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OFFICE OF SECRETARY
RULEMAKINGS AND
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97

SUPPLEMENTAL COMMENTS
BY SAN LUIS OBISPO MOTHERS FOR PEACE
ON NRC PROPOSED RULE REGARDING DESIGN BASIS THREAT
FOR PROTECTION OF NUCLEAR FACILITIES AGAINST
SABOTAGE AND THREAT OF STRATEGIC SPECIAL NUCLEAR MATERIAL

February 22, 2006

I. INTRODUCTION

The San Luis Obispo Mothers for Peace ("SLOMFP") hereby supplements its comments regarding the U.S. Nuclear Regulatory Commission's ("NRC's") proposed rule entitled "Design Basis Threat, 70 Fed. Reg. 67,380 (November 7, 2005).¹ These supplemental comments address the proposed rule's noncompliance with the National Environmental Policy Act ("NEPA").

In addition, SLOMFP hereby adopts and incorporates by reference the comments of the Committee to Bridge the Gap and Public Citizen, filed on January 23, 2006; and the comments of the Council on Intelligent Energy and Conservation Policy, filed on February 21, 2006.

II. SUPPLEMENTAL COMMENTS

A. The Proposed Rule Fails to Satisfy NEPA.

1. The NRC must prepare an EIS for the proposed rule.

The NRC has violated Section 102 of NEPA, 42 U.S.C. § 4332, by refusing to prepare an Environmental Impact Statement ("EIS") in connection with the proposed rule. *See* Environmental Assessment Supporting Proposed Rule, 10 CFR Part 73.1 – Design Basis Threat (November 2005). Contrary to the Environmental Assessment's ("EA's") conclusion, the DBT is a major federal action significantly affecting the quality of the human environment, because the NRC's limitations on the scope of adversaries against which "a private security force could reasonably be expected to defend" [70 Fed. Reg. at 67,385] bears directly on the degree to which public health and the environment will be protected against the impacts of accidents caused by terrorist attacks.

¹ Comments By San Luis Obispo Mothers For Peace On NRC Proposed Rule Regarding Design Basis Threat for Protection of Nuclear Facilities Against Sabotage and Threat of Strategic Special Nuclear Material (January 23, 2006) (hereinafter "SLOMFP's 1/23/06 Comments").

Publication of an EIS would be consistent with NRC's past practice of preparing EISs in the course of establishing new or expanded regulatory schemes that affect the quality of the human environment.² The revised DBT likewise establishes the basis for the NRC's entire regulatory scheme of security measures based on a comprehensive regulatory review, thereby determining the extent to which the human environment is protected from intentionally caused radiological releases. Moreover, the regulatory review was far-reaching and complex, involving much more than just an upward revision to the level of domestic threat considered credible. Instead, the rulemaking was based on an array of factors, including the NRC's comprehensive evaluation of its NRC's existing scheme for regulation of security, an assessment of the current domestic threat characteristics, an evaluation of costs of security measures to licensees, and an analysis of the appropriate division of responsibilities between licensees and the local, state, and federal governments. 70 Fed. Reg. at 67,381. These complex policy and cost-related considerations should be disclosed and discussed with the public through the NEPA commenting process.³

One of the purposes of circulating an EIS for comment would be to counter-balance the narrow process for soliciting comment that the Commission already has undertaken with respect to the proposed rule. As described in a May 9, 2003, letter from NRC Chairman Nils J. Diaz to Senator Chuck Hagel:

² In establishing quantitative radiological criteria for decommissioning, for example, the NRC prepared a Generic Environmental Impact Statement ("GEIS") which analyzed "regulatory alternatives for establishing radiological criteria for decommissioning structures and lands of licensed facilities." See NUREG-1496, Draft Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for Decommissioning of NRC's Licensed Nuclear Facilities, Vol. 1 at xvi (August 1994). Similarly, the NRC prepared an EIS in promulgating amended regulations with respect to decommissioning alternatives, site release criteria, financial assurance for decommissioning, management of radioactive waste, and safeguards for NRC-licensed facilities. NUREG-0586, Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (August 1988). The NRC also prepared a GEIS in order to "assess the nature and extent of the environmental impacts of uranium milling in the United States" and thereby "determine what regulatory actions are needed." NUREG-0706, Final Generic Environmental Impact Statement on Uranium Milling, Vol. 1 at 2 (September 1980).

