

Enclosure 5

Basis For The Revised Petition Denial
Language Related to
State and Local Government Tasking of
Other Legal Entities With Emergency
Planning and Preparedness Implementation
Actions

(ML060760661)

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BASIS FOR THE REVISED PETITION DENIAL LANGUAGE RELATED TO STATE AND LOCAL GOVERNMENT TASKING OF OTHER LEGAL ENTITIES WITH EMERGENCY PLANNING AND PREPAREDNESS IMPLEMENTATION ACTIONS

1. PURPOSE

This paper provides the basis for the language added to the revised petition denial (Enclosure 3) that addresses whether the Commission's emergency preparedness regulations allow a finding that reasonable assurance that adequate protective measures can and will be taken during a radiological emergency where a State or local government tasks a non-governmental entity with emergency planning, preparedness, or response activities responsive to the planning standards of 10 CFR 50.47(b).

2. BACKGROUND

The need for this language arose from assertions made by internal and external stakeholders¹ regarding legislation enacted in the Commonwealth of Pennsylvania (Commonwealth) that, in conjunction with associated regulations, requires the administrators of licensed daycare facilities to develop facility-specific all-hazards emergency plans. These stakeholders generally assert that the Commonwealth's tasking of these entities with the development of plans and provision of transportation and relocation resources is inconsistent with the Commission's emergency preparedness regulations.

The Commonwealth encompasses part or all of the plume exposure emergency planning zones (EPZ) for five nuclear power plant sites: Beaver Valley, Limerick, Peach Bottom, Susquehanna, and Three Mile Island. The Commonwealth has established emergency plans that have been found to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at any one of these five sites. In 2004, the Pennsylvania legislature passed legislation that amended its statutes to require that all child custodial facilities within the Commonwealth develop and maintain facility-specific all-hazards emergency plans. Enclosure 2 to this Commission paper describes in more detail how the Commonwealth provided for children in daycare facilities prior to passage of this legislation and how they are provided for moving forward.

The legislation and the implementing regulations are applicable to licensed daycare facilities across the Commonwealth and are not limited to facilities located within the emergency planning zones of the nuclear power plants located within the Commonwealth.² Pursuant to the legislation, the Pennsylvania Emergency Management Agency (PEMA) developed planning guidance and template plans and distributed these materials to all licensed daycare facilities.

¹ For example: Correspondence associated with allegation NSIR-2005-A-0011; Harrisburg Patriot article by G. Lenton, dtd October 03, 2005; E-mail: DPO author to W. Kane, dtd January 6, 2006; Mssrs Christian and Epstein ltr dated October 3, 2005 [ML053550215]

² The Commonwealth's emergency management services code has required that every school district develop and implement emergency preparedness plans in cooperation with the local emergency management agency. The 2004 legislation extended this requirement to child custodial facilities.

These materials require each daycare facility to plan for the hazards that may affect that facility, to arrange transportation and relocation centers that would be used to effect an evacuation, and to obtain letters of agreements with the providers of these resources. The Commonwealth enacted this legislation and promulgated these regulations consistent with its statutory interest in facilitating the safe and healthful care of a child in a daycare facility. As discussed above, some stakeholders have asserted that the State and local governments, rather than the daycare facilities, should be held responsible for developing the plans and providing the needed resources. These stakeholders cite various sections of the Commission's regulations and the December 19, 2005 *Federal Register* notice in support of their positions.

3. CLARIFICATION LANGUAGE

The staff believes that the Commission's regulations do not preclude the Commonwealth's approach to providing adequate protective measures during a radiological emergency. The stakeholders' position could have the effect of injecting the NRC into matters unrelated to ensuring that adequate protective measures can and will be taken in the event of a radiological emergency, such as State financing of emergency resources or State licensure of child custodial facilities, matters that are clearly beyond the Commission's authority. Accordingly, the staff included the following language in the proposed revision to the petition denial:

The Commission's emergency preparedness regulations allow a finding of reasonable assurance that adequate protective measures can and will be taken during a radiological emergency where a State or local government tasks a non-governmental entity with emergency planning, preparedness, or response activities responsive to the planning standards of 10 CFR 50.47(b), provided that the overall responsibility for demonstrating, with reasonable assurance, that adequate protective measures can and will be taken in the event of a radiological emergency continues to remain with the State and local governments.

4. RATIONALE

The State and local governments are not regulated by the NRC³ nor are they regulated by the Department of Homeland Security (DHS). Therefore the NRC cannot mandate State or local government compliance with Commission's emergency preparedness regulations. A State's authority and responsibility for providing for the safety of its citizens derives from the Constitution. A radiological emergency is but one of the hazards that a State and its local government entities must prepare for. All emergency response is local; the planning for that response must similarly reflect local capabilities, constraints, organizational relationships, statutes, regulations, and ordinances.

4.1 Regulations

³ An exception is where the State or local government is a licensee, for example, a municipal utility that operates a nuclear power plant.

In 1980, the NRC published the final rule promulgating the emergency planning regulations in 10 CFR Part 50 at 45 FR 55402. In the Rationale for the Final Rule in the statements of consideration, the Commission stated the following:

. . . In order to discharge effectively its statutory responsibilities, the Commission must know that the proper means and procedures will be in place . . . that adequate protective measures can and will be taken. . . .

