UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

November 17, 2005

Cathy A. Catterson, Clerk
United States Court of Appeals for
the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

RE: *San Luis Obispo Mothers for Peace, et al. v. U.S. Nuclear Regulatory Commission*, No. 03-74628.

Dear Ms. Catterson:

The Federal Respondents file this letter under Rule 28(j) to inform the Court of action taken by the Nuclear Regulatory Commission since this Court held oral argument in this case. **Oral argument was held in this case on October 17; accordingly, please distribute this letter to the panel immediately.**

Last week we advised this Court of a Commission decision to initiate a rulemaking that would impact security at all nuclear facilities, including ISFSI's such as the Diablo Canyon facility that is involved in this litigation. Our letter informed the Court that the Petitioners "still have a separate rulemaking request pending before the Commission and a decision is expected on that request in the near future." NRC Letter of November 9, 2005. We are writing this letter to inform the Court of the Commission's decision on that separate pending petition for rulemaking.

In our Brief, we responded to Petitioners' arguments that the Commission did not institute a rulemaking in the area of security by pointing out that the Petitioners themselves could have requested their own rulemaking on the issues raised in this case. *See generally* Federal Respondents' Brief at 59-62. We noted that Petitioners knew how to file a rulemaking petition because they had submitted such a petition with another request to stay the Diablo Canyon ISFSI Proceedings. *See* Federal Respondents' Brief at 60, n.15.

The Commission has granted, in part, Petitioners' Petition for Rulemaking that we referenced in footnote 15 of our brief and in our letter of November 9. *See* 70 Fed. Reg. 69660 (Nov. 17, 2005). We have enclosed a copy of the Federal Register Notice for the Court's review.

Respectfully,

Charles E. Mullins
Senior Attorney
Office of the General Counsel

Enclosure: As stated

cc: Service List

Proposed Rules

Federal Register
Vol. 70, No. 221
Thursday, November 17, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM-50-80]

Union of Concerned Scientists and San Luis Obispo Mothers for Peace; Partial Grant of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: Partial grant.

SUMMARY: The Nuclear Regulatory Commission (NRC) is granting in part, a petition for rulemaking (PRM-50-80) submitted by the Union of Concerned Scientists (UCS) and San Luis Obispo Mothers for Peace (MFP). The petitioners requested two rulemaking actions in PRM-50-80. First, the petitioners requested the regulations establishing conditions of licenses and requirements for evaluating proposed changes, tests, and experiments for nuclear power plants be revised to require licensee evaluation of whether the proposed actions cause protection against radiological sabotage to be decreased and, if so, that the changes, tests, and experiments only be conducted with prior NRC approval. The NRC is contemplating a rulemaking action that would address the petitioners' request and, if issued as a final rule, essentially grant this portion of the petition. Second, the petitioners requested that regulations governing the licensing and operation of nuclear power plants be amended to require licensees to evaluate facilities against specified aerial hazards and make changes to provide reasonable assurance that the ability of the facility to reach and maintain safe shutdown will not be compromised by such aerial hazards. The NRC is deferring resolution of the second issue of the petition at this time. The NRC intends to address this issue when the NRC responds to comments on its proposed Design Basis Threat rule.

The petitioners further requested the Commission to suspend the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) proceeding during the NRC's consideration of PRM-50-80. That request was denied by Commission Memorandum and Order CLI-03-04, dated May 16, 2003.

ADDRESSES: Copies of the petition, the public comments received, and the NRC's letter of partial grant to the petitioner may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike, Public File Area O1F21, Rockville, Maryland. These documents are also available electronically at the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. From this site, the public can gain entry into the Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For further information, contact the PDR reference staff at (800) 397-4209 or (301) 415-4737 or by e-mail to *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Joseph L. Birmingham, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-2829, e-mail *jlb4@nrc.gov*.

SUPPLEMENTARY INFORMATION:

The Petition

The petition was sent to the NRC on April 28, 2003, and the notice of receipt of the petition and request for public comment was published in the Federal Register (FR) on June 16, 2003 (68 FR 35585). The public comment period ended on September 2, 2003. Four comments were received opposing the petition. No comments were received supporting the petition.