³ The EIS should also address the continuing viability of 10 C.F.R. § 50.13, which has no counterpart in the Atomic Energy Act and was promulgated by the Commission during the Cold War, for the particular purpose of excusing a Florida nuclear power plant licensee from protecting the plant against a Cuban missile. As suggested by the Second Circuit of the U.S. Court of Appeals, the rule that nuclear power plant licensees need not protect against the "possibilities of attack or sabotage by foreign enemies" was promulgated "a generation ago" under "sufficiently different circumstances" that it may no longer be valid. *Riverkeeper Inc. v. Collins*, 359 F.3d 155, 168 n.14 (2nd Cir. 2004), citing *Siegel v. AEC*, 400 F.2d 778, 779 (D.C. Cir. 1968).

We recognize that there are limits to the defensive capabilities that should be expected of nuclear plant operators and that certain threats may be beyond the reasonable capabilities of licensee security forces. The NRC acknowledged this and specifically sought comments on the public-private threshold when we circulated NRC staff draft views on adversary attributes associated with the DBT in January 2003.

Unfortunately, the class of commenters to which the proposed enforcement orders was circulated was extremely narrow, and did not include the general public or all affected government agencies. Under NEPA, the entire public should have been given reasonable notice of the Commission's and other commenters' views regarding the appropriate division of responsibility for nuclear facility security as reflected in the DBT. While this notice need not include safeguards or classified information, it should be possible for the NRC to provide enough information about the rule and relevant environmental considerations to allow for meaningful public comment.

2. The NRC's rationales for refusing to prepare an EIS are invalid.

Moreover, none of the NRC's numerous rationales for refusing to prepare an EIS is valid. First, the NRC argues that the rule change "pertains only to security requirements." EA at vi. Just as NEPA has no "national defense" exception, however [*see No Gwen Alliance v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988)], it has no exception for nuclear security.

Second, the NRC argues that the rule "would not revise any of the part 73 requirements which govern the response to the DBT requirements," and that the rule's purpose "is simply to more closely align the regulations with the DBT orders which have already been imposed on licensees." EA at vi. To the contrary, the proposed rule constitutes a proposal for major federal action because it would codify a generic standard for the establishment of security requirements at nuclear facilities.⁴ By proposing to change its regulatory code in a way that could significantly affect the degree to which the human environment is protected from terrorist attacks on both existing and new facilities, the Commission has brought itself within the ambit of NEPA. The fact that these generic regulatory requirements were once imposed on individual licensees through plant-specific enforcement orders does not affect NEPA's applicability to the rulemaking.

Third, the NRC argues that the proposed rule:

⁴ As stated in the notice of proposed rulemaking, "[a]fter gaining experience under [the NRC's enforcement] orders over the past two years, the Commission believes that the attributes of the orders should be generically imposed on certain classes of licensees." 70 Fed. Reg. at 67,381.

would not result in changes to the design basis functional requirements for the structures, systems, and components (SSCs) in the facility that function to limit the release of radiological effluents during and following postulated accidents. As a result, all the SSCs associated with limiting the releases of offsite radiological effluents would continue to be able to perform their functions, and as a result, there would be no significant radiological effluent impact.

EA at vi. Similarly, the NRC claims that the “standards and requirements applicable to radiological releases and effluents are not affected by this rulemaking (nor by the orders) and continue to apply to the SSCs affected by this rulemaking.” *Id.* These arguments are specious. The DBT directly affects the degree to which SSCs are protected from intentional damage that could result in a radiological release to the environment. The question of whether an SSC functions adequately or is adequately regulated under normal conditions is irrelevant to the question of whether the NRC has considered all reasonable alternatives for protection of the human environment from successful attacks on SSCs.

Finally, the NRC argues that “the DBT orders themselves do not result in impacts to a facility related to normal operation and any associated releases.” EA at vi. This claim is irrelevant to the applicability of NEPA. As should be obvious, the concern of the DBT is not normal operation, but the potential for accidental releases caused by intentional damage to a nuclear facility.

III. CONCLUSION

For the foregoing reasons, the proposed DBT fails to satisfy NEPA. The rule must be accompanied by an EIS that is circulated in draft for public comment.

Respectfully submitted,

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February 22, 2006

From: Diane Curran <dcurran@harmncurran.com>
To: <SECY@nrc.gov>, Glenn Tracy <GMT@nrc.gov>
Date: Wed, Feb 22, 2006 4:08 PM
Subject: Supplemental Comments on Proposed DBT Rule

Dear Office of the Secretary,

Attached for filing please find the supplemental comments of San Luis Obispo Mothers for Peace on the NRC's proposed Design Basis Threat Rule.

Sincerely,
Diane Curran
Attorney for SLOMFP

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