officers or other appropriate officials to initiate a declassification review or in the case of sensitive information, to determine if the information can be released in accordance with applicable procedures for proper handling. If the information can be declassified in a meaningful form, or otherwise released, steps should be taken to accomplish this and the State should be notified of the approximate release date. If the information cannot be declassified in a meaningful form, or otherwise released, DOE personnel and the State should work together to determine if there are other alternatives to meeting State information needs.

## IV. Conclusion

DOE is committed to continuous improvement in achieving excellence in worker, public, and environmental protection. One of the ways this can be accomplished is through open communications, such as sharing of information with all interested persons. Sharing includes providing radionuclide information to States in a manner consistent with the law and DOE policy. Circumstances which could hinder or prevent the release of requested information should be resolved, whenever practicable, through discussion with State authorities.