First Requested Action

The petitioners requested that 10 CFR 50.54(p), "Conditions of licenses," and 10 CFR 50.59, "Changes, tests, and experiments," be revised to require licensee evaluations of whether proposed changes, tests, and experiments cause protection against radiological sabotage to be decreased and, if so, that such activities only be conducted with prior NRC approval. The petitioners stated that the two regulations have minimal overlap and that many changes, tests, and experiments have no effect on security. However, some proposed changes, tests, and experiments, including those that are short-term or temporary, may affect plant security.

The petitioners stated that short-term degraded or off-normal conditions are often determined to be acceptable because of the low probability of an accident initiator during a short period of time. However, the petitioners stated that sabotage is not random and the saboteur or saboteurs may choose to act during the degraded or off-normal conditions. Therefore, the probability of sabotage occurring during degraded or off-normal conditions increases toward 100 percent. The petitioners asserted that it is reasonable to assume an insider acting alone or an insider aided by several outsiders will time the sabotage to coincide with a vulnerable plant configuration. Therefore, the petitioners requested that licensees be required to evaluate changes, tests, and experiments from both a safety and a security perspective. The petitioners suggested that the security review could flag a heightened vulnerability for a given change, but accept it (for temporary situations) based on compensatory measures (armed guards, etc.). The petitioners suggested the result would probably be that many licensee actions could proceed as planned, some could proceed with compensatory measures, a few would require NRC review, and a very small number might be denied.

Second Requested Action

The petitioners requested that 10 CFR part 50 be amended to require that licensees evaluate each facility against specified aerial hazards and make necessary changes to provide reasonable assurance that the ability of the facility to reach and maintain safe shutdown will not be compromised by an accidental or intentional aerial assault. The petitioners asserted that none of the nuclear power plants were designed to withstand suicide attacks from the air and that the fire hazards analysis process used by the NRC following the March 22, 1975, fire at the Browns Ferry reactor in Decatur, Alabama, should be implemented for aerial hazards.

The petitioners claimed that the Federal Aviation Administration (FAA)

no-fly zones established in late 2001 was a concession by the Federal government to the vulnerability of nuclear power plants to air assaults. The petitioners also asserted that the control buildings at nuclear power plants are outside of the robust concrete structures studied by the Nuclear Energy Institute (NEI) in their analyses of nuclear power plant vulnerability to aircraft crashes. The petitioners further asserted that 37 of 81 Operational Safeguards Response Evaluations (OSRE) conducted to the date of the petition identified significant weakness(es), and contended that the control building is the Achilles' heel in the OSRE target sets. The petitioners claimed that an aircraft hitting the control building may destroy the control elements for all four water supplies and much more. The petitioners asserted that the scope of the NRC-required fire hazards analyses are not restricted to containment and that this is a recognition that core damage can result from fires outside containment. The petitioners stated that licensees are required to show in their fire hazards analyses that there is enough equipment outside the control room for safe shutdown, and that these analyses have resulted in equipment and cable relocation. The petitioners further stated that the fire hazards analyses are "living documents" that future plant changes must be reviewed against.

The petitioners suggested that the way to ensure adequate protection from aerial threats is to replicate the fire hazards analysis process and that NRC should define the size and nature of the aerial threat that a plant must protect against as part of the design basis threat (DBT). The petitioners suggested the aerial threat should include, at a minimum, general aviation aircraft, because post-9/11 airport security measures generally overlook general aviation. The petitioners suggested the aerial threat include explosives delivered via mortars and other means (e.g., rocket propelled grenades). The petitioners further stated that, if the aerial hazards evaluation determines that all targets within a target set are likely to be disabled, the licensee should have three options:

(1) Add or install other equipment to the target set that is outside of the impact zone to perform the target set's function.

(2) Protect in place at least one of the targets (shield wall, etc.).

(3) Relocate or reroute affected portions of a system to be outside of the impact zone.

The petitioners also suggested the aerial hazards analysis should provide a means to ensure that future changes do not compromise protection and that whether arriving on foot or by air adversaries would not be able to neutralize an entire target set. The petitioners asserted that in 13 of 57 plant OSREs the adversary team did not enter containment in order to destroy every target in the target set, (27 of the OSREs simulated destruction of at least 1 target set). The petitioners further argued that if an aircraft had hit a nuclear power plant on September 11, 2001, then the approach set forth in the petition would have been undertaken as necessary to prevent recurrence. The petitioners suggested that these measures should be implemented to prevent occurrence in the first place.

