

RULEMAKING ISSUE NOTATION VOTE

October 18, 2001

SECY-01-0192

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: RULEMAKING PLAN: REVISION OF APPENDIX E TO 10 CFR PART 50

PURPOSE:

To obtain the Commission's approval to proceed with rulemaking to revise Appendix E to 10 CFR Part 50, "Emergency Planning and Preparedness for Production and Utilization Facilities," to resolve an ambiguity in the regulations regarding NRC approval of nuclear power plant licensee-initiated changes to emergency action levels (EALs).

BACKGROUND:

EALs are thresholds of plant parameters (such as containment pressure and radiation levels) utilized to classify events at nuclear power plants into one of four emergency classes (Notification of Unusual Event, Alert, Site Area Emergency, or General Emergency). EALs are required by Appendix E to 10 CFR Part 50 and §50.47(b)(4) and are contained in licensees' emergency plans and emergency plan implementing procedures.

Section §50.54(q) states that licensees can make changes to their emergency plans without Commission approval "only if the changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the standards of §50.47(b) and the requirements of Appendix E to 10 CFR Part 50." However, Appendix E to 10 CFR Part 50 states that "EALs shall be discussed and agreed on by the applicant and State and local governmental authorities and approved by NRC." Because EALs are required to be included in the emergency plan, the issue is whether changes to EALs incorporated into the emergency plan are subject to the change requirement in 10 CFR 50.54(q), or to the more restrictive requirement in Appendix E.

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The current staff and industry practice, in general, has been to make revisions to EALs and to implement them without requesting NRC approval after determining that the changes do not reduce the effectiveness of the emergency plan, in accordance with §50.54(q). When the determination is made that a proposed change constitutes a decrease in effectiveness, licensees submit the changes to NRC for review and approval. Additionally, if a change involves a major change to the EAL scheme, for example, changing from an EAL scheme based on NUREG-0654 guidance to an EAL scheme based on NUMARC/NESP-007 guidance, it has been the industry practice to seek NRC approval before implementing the change.

The staff believes that industry practice complies with the requirements of §50.54(q) for emergency plan changes. However, staff practice has been to review all EAL revisions, either before or after licensee implementation. EALs submitted by licensees for NRC approval before implementation are reviewed by Office of Nuclear Reactor Regulation (NRR) staff and the staff's review is documented in a safety evaluation. Other EAL reviews are performed as part of the regional inspection of licensees' emergency preparedness programs (after the licensee implemented the changes) and the inspection results documented in an inspection report.

During the staff's development of guidance for regional inspectors on inspection of emergency plan changes, questions were raised regarding whether the industry practice of implementing revised EALs before receiving NRC approval complied with requirements of Appendix E to 10 CFR Part 50. To resolve these questions, the staff sought advice from the Office of the General Counsel (OGC) as to whether the industry practice met the intent of the regulations in 10 CFR Part 50 or whether all revisions to EALs must be approved by the NRC before implementation. OGC advised the staff that while the regulations are unclear as to whether prior NRC approval is required for changes to a licensee's EAL classification scheme, the regulations are best interpreted to require prior NRC approval for all changes to a licensee's EALs.

DISCUSSION:

Because current staff and industry practice differs from OGC's view of how the industry should comply with the regulations for revising EALs, the staff considered two options for reconciling this difference. One option is to inform licensees that their current practice does not comply with the requirements in Appendix E to 10 CFR Part 50 and require them to submit all EAL revisions for NRC approval before implementation. A second option is to clarify the requirements governing EAL approvals in Appendix E to require licensees or applicants to submit for prior approval only initial EALs and major changes to the EAL schemes, which is consistent with current staff and licensee practice. Under this second option, NRC approval would also continue to be required for EAL changes that decrease the effectiveness of the emergency plan in accordance with §50.54(q).