The staff believes that the Commission's regulatory interest expressed in this excerpt is clear—that adequate protective measures can and will be taken. The Commission's regulatory interest is realized, not from *who* performed the planning or *who* provided the necessary resources, but rather because *the efforts have resulted* in reasonable assurance that adequate protective measures can and will be taken in the event of a radiological incident. Obviously, the entity must have the authority and capability necessary to perform the actions assigned. Given that, it is the endpoint rather than the route taken that matters with regard to the Commission's regulatory interest. The operative question in the instant situation becomes, is public health or safety jeopardized by a State's requiring daycare facility operators to provide their own emergency plans and transportation resources? If the answer to this question is no, as the staff and DHS believe it is, then the NRC should not mandate requirements that may interfere with the prerogatives of the States.

The Commission's interest was expressed, as regulation, in 10 CFR 50.47(a)(1), which provides in part:

. . . no initial operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. . . .

The staff notes that no particular assignment of planning responsibility is established by this regulation, just the requirement that there be a finding of reasonable assurance. The regulation goes on to state:

The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. . . .

There are other similar references in regulation to "State and local emergency plans." These references are consistent with the police powers these entities have to implement the emergency plans during emergency conditions, and the state constitutional and statutory responsibilities these governments have to provide for the health and safety of their citizens. The staff believes that the phrases "State and local governments," or "State and local officials," are intentionally broad so as to encompass governance differences that exist from state to state. Tolerance of such differences is appropriate since the Commission's regulatory interest is served by a finding that there is reasonable assurance that adequate protective measures can and will be implemented—rather than on who performed the planning and preparedness. The staff believes that support for this view can be found in § 50.47(b)(1), which recognizes that offsite emergency preparedness involves organizations beyond the State and local governments and that these organizations can be assigned responsibilities:

Primary responsibilities for emergency response by the nuclear facility licensee and by State and local organizations within the Emergency Planning Zones have been assigned, the emergency *responsibilities* of the various *supporting organizations* have been specifically established . . .[emphasis added]

Nonetheless, the staff recognizes that the plans and preparedness that result from this tasking must continue to enable DHS to make its requisite determinations regarding reasonable assurance that adequate protective measures can and will be implemented. If DHS can make these findings, the Commission's regulatory interest is met.

The staff notes that this tasking does not relieve the State and local governments from continuing to demonstrate to DHS that there is reasonable assurance that adequate protective measures can and will be implemented. Accordingly, State and local governments would need to review the plans and procedures developed by these entities for adequacy and to ensure that the planned emergency response actions are integrated into those of the State and local governments

It is important to note that under DHS regulations, only the State can request approval of the State and local plans. DHS regulations at 44 CFR § 350.13(a) address withdrawal of reasonable assurance which states in part:

If, at any time after granting approval of a State plan, the Associate Director determines . . . that the State or local plan is no longer adequate to protect public health and safety by providing reasonable assurance that appropriate protective measures can be taken, or is no longer capable of being implemented, he or she shall immediately advise the Governor of the affected State, through the appropriate Regional Director and the NRC of that initial determination in writing. . . .

As stated, a State remains accountable for emergency preparedness even if it tasks another entity with planning, preparedness, or response activities.

4.2 Guidance Documents

The joint NRC/FEMA guidance document NUREG-0654/FEMA REP-1, provides guidance and evaluation criteria for NRC licensees, State, and local governments to develop radiological emergency plans and improve emergency preparedness. This document assigns functions to one of three organizations: "Licensee," "State," and "Local." Appendix 5 of NUREG-0654 expands on this protocol:

It is not possible to totally specify each class or type of organization that may be involved in the total emergency planning and preparedness scheme. Nor is it possible to define the particular roles, functions and responsibilities of "principal organizations" and "sub-organizations." This is a matter that is best defined by the various parties involved in developing plans and preparedness for each nuclear site. Where the guidance in this document indicates a function that must be performed, emergency planners at all levels must decide and agree among themselves which organization is to perform such function. As a minimum, one lead agency at the State level and one lead local government agency having 24-hour manning is required.

This statement is a clear indication that the intent of the authors of NUREG-0654 in assigning the various functions to the various response organizations was not as restrictive as the column headings and the language in the evaluation criteria would imply on first glance.

FEMA Guidance Memorandum (GM) EV2 provides guidance in implementing the guidance in NUREG-0654 as it applies to schools and licensed child care facilities. The document tabulates the pertinent evaluation criteria from NUREG-0654. The fundamental criterion is J.9, which states in part: “ Each State and local organization shall establish a capability for implementing protective actions based upon protective action guides and other criteria. . . .” There are several subtiered evaluation criteria addressing various aspects for achieving this capability. GM EV2 then provides guidance on how these evaluation criteria could be met for schools and licensed daycare facilities. This guidance assigns some oversight and coordination functions to the local governments *and* tasks the administrators of the public and private schools with various aspects for planning for protecting the health and safety of their students. Obviously this is appropriate—who is better prepared to provide for the students of these institutions than the staff and the administrators who provide for these students during normal conditions?

5. CONCLUSION

Based upon the preceding discussion, the staff believes that the Commissions’s regulations and regulatory guidance allow a finding that reasonable assurance that adequate protective measures can and will be taken in a radiological emergency, where State or local government tasks other non-governmental entities with emergency preparedness activities responsive to the applicable planning standards of 10 CFR 50.47(b). In doing so, the State and local governments retain the overall responsibility for demonstrating to DHS’s satisfaction that adequate protective measures can and will be taken to protect the public in the event of a radiological emergency.