

DOCKET NUMBER  
PROPOSED RULE 73  
(70FR67380)

DOCKETED  
USNRC

January 24, 2006 (11:15am)

COMMITTEE TO BRIDGE THE GAP  
PUBLIC CITIZEN

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

January 23, 2006

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attention: Rulemaking and Adjudications Staff

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**Re: RIN 3150-AH60 – Comments on Proposed Rule to Maintain Status Quo With Regards  
Protection Level of Nuclear Facilities Against Terrorism**

To the Commission:

The following comments are submitted by Committee to Bridge the Gap and Public Citizen in response to the November 7, 2005, Notice of Proposed Rulemaking to amend the design basis threat regulations. We object to the NRC's proposed rulemaking, which codifies the existing level of security protections at nuclear facilities without essentially any upgrade of those requirements. We particularly object to the Commission's refusal to bring security of nuclear sites to levels consistent with the post-9/11 threat environment.

Furthermore, the rulemaking's virtual lack of content deprives the public of any genuine opportunity for meaningful comment. In section 651(a) of the Energy Policy Act of 2005, Congress clearly directs NRC to consider 12 factors as part of its DBT rulemaking, including protection against 9/11-level attacks, attacks by large groups, attacks by air, etc. Instead, the Commission has chosen not to address the 12 factors as directed by Congress and remarkably solicits public comment on "*whether* or how" (emphasis added) the 12 matters should in fact be addressed. Deferring the analysis to the final rule is also a violation of rulemaking law, because such vague generalities make genuine comment impossible. Lastly, we object to the fact that the Committee to Bridge the Gap Petition for Rulemaking on these DBT issues has been ignored.

We urge the NRC to withdraw this proposed rule for amending the DBT, complete a thorough analysis of the 12 factors as required by Congress in the Energy Policy Act of 2005, and reissue a proposed DBT rule with adequate detail for public comment.

**Background**

Since the 1970s, the NRC's "Design Basis Threat" (DBT) regulations have required reactor security plans to be designed to successfully defend against an attack involving no more than three external attackers with the possible assistance of one insider.<sup>1</sup> Despite repeated

<sup>1</sup> 10CFR 73.1, as interpreted by Commission case law (in the Diablo Canyon operating licensing proceeding). For a detailed discussion, see Hirsch, Murphy, and Ramberg, "Protecting Reactors from Terrorists," The Bulletin of the Atomic Scientists, Vol. 42, No. 3, March, 1986, and, by the same

Template = SECY-067

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requests over the decades to upgrade the DBT in the face of increasing risks of terrorist attack, including petitions for rulemaking by the Committee to Bridge the Gap (CBG) and the Nuclear Control Institute (NCI) in the 1980s and 1990s, the Commission declined to do so, with the exception of adding some requirements for protecting against truck bombs.<sup>2</sup> The agency continued to cling to the fiction that there could never be an attack involving a large group of attackers nor involving attack by air.

The events of September 11, 2001 changed all that – or should have. The 9/11 attacks involved nineteen (19) external attackers, planning for more than a year in an intense fashion (including learning how to fly jumbo jets), evidencing a high level of sophistication and ruthlessness, coming in by air – characteristics all far beyond the NRC's DBT. Subsequently, the 9/11 Commission determined that the plotters had originally considered targeting nuclear reactors as part of the attack, eventually being told that such an attack on a nuclear site would be deferred to some subsequent action.

Immediately after the attacks on the World Trade Center and the Pentagon, CBG and NCI called on the Commission to require upgrade of the DBT to a level consistent with the level of threat evidenced by 9/11.<sup>3</sup> NRC declined, instead commencing a “top to bottom” review that dragged on for years, provoking criticism from Congress and elsewhere.<sup>4</sup>

Finally, nearly two years after 9/11, NRC issued modest revisions to the DBT. This action was troubling from both a substantive and procedural standpoint. Substantively, the revised DBT was still a small fraction of the number of attackers (19) seen on 9/11 and still required no protection against air attack. Procedurally, the revisions to the DBT regulations were made in closed-door negotiations with representatives of the nuclear industry, with the public frozen out, and without any effort to comply with the notice-and-comment requirements of the Administrative Procedure Act (APA).

The APA requires rules of general applicability to be issued in proposed form for public review and comment before being adopted as final rules. Instead, to bypass those requirements, NRC issued the DBT changes as secret Orders applicable to entire categories of nuclear facilities.