The staff recommends the second option and has developed the attached rulemaking plan to propose revision of Appendix E to 10 CFR Part 50 to require NRC approval of EALs for applicants for initial reactor operating licenses and for licensees who are converting from one

scheme (e.g., NUREG-0654-based) to another scheme (e.g., NUMARC/NESP-007-based). This practice has been shown to maintain safety and reduce unnecessary regulatory burden for licensees in revising their EALs. Licensees can make minor EAL changes promptly and efficiently without undue NRC oversight. The staff believes an appropriate level of NRC oversight would be maintained because a review of licensee EAL changes is part of the baseline inspection program, including confirmation of the licensees' determination that the changes did not decrease the effectiveness of the emergency plan. For EAL conversions from a NUREG-0654 based scheme to a NUMARC/NESP-007 based scheme, NRR staff would continue to review and give prior approval before licensee implementation of the changes. The staff and the industry believe, and extensive experience has shown, that conversions to a new EAL scheme require prior NRC review and approval. Prior approval provides assurance that licensees can make proper and timely classifications and notifications of an event after adopting a new scheme. Clear and accurate EALs are a crucial part of the emergency preparedness program. By ensuring the efficacy of the EALs, safety and public confidence are maintained.

The staff does not recommend the first option because it would place unnecessary additional regulatory burden on the licensees and on the NRC staff which would have to process even the most minor EAL revisions. The staff believes this to be an inefficient use of resources for all parties involved. In addition, the staff is concerned that implementation of this option may discourage licensees from improving their EALs. This option has no safety benefit and would be a change in current staff position.

RESOURCES

Resources to conduct the rulemaking (approximately 2.0 full-time equivalent (FTE) over the period FY 2001-2004) are currently budgeted.

COORDINATION:

OGC has no legal objection to the rulemaking plan. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection to its content.

The Office of Enforcement (OE) has no objection to the rulemaking plan and concurs in it. However, the OE staff recommends exercising enforcement discretion regarding past violations of 10 CFR Part 50, Appendix E, until the rule is finalized. This issue is discussed in the attached rulemaking plan.

RECOMMENDATION:

The staff recommends that the Commission approve the rulemaking plan to proceed with the Part 50, Appendix E, rulemaking using Option 2 in the attached rulemaking plan.

/RA by William F. Kane Acting For/

William D. Travers
Executive Director
for Operations

Attachment: Rulemaking Plan

RECOMMENDATION:

The staff recommends that the Commission approve the rulemaking plan to proceed with the Part 50, Appendix E, rulemaking using Option 2 in the attached rulemaking plan.

/RA by William F. Kane Acting For/

William D. Travers
Executive Director
for Operations

Attachment: Rulemaking Plan

ADAMS ACCESSION NUMBERML011660098 *See previous concurrence
DOCUMENT NAME:C:\Program Files\Adobe\Acrobat 4.0\PDF Output\SP01-0192.wpd

OFFICE	NRR/IOLB	NRR/IOLB	NRR/IOLB	NRR/RGEB	D/DIPM
NAME	LCOHEN*	KGIBSON*	GTRACY*	WBECKNER*	BBOGER*
DATE	3 /12/2001	3/12/2001	3/14/2001	5/25 /2001	3/23/2001
OFFICE	OGC	OE by e-mail	ADM by phone	CIO by e-mail	CFO by e-mail
NAME	STREBY*	JDIXON-HERRITY*	MLESAR*	BSHELTON*	JFUNCHES*
DATE	6/29/2001	07/9/2001	07/11/2001	6/26/2001	7/3 /2001
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DATE	7/05/2001	9/25/2001	9/28/2001	10/18/2001	

OFFICIAL RECORD COPY

Rulemaking Plan

Revision of Appendix E to 10 CFR Part 50

Regulatory Issue

There is an ambiguity in the regulations regarding NRC approval of nuclear power plant licensee-initiated changes to emergency action levels (EALs).

The industry practice, in general, has been to make revisions to EALs that do not reduce the effectiveness of the emergency plan and then to implement them, in accordance with §50.54(q), without requesting NRC approval. However, Appendix E to 10 CFR Part 50 states that "EALs shall be discussed and agreed on by the applicant and State and local governmental authorities and approved by NRC." The Office of Nuclear Reactor Regulation (NRR) sought advice from the Office of the General Counsel (OGC) as to whether the industry practice met the intent of the regulations in 10 CFR Part 50 or whether all revisions to EALs must be approved by the NRC before implementation. OGC advised the staff that while the regulations are unclear as to whether prior NRC approval is required for changes to a licensee's EAL classification scheme, the regulations are best interpreted to require prior NRC approval for all changes to a licensee's EALs.