Public Comment on the Petition

The NRC received four letters of public comment on PRM–50–80. All of the comments opposed the actions requested in the petition. The comments are described below.

The Aircraft Owners and Pilots Association (AOPA) stated that they oppose inclusion of general aviation aircraft in the DBT. AOPA described the actions taken to date by the Federal government and industry in terms of airport and aircraft security and current flight restrictions near nuclear power plants. AOPA also cited a report by Robert M. Jefferson, who concluded that general aviation aircraft are not a significant threat to nuclear power plants. The report is on the AOPA's Web site at *http://www.aopa.org/whatsnew/newsitems/2002/02-2-159_report.pdf.*

Tennessee Valley Authority (TVA), a nuclear power plant licensee, stated that the proposed change to 10 CFR 50.59 is inconsistent with the purpose of the regulation and that the DBT order already required revised physical security plans for the new DBT by April 29, 2004. The same commenter further stated that Sandia National Laboratories, in conjunction with NRC, has been performing vulnerability studies of aircraft impacts and that the NRC will promulgate changes to the regulations if they are needed.

A consortium of nuclear power plants, Strategic Teaming and Resource Sharing (STARS), stated that industry guidance in NEI 96–07, "Guidelines for 10 CFR 50.59 Implementation," for performing 10 CFR 50.59 evaluations specifies that all applicable regulations be considered in those evaluations and that a required dual security review for all changes is unnecessary. STARS stated further that requirements to prevent radiological sabotage already exist in 10 CFR 50.34 (c) and (d), 50.54(p), part 73 and recent security orders. STARS further asserted that nuclear power plants have diverse, divided trains and shutdown capability. STARS asserted that NRC and industry studies of the effects of a large airborne object showed no massive releases of radiation. STARS concluded that an aircraft impact would pose no greater or different vulnerability than has already been analyzed.

NEI, an industry group representing all U.S. commercial nuclear power plants, plant designers, architect/engineering firms, and fuel cycle facilities, opposed the petition. NEI stated that industry guidance in NEI 96–07, "Guidelines for 10 CFR 50.59 Implementation," already requires all applicable regulations to be considered in those evaluations and a required dual security review for all changes is unnecessary. NEI also argued that 10 CFR 50.59 and 50.54(p) are necessarily different in purpose. NEI further asserted that there is no direct correlation between security plan effectiveness and the plant condition. NEI also argued that the Federal Government, not the licensee, is responsible for protection of nuclear power plants from aircraft attacks. NEI further claimed that extensive aircraft impact analyses are not justified and cited an industry study of the risk from an armed terrorist ground attack that concluded there would be noncatastrophic consequences.

Reasons for NRC's Response

The NRC evaluated the advantages and disadvantages of the first action requested by the petition versus the attributes of the NRC Performance Goals. The NRC's conclusions are described below.

First Proposed Action

The NRC acknowledges that the requested rulemaking would help to ensure protection of public health and safety and the environment and help to ensure secure use and management of radioactive materials. The NRC notes that current regulations require nuclear power plant licensees to address the continued safety of the plant with regard to changes, tests, or experiments involving structures, systems, or components as described in the Final Safety Analysis Report (FSAR) (10 CFR 50.59) and also to "* * * establish, maintain, and follow an NRC-approved safeguards contingency plan for responding to threats, thefts, and radiological sabotage * * *" (10 CFR 73.55(h)(1)). Further, licensees must "* * * establish and maintain an onsite physical protection system and security organization which will have as its

objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety." (10 CFR 73.55(a)), and "* * * may make no change which would decrease the effectiveness of a security plan * * *" (10 CFR 50.54(p)(1)). These regulations are focused on evaluation of specific areas of safety and security and do not explicitly require evaluation of the interactive effect of plant changes on the security plan or the effect of changes to the security plan on plant safety. Additionally, the regulations do not require communication amongst operations, maintenance, and security organizations regarding the implementation and timing of plant changes in order to promote awareness of the effects of changing conditions to allow the organizations to make an appropriate assessment of changes and implement any necessary response.