Public Citizen challenged in federal court the legality of such efforts at bypassing the APA. At a court hearing at which the judges expressed skepticism about NRC's compliance with APA, NRC announced it would conduct a public rulemaking on the DBT, and the court

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authors, “Nuclear Terrorism: A Growing Threat,” A Report to the Safeguards and Security Subcommittee, Advisory Committee on Reactor Safeguards, U.S. Nuclear Regulatory Commission; with Bennett Ramberg and Stephanie Murphy, May 7, 1985, reprinted in monograph series, Stevenson Program on Nuclear Policy, University of California, Santa Cruz, SPNP-85-F-1.

<sup>2</sup> A more detailed discussion of this history of inertia can be found in CBG's 2004 Petition for Rulemaking, and in Hirsch, “NRC: What Me Worry?” The Bulletin of the Atomic Scientists, January/February 2002.

<sup>3</sup> See 14 September 2001 letter by CBG and NCI to then-Chairman Reserve, response of 21 September 2001, and CBG and NCI statements made at and transcript of news conference at National Press Club, 25 September 2001, posted at <http://www.nci.org>.

<sup>4</sup> Hirsch, Lochbaum, and Lyman, “The NRC's Dirty Little Secret: The Nuclear Regulatory Commission is Still Unwilling to Respond to Serious Security Problems,” Bulletin of the Atomic Scientists, May/June 2003.

proceeding was suspended in anticipation of that action. The instant rulemaking is thus widely seen as an effort by the Commission to avoid an adverse decision by the court as to its prior evasion of APA. The question is whether the rulemaking constitutes a good faith effort to permit genuine public input into a matter of critical national importance, or instead just an empty effort to avoid an adverse court decision while codifying decisions already made by the Commission in closed-door meetings with industry, from which the public was excluded.

Complicating the situation is the Commission's treatment of a Petition for Rulemaking by CBG to upgrade the DBT and implementing regulations. The core of the Rulemaking Petition was to require protection against attacks by groups at least as large as the 19 seen on 9/11 and to require protection against air attack. Submitted in 2004, it generated 845 comments, reportedly more than any other petition for rulemaking, or perhaps all rulemaking petitions together. Of these, virtually all supported the petition and/or wanted a substantially strengthened DBT. As the Federal Register Notice for the NRC's proposed rulemaking states, six commenters from industry groups or licensees opposed the CBG Petition for Rulemaking. So despite the fact that the remaining 839 comments supported the CBG Petition, the NRC treatment of the Petition for all practical purposes was to reject the hundreds of supportive comments and ally itself instead with the handful of industry representatives who opposed it.<sup>5</sup>

This approach to the laws regarding public input and agency neutrality produces in the public a marked lack of confidence in the agency. When deals are struck with industry behind closed doors on critical matters of public safety and active steps taken to evade statutory requirements for genuine public input, skepticism about the agency deepens. When the 99% of comments on a rulemaking petition that come from the public and that support marked increases in security requirements are ignored in favor of the less than one percent of comments, all from industry, pushing for maintenance of the status quo, it becomes very hard for the public to believe that public input is taken seriously by the Commission.

One way of determining whether the public's skepticism is warranted is to examine whether this notice of rulemaking is designed to facilitate or frustrate meaningful public comment. We do so briefly in the next section of these comments.

### **Failure to Comply with APA Obligations**

#### **The Rulemaking Proposal Has No Content, Making Meaningful Comment Essentially Impossible**

Given the fact that the 2003 revision of the DBT via secret Orders enacted after extensive meetings with industry froze out the public in violation of the APA, and the clear link between this rulemaking and the pending court challenge, it was incumbent on the Commission to assure that genuine opportunity for meaningful public input was provided. Sadly, the NRC has failed in this regard.

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<sup>5</sup> The NRC, in the current rulemaking notice, states that it has accepted in part and deferred in part CBG's Petition for Rulemaking, but that is a sleight-of-hand. The aspects it claims to have accepted are part of the status quo at reactors, and thus no real acceptance of the rulemaking petition; the matters it has deferred (e.g., protection against air attack) and matters it has apparently rejected (a DBT >19) are the core of the CBG Petition for Rulemaking.

While one certainly recognizes that certain details need to be left out for security reasons, the Commission had hidden behind that fig leaf to leave out any substantive content to the rulemaking. There is virtually nothing in it on which one can meaningfully comment.