Existing Regulatory Framework

Section 50.54(q) states that licensees can make changes to their emergency plans without Commission approval "only if the changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the standards of §50.47(b) and the requirements of Appendix E to 10 CFR Part 50." However, Appendix E to 10 CFR Part 50 states that "EALs shall be discussed and agreed on by the applicant and State and local governmental authorities and approved by NRC." Simply put; §50.54(q) permits certain changes to EALs without NRC approval while Appendix E requires that all EAL changes must be approved by NRC.

How the Regulatory Problem Will Be Addressed by Rulemaking

The staff proposes to revise the regulations governing changes to EALs to reflect current industry practice and staff policy on the approval of revisions to EALs. The proposed rulemaking would modify Appendix E to 10 CFR Part 50 to clarify that NRC approval of EALs would be required for applicants for initial reactor operating licenses and for licensees who are converting from one scheme (e.g., NUREG-0654-based) to another scheme (e.g., NUMARC/NESP-007-based) and that NRC approval would not be necessary for minor EAL changes that meet the criteria in §50.54(q). This approach maintains safety without increasing regulatory burden. Licensees can make minor EAL changes promptly and efficiently without undue NRC oversight.

An appropriate level of NRC oversight would be maintained because a review of licensee EAL changes is part of the baseline inspection program, including confirmation of the licensees' determination that the changes did not decrease the effectiveness of the emergency plan. For EAL conversions from one scheme (e.g., NUREG-0654-based) to another scheme (e.g., NUMARC/NESP-007-based), NRR staff would continue to review and give prior approval before licensee implementation of the changes. The staff and the industry believe, and extensive experience has shown, that conversions to a new EAL scheme require prior NRC review and approval. NRC approval would also continue to be required in accordance with §50.54(q) for EAL changes that decrease the effectiveness of the emergency plan. Clear and accurate EALs are a crucial part of the emergency preparedness program. By ensuring the efficacy of the EALs, safety and public confidence is maintained. This rulemaking will not require changing §50.54(q) and will not need a regulatory guide because it simply eliminates the need for NRC to approve minor EAL changes.

Options Considered

Two principal options were considered.

- Option 1 - No rule change. Implementing this option would require NRC to notify nuclear power reactor licensees that their current practice of changing EALs (even minor changes) without the NRC's approval, is a violation of Appendix E to 10 CFR Part 50.

The benefit of this approach would be that the NRC would avoid the costs of changing the rule and of implementing the revision. However, this alternative would increase the regulatory burden on licensees with no safety benefit and might be a disincentive to improving their EALs. In addition, reviewing even the most minor EAL change would increase the burden on the staff. Also, it would not correct the conflict in the regulations.

- Option 2 - Amend the existing regulations to eliminate the inconsistency between the requirements of Appendix E and §50.54(q) relating to approval of changes to EALs and reflect current practice. This would be done by amending Appendix E to 10 CFR Part 50, to delete the need for NRC to approve changes to EALs that do not diminish the effectiveness of the emergency plans (§50.54(q) criteria). This would allow licensees to revise their EALs without NRC approval unless the revision implemented a new EAL scheme or decreased the effectiveness of the emergency plan. The rulemaking would provide a means for licensees to improve their EALs without unnecessary regulatory burden.

Under Option 2, the regulatory burden on licensees would remain essentially the same as the current level. Once the rule is revised, licensees making minor EAL changes without prior NRC approval would be in compliance with the regulations.

Preferred Option:

Option 2 is preferred by the staff because it would clarify the regulations, it codifies current staff and licensee practice which has shown by experience to maintain safety, and its implementation would not increase unnecessary burden on licensees or the NRC.

Risk Considerations of Option 2

Under Option 2, EAL changes that decrease the effectiveness of the emergency plan and conversions to a new EAL scheme would be reviewed and approved by the NRC staff. This reflects the industry's and NRC's historical practice. Experience has shown that this practice maintains safety and is not an unnecessary regulatory burden on the industry.

If licensees have determined that changes to existing EALs do not decrease the effectiveness of the emergency plan, NRC reviews the changes after implementation during routine inspections. Post-implementation review by the NRC, instead of prior review and approval of these types of changes, poses a very small risk that licensees will implement an EAL that results in classifying an event at the wrong classification level or delaying the classification of an event. The event classification initiates the emergency response (including notification of licensee, State and local emergency response organizations). The level of emergency response is based on the classification level. For the most serious classification level, General Emergency, the predetermined set of response actions includes determination of protective action recommendations for the public, which may entail evacuation of portions of areas surrounding the nuclear power plant site.