Because existing regulations are focused on ensuring that licensees evaluate changes to specific subject areas, and because guidance has already been developed to help ensure that those evaluations are performed appropriately, the NRC must consider carefully the effect of a revision on the existing regulations. For example, 10 CFR 50.59 is focused on ensuring safe operation of the facility by requiring evaluation of changes, tests, and experiments that affect the facility as described in the FSAR. Industry and NRC have expended a large amount of resources to provide guidance to help ensure that regulatory expectations for this area are clearly described. At this time, regulatory expectations for the implementation of 10 CFR 50.59 are thought to be well understood. Further, operations personnel, performing a 10 CFR 50.59 evaluation, may not be sufficiently knowledgeable of the security plan details in order to make an appropriate evaluation of the effect of changes, tests, and experiments on security. Current regulations do not require such an evaluation for many plant changes made to nonsafety systems, structures, and components. Therefore, it may be appropriate to provide a requirement in 10 CFR part 73 that changes to the facility be assessed for potential adverse interaction on the safety/security interface.

The NRC believes that the rulemaking process, including stakeholder comment, will better identify how the regulations should be modified and what the scope and details of a revision should be.

In summary, the NRC agrees with the petitioners that rulemaking may be appropriate for the first requested action.

NRC Plans for the First Proposed Action

Regarding the first requested action, the NRC's interoffice Safety/Security Interface Advisory Panel (SSIAP) has advised the staff on the most effective and efficient method to integrate this rulemaking with other ongoing safety/security actions to require that licensees evaluate changes to the facility or to the security plan for adverse interactions. Further, in its SRM on June 28, 2005, the Commission directed the staff to include this issue as part of ongoing rulemaking for 10 CFR 73.55, currently due to the Commission on May 31, 2006.

Second Proposed Action

The NRC evaluated the second proposed action and is deferring resolution of the second issue of the petition. The NRC intends to address the request when the NRC responds to comments on its proposed Design Basis Threat rule. That rule was issued for public comment on November 7, 2005.

For these reasons, the Commission is granting the first requested action of PRM-50-80 and is deferring resolution of the second requested action.

Dated at Rockville, Maryland, this 9th day of November, 2005.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E5-6365 Filed 11-16-05; 8:45 am]

BILLING CODE 7590-01-P

FARM CREDIT ADMINISTRATION

12 CFR Parts 652 and 655

RIN 3052-AC17

Federal Agricultural Mortgage Corporation Funding and Fiscal Affairs; Federal Agricultural Mortgage Corporation Disclosure and Reporting Requirements; Risk-Based Capital Requirements

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, Agency, us, or we) is proposing to amend regulations governing the Federal Agricultural Mortgage Corporation (Farmer Mac or the Corporation). Analysis of the Farmer Mac risk-based capital stress test (RBCST or the model) in the 3 years since its first official submission as of June 30, 2002, has identified several opportunities to update the model in response to changing financial markets, new business practices and the evolution of the loan portfolio at Farmer Mac, as well as continued development of best-industry practices among leading financial institutions. The proposed rule focuses on improvements to the RBSCT by modifying regulations found at 12 CFR part 652, subpart B. The effect of the proposed rule is intended to be a more accurate reflection of risk in the model in order to improve the model's output—Farmer Mac's regulatory minimum capital level. The proposed rule also makes one clarification relating to Farmer Mac's reporting requirements at 12 CFR 655.50(c).

DATES: You may send us comments by February 15, 2006.

ADDRESSES: Send us your comments by electronic mail to *reg-comm@fca.gov*, through the Pending Regulations section of our Web site at *http://www.fca.gov*, or through the Government-wide Web site *http://www.regulations.gov*. You may also submit your comments in writing to Robert Coleman, Director, Office of Secondary Market Oversight, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090, or by facsimile transmission to (703) 883-4477.

You may review copies of comments we receive at our office in McLean, Virginia, or from our Web site at *http://www.fca.gov*. Once you are in the Web site, select "Legal Info," and then select "Public Comments." We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove electronic-mail addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT:

Joseph T. Connor, Associate Director for Policy and Analysis, Office of Secondary Market Oversight, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4280, TTY (703) 883-4434; or

Joy Strickland, Senior Counsel, Office of the General Counsel, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4020, TTY (703) 883-4020.

SUPPLEMENTARY INFORMATION:

I. Purpose

The purpose of this proposed rule is to revise the risk-based capital (RBC) regulations that apply to Farmer Mac. The substantive issues addressed in this