For example, one need not publish the precise number of attackers in the DBT. But one can certainly state that there are two primary alternatives to be considered in the rulemaking and for which comments are solicited: either protect the reactors against attacks by some number of attackers greater than the 19 seen on 9/11, or protect them against attacks by a small fraction of that number. The Commission should be candid here that it has chosen in the DBT Orders to do the latter and is proposing in this rulemaking to now codify that decision, and that public comments are solicited on the wisdom of leaving reactors vulnerable to attacks by groups larger than a fraction of the number seen on 9/11.<sup>6</sup>

Should we protect reactors against a 9/11-size threat? This issue would be a meaningful public debate, but it could prove embarrassing to the Commission and to industry. Protection against embarrassment, however, is not a valid exemption to APA notice-and-comment rulemaking requirements.

#### The Deferral of Matters to the Final Rulemaking Stage Violates APA

The rulemaking notice proposes no action on protecting reactors from air attack, but says it is deferring consideration of that matter to the final rulemaking stage. APA, however, requires contemplated agency action to be issued as a proposed rule so that the public has something to comment on. Hiding proposed action to the final stage, after public comment, defeats the entire purpose of notice-and-comment rulemaking. It eliminates notice and makes meaningful comment impossible.

If the Commission were in fact proposing to take no action on air attack – which we suspect is the true case – it should say so in the rulemaking notice and solicit comment on that proposed dangerous inaction. But instead it says it will consider what if anything to do about air vulnerabilities at the final rulemaking. This is inappropriate.

#### The Drafting of the Rulemaking to Give the Commission Complete Flexibility to Subsequently Change the DBT Without Public Comment Again Violates the APA

Much of the rulemaking is designed to eliminate specificity in the current regulation so as to give the NRC freedom to subsequently, whenever it wishes, alter the DBT rules without APA-compliant rulemaking or input from anyone other than industry. See for example proposed 10CFR 73.1(a)(1)(i)(C) and (2)(i)(B). The former was written “to provide flexibility in defining the range of weapons licensees must be able to defend against,” and the latter “to provide flexibility in defining the scope of the inside threat.” 70 FR 67383-4. With that “flexibility,” NRC could set a protective range of weapons or numbers of insiders one day, then subsequently

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<sup>6</sup> It would be an unseemly misdirection were the Commission to refer to the number of attackers on 9/11 as five -- the number on most of the individual planes. There were four attacking groups, totaling nineteen.

dramatically reduce the requirements, without any rulemaking to reflect the change, and with no public notice or opportunity for public comment.

### **Failure to Comply with Congressional Direction in the Energy Policy Act**

In the Energy Policy Act of 2005, Congress directed NRC to commence a rulemaking to upgrade the DBT and in the process to take into account 12 factors, among which included attacks of a magnitude of 9/11, attacks by large groups, and attacks by air.

In NRC's rulemaking notice, the Commission concedes this direction but then concedes that a number of these factors are *not* addressed in the proposed rule. The Commission then invites public comments on "*whether* or how the 12 factors should be addressed in the DBT rule." (emphasis added)

This is remarkable. Congress directed NRC to address those twelve matters. NRC has refused. It now asks the public to comment on the NRC refusal. What can the public say except "follow the law, consider the factors Congress directed."<sup>7</sup>

### **Substantive Concerns**

Since, as discussed above, there is no actual content in the proposed rule, making meaningful comment impossible, we will here comment on DBT issues as if there were content in the proposal. We have no other way of addressing the issue, given the NRC's empty shell of a rule as presented.

### **The Size of the Presumed Attacking Force is Far Too Small to Be Realistic in the Post-9/11 World**

*Time Magazine* reports<sup>8</sup>:

Before 9/11, the agency required plants to be able to thwart an attack by little more than an armed gang – three outsiders equipped with handheld automatic weapons and aided by a confederate working inside the plant. After 9/11, when al-Qaeda showed the ability to produce 19 operatives for a suicide mission on a single day, some security specialists anticipated a significant hike in the DBT. *But the number of attackers in the revised DBT is less than double the old figure and a fraction of the size of the 9/11 group.*

Giving the Commission the benefit of the doubt and presuming that the number of external attackers in the new DBT is five rather than four (both would be "less than

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<sup>7</sup> One cannot say that NRC addressed the issues but chose not to amend the regulations after careful review of the twelve factors. There is no such consideration in the proposed rule. Instead, the public is asked to comment on whether the factors should be addressed, and again, the Commission says it will consider the issue in the final rulemaking, evading APA notice-and-comment requirements where that consideration should be in the proposed rule.

<sup>8</sup> Mark Thompson, "Are These Towers Safe: Why America's Nuclear Power Plants Are Still So Vulnerable to Terrorist Attack – and How to Make Them Safer. A Special Investigation." 20 June 2005.

double the old figure), and assuming the number of insiders to be two (double the old figure), is this at all adequate given the post – 9/11 threat level? The answer is a resounding “NO!”