Events that are classified too low may receive less support for onsite event mitigation, and actions taken by offsite agencies to prepare for (and if necessary implement) public protective actions may be delayed. Events that are classified at too high a level may result in unnecessary emergency response actions onsite and off site. Unnecessary onsite actions may include notification of licensee personnel to staff emergency response facilities, assembly of onsite personnel, and evacuation of nonessential plant personnel. Unnecessary offsite emergency response actions may include staffing emergency response facilities and implementing public protective actions, including possible evacuation of the public surrounding the nuclear plant site. The risk that unnecessary actions will affect the health of emergency workers or the general public is very small (and is mainly the risk involved in travel). However, there would be increased anxiety among the public and a financial burden associated with implementing unnecessary protective actions.

Benefits of Option 2

There are several benefits of adopting the proposed rulemaking. The discrepancy between the requirements for NRC approval of EAL changes in 10 CFR 50.54(q) and in Appendix E to 10 CFR Part 50 would be eliminated. At the same time, proposed EAL changes that decrease the effectiveness of the emergency plan or converting from one scheme (e.g., NUREG-0654-based) to another scheme (e.g., NUMARC/NESP-007-based) will continue to receive prior NRC review and approval. Review of EAL changes is part of the baseline inspection program. The proposed rulemaking would maintain safety and regulatory burden at

the current levels. The proposed rulemaking is expected to have no economic cost or benefit for the industry.

Enforcement Considerations of Option 2

The staff proposes not to expend inspection resources determining whether licensees are in compliance with the current requirement for changes to EALs. For deficiencies that are identified through the inspection program, the staff recommends exercising discretion in accordance with Section VII.B.6 of the enforcement policy. The basis for this discretion would be the lack of clarity in the requirements. Further, recognizing that it will take time to conduct the rulemaking and no benefit would be realized from changing the existing practice for licensees to make EAL changes to conform with the current requirement, the staff recommends continuing to exercise enforcement discretion for similar violations that occur until rulemaking is complete. Once the rulemaking plan is approved, the Office of Enforcement will develop enforcement guidance for the staff.

OGC Legal Analysis

The purpose of the rulemaking is to address an apparent ambiguity in the regulations. Section 50.54(q) permits licensees to make changes to their emergency plans without prior NRC review and approval if the changes do not “decrease the effectiveness of the plan and the plan continues to meet the requirements of [Section 50.47q and 10 CFR Part 50, Appendix E].” However, 10 CFR Part 50, Appendix E, states that EALs which are a required part of an emergency plan, “shall be discussed and agreed upon by the applicant and State and local government authorities *and approved by the NRC* [emphasis added].” OGC has advised the staff that the best reading of the regulations is that changes to EALs are governed by the specific change provision in Appendix E rather than the more general change provision in Section 50.54(q). OGC has also advised that a rulemaking would be the most appropriate method for adopting different change criteria and a different change process. Accordingly, the staff proposes to initiate this rulemaking. As OGC understands it, the rulemaking would require licensees to submit for NRC review and approval initial EALs and “revisions which adopt a new EAL scheme.” Licensees would be allowed to initiate and implement changes to existing EALs without prior NRC review and approval if these changes (i) do not constitute a “new EAL scheme,” (ii) do not decrease the effectiveness of the emergency plan, and (iii) otherwise meet the requirements of §50.47 and Appendix E.

After review of the Atomic Energy Act of 1954 as amended (AEA); we conclude that Section 103, 109, 161 and 182 of the AEA provide the Commission with sufficient authority to promulgate Option 2. However, there are a number of cautions discussed in the following paragraphs.

First, OGC cautions that the staff must develop clear, unambiguous rulemaking language that precisely describes the types of changes to EALs which may be made without NRC review and approval. Precision is necessary inasmuch as the staff wishes to require NRC review and approval of all *initial* EALs and changes to EALs that constitute a “new EAL scheme,” but intends *not* to require prior NRC review and approval for any changes to existing EALs (except those constituting a “new EAL scheme”) if EAL effectiveness is not reduced. In practice, it may be difficult to distinguish among these categories. It is unclear what a change to an “EAL

scheme” is and whether legally acceptable criteria can be developed to distinguish this concept. At a minimum, the statement of considerations (SOC) should address these issues by providing guidance on what constitutes a new EAL scheme.