The DOE DBT is reportedly considerably larger than the NRC’s. Yet, the Government Accountability Office has reported that the DOE DBT is insufficient, below the threat level presumed by most intelligence agencies. If the DOE DBT is inadequate, and NRC’s is even lower, how can anyone legitimately argue that protecting against five attackers with the possible assistance, passive or otherwise, of two insiders, is protective? 9/11 involved an attack far, far larger.

Indeed, the Commission itself concedes that it has relaxed the DBT significantly from what it would be if protection of the common defense and security were its highest priority. The rulemaking notice states that the DBT was arrived at only in part by considering intelligence factors as to potential threat levels; that information was then countered by a desire to not impose burdens on industry. As the Federal Register notice states, consideration of 9/11 was only a part of the consideration: “However, the DBT is based upon review and analysis of actual demonstrated characteristics in a range of terrorist attacks, *and a determination as to the attacks which a private security force could reasonably be expected to defend.*” (emphasis added) In other words, rather than base the DBT on the maximum attack that has actually occurred, plus a margin of safety, NRC looked at a range of lower-level attacks and then reduced the DBT further by its desire not to burden private industry.

The Atomic Energy Act does not provide for this kind of calculation. The Commission’s statutory duty is to public health and safety and to the protection of common defense and security. Its sole job is to assure high levels of both protections. Private deals with industry – as happened in the run-up to this DBT – with the public frozen out results in rules that reflect those interests rather than those statutory responsibilities.

We reiterate: the DBT should include an attacking force at least as large as the 19 seen on 9/11, plus a margin of safety. More than two insiders must be presumed also.

#### Protection Against Air Attack Must be Required

We continue to reiterate the need to protect nuclear facilities against air attack. We continue to urge that such facilities be required to promptly construct “Beamhenge” shields of I-beams, cabling, and steel or Kevlar netting at standoff distances from critical reactor structures so that an incoming plane impacts the shield rather than the reactor, support facilities, or spent fuel pools. They can be constructed in a few months for less than 1% of the construction cost of the nuclear plant and can provide high protection against an event that could lead to massive radiation release.

The implication in the Federal Register notice that NRC wants to keep existing reactors naked to air attack but might consider requiring protections for new reactors

makes little sense from a security standpoint. If al-Qaeda were to contemplate attacking reactors from the air, why would they aim at new reactors (if they ever get built) with supposedly better protections instead of some of the 103 old unprotected reactors?

Protection against air attack is essential.

Protection Is Needed Against Weapons of Greater Destructive Force Than Currently Required

Potential adversaries may well employ mortars, rocket-propelled grenades, platter charges, shoulder-mounted surface-to-surface missiles, improvised explosive devices of the sort so deadly to U.S. forces in Iraq, or other weaponry for which reactor facilities are apparently currently unprotected. Additionally, truck bombs of larger size than apparently required to be protected against could be used. These DBT problems should be rapidly fixed.

**Conclusion**

We are told over and over again that we are in a war on terror, with a ruthless and cunning adversary. Yet the nation's most dangerous targets – nuclear facilities – are protected only against an adversary far smaller and less capable than the one we know exists and which has already attacked this country with a magnitude far beyond the DBT. A pre-9/11 size DBT in a post-9/11 world makes no sense.

Attacking a nuclear plant gives a terrorist a quasi-nuclear capability. Tens of thousands of immediate casualties, hundreds of thousands of subsequent cancers and leukemias, hundreds of billions of dollars of damages, an area “the size of Pennsylvania” made uninhabitable for generations. Certainly the Commission charged with setting security requirements for these facilities capable of providing for the common defense and security and public health and safety must establish a level of protection that can defend against at least a 9/11-magnitude attack.

We urge the NRC to withdraw this proposed rule for amending the DBT, complete a thorough analysis of the 12 factors as required by Congress in the Energy Policy Act of 2005, and reissue a proposed DBT rule with adequate detail for public comment.

Sincerely,

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**From:** Carol Gallagher  
**To:** Evangeline Ngbea  
**Date:** Tue, Jan 24, 2006 10:34 AM  
**Subject:** Comment letter on Proposed Rule - Design Basis Threat

Van,

Attached for docketing is a comment letter on the above noted proposed rule from Daniel Hirsch, Committee to Bridge the Gap, and Michele Boyd, Public Citizen, that I received via the rulemaking website on 1/23/06.

Carol

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**Expiration Date:** None  
**Priority:** Standard  
**Reply Requested:** No  
**Return Notification:** None

**Concealed Subject:** No  
**Security:** Standard