OGC also notes that the rulemaking plan does not specifically address the regulatory process by which the NRC will provide approvals of licensee changes to EALs. Some regulations, such as 10 CFR 50.54(p), require that a proposed change requiring NRC review and approval be submitted as a license amendment. Other regulations such as 10 CFR 50.55a provide for approval of alternatives by the Director following licensee application. The statement of considerations - if not the rule language - should clearly state the regulatory nature of NRC reviews and approvals of changes to EALs that the agency intends for these changes.

In sum, OGC concluded that there is no known basis for legal objection to the proposed rulemaking.

Agreement State Implementation Issues

Under the “Policy Statement of Adequacy and Compatibility of Agreement State Programs” approved by the Commission on June 30, 1997, and published in the *Federal Register* on September 3, 1997 (62 FR 46517), Part 50 is classified as compatibility category “NRC.” The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act or provisions of Title 10 of the Code of Federal Regulations, therefore, there are no agreement state implementation issues to address.

Category of Rule

The category of this rule is burden relief and conflict resolution of regulations.

Based on the preliminary economic impact assessment conducted for this rulemaking plan, this rule does not appear to be a major rule as defined in the Small Business Regulatory Enforcement Fairness Act because its economic impact is likely to be less than \$100 million. As discussed in the Benefits section of this rulemaking plan, there is no economic cost or benefit to the industry. A final determination as to whether this is a major rule will be made when a detailed regulatory analysis has been performed.

Backfit Analysis

The proposed rulemaking addresses the regulatory conflict between two regulations regarding the need for NRC approval of minor EAL revisions. The proposed rule will not constitute a backfit as defined in §50.109(a)(1). Appendix E requires NRC review and approval of all changes to EALs. The proposed rulemaking would obviate the need for NRC review and approval for certain EAL changes, but it does not preclude the licensee from submitting *all* EAL changes to the NRC for review and approval.

Accordingly, the proposed rulemaking represents a voluntary relaxation of current requirements and is not a backfit. In addition, the proposed change applies prospectively to changes initiated by licensees. The Commission has indicated in various rulemakings that the Backfit Rule does

not protect the prospects of a potential applicant. For these reasons, the Backfit Rule would not apply to this proposed rulemaking.

Supporting Documents

The proposed rule will require preparation of a regulatory analysis, as well as an environmental assessment, as it appears that no categorical exclusions in §51.22(c) which would apply to this rulemaking.

The proposed rule will require licensees to submit requests for changes to EALs and to generate and maintain records. However, licensees are currently required to obtain NRC approvals for EAL changes, an argument could be made that the existing OMB clearances apply to this rulemaking. The staff will evaluate further the need to prepare an OMB clearance package for this rulemaking during preparation of the proposed rule.

The proposed rulemaking addresses the procedural issue of the circumstances under which a licensee may modify an existing EAL without prior NRC review and approval. This matter is not within the purview of the National Technology Transfer and Advancement Act of 1995.

The proposed rule should not require revising other regulations or necessitate a revision to Regulatory Guide 1.101, "Emergency Planning and Preparedness for Nuclear Power Plants."

Interoffice Management Steering Group

A steering group is not required for this rulemaking.

Public Participation

The staff will seek public comment by publishing the proposed rule in the Federal Register for a 75-day public comment period. The staff will inform the Federal Emergency Management Agency and State, Tribal Nation, and local government organizations within the plume exposure emergency planning zone when the proposed rule is issued for comment.

EDO or Commission Issuance

The staff recommends that this proposed rule be issued by the Commission.

Resources

Approximately 2.0 FTE of staff resources is anticipated to be expended for this rulemaking during the time frame FY 2001 through FY 2004. These resources are included in the current budgets for these years.

Staffing

NRR Staff Lead..... Lawrence K. Cohen
Division of Inspection Program Management

NRR Supporting Division Staff..... Michael T. Jamgochian
Division of Regulatory Improvement Programs

OGC Contact..... Geary Mizuno

Regional Contacts..... Richard Conte, Region I
Michael Ernstes, Region II
Wayne Slawinski, Region III
Gail Good, Region IV

Contractual Assistance..... None anticipated

Schedule

Proposed rule to the Commission..... 9 months after the rulemaking plan
is approved by the Commission

Public comment period on the proposed rule 75 days

Final rule to the Commission..... 9 months following the end of the
public comment period