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

June 2, 2006

NOTE TO COMMISSIONERS' ASSISTANTS

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FROM: William M. Dean
Assistant for Operations, OEDO

SUBJECT: NON-CONCURRENCE RESPONSE TO SECY-06-0101, "EMERGENCY PREPAREDNESS FOR DAYCARE FACILITIES WITHIN THE COMMONWEALTH OF PENNSYLVANIA; UPDATE ON STAFF ACTIONS AND REQUEST FOR COMMISSION APPROVAL FOR RELATED STAFF ACTIONS"

During the week of May 22, 2006, the staff provided to the Commission's Technical Assistants comments and issues associated with a non-concurrence to SECY-06-0101. At that time, the staff committed to provide to the Commission offices the resolution of the comments and concerns from the non-concurrence.

Enclosed is the staff's evaluation related to the non-concurrence to SECY-06-0101 (ML061520193). The staff has concluded that all concerns have been adequately addressed in the Commission paper, and that the Office of Nuclear Reactor Regulation's concurrence on SECY-06-0101 remains in effect. In conclusion, it is important to note that the NRR's division director had recommended the use of the non-concurrence process to the individual to record disagreements to SECY-06-0101.

Enclosure: As stated

cc: L. Reyes, EDO (w/o enclosure)
M. Virgilio, DEDMRS (w/o enclosure)
W. Kane, DEDR (w/enclosure)
J. Silber, DEDIA (w/o enclosure)
W. Dean, AO (w/enclosure)
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J. Dyer, NRR (w/o enclosure)
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SECY (w/enclosure)
OGC (w/enclosure) 2006-0246
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OIS (w/o enclosure)
CFO (w/o enclosure)
EDO R/F (w/enclosure)

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Enclosure Contains "Official Use Only" Sensitive Internal Information

June 1, 2006

MEMORANDUM TO: Michael Jamgochian, Senior Nuclear Engineer
Regulatory Analysis, Policy and Rulemaking Branch
Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation

FROM: Christopher Grimes, Director /RA/
Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation

SUBJECT: NON-CONCURRENCE WITH SECY-06-0101, "EMERGENCY PREPAREDNESS FOR DAYCARE FACILITIES WITHIN THE COMMONWEALTH OF PENNSYLVANIA; UPDATE ON STAFF ACTIONS AND REQUEST FOR COMMISSION APPROVAL FOR RELATED STAFF ACTIONS"

In an email addressed to William Kane dated May 19, 2006, you presented your basis for non-concurring in the subject Commission paper. NRR Office Instruction ADM-200 Section 4.2 is designed for NRR documents, and does not apply clearly to documents developed by other offices. The procedure directs that the non-concurrence should be addressed to the responsible division director, who would be Nader Mamish for the subject document. Nevertheless, I recommended that you use this process to record your disagreement, as described below. I am responding to the non-concurrence as your division director, in accordance with ADM-200. Further, a non-concurrence would normally be submitted before a document is issued, so that the decision to issue the document could be informed by the non-concurrence. As described below, there was substantial discussion of your comments and concerns related to the Commission paper, prior to the decision to issue the paper to the Commission.

Your non-concurrence describes a wide variety of issues and comments associated with emergency planning generally and evacuation of schools and child-care facilities specifically. During the development of this Commission paper, there were a series of meetings you attended with NSIR, NRR, OGC and Region I representatives that discussed these issues and documented much of the basis for specific findings in the Commission paper. In addition, you met with Mr. Kane before he concurred in the Commission paper and described most of these concerns and your views regarding the "realism rule" (November 3, 1987) as it applies to the NRC's responsibilities for assuring the adequacy of emergency planning capabilities. Despite these efforts, you continued to disagree with information provided in the Commission paper based on your experience and past involvement in the development of the emergency planning regulations and, in accordance with ADM-200, you documented your disagreement. These views are your personal opinions and do not reflect an organizational position. I recommended NRR concurrence in the paper after I concluded that your comments and concerns had been adequately addressed.

You have submitted a Differing Professional Opinion (DPO) on this topic in accordance with Management Directive 10.159, which is referenced in the Commission paper. However, your pending DPO does not cover the full extent of your comments on the Commission paper. Therefore, I have attached specific responses to the comments in your non-concurrence on SECY-06-0101.

In accordance with ADM-200, I have discussed these responses with the NRR Deputy Director, and recommended that these responses serve as the resolution of the issues. This memorandum will be placed in ADAMS as a non-public record, and appropriately linked to the Commission paper. In addition, the EDO shared your non-concurrence with the Commission offices when it was received and will share this response with the Commission offices.

We appreciate that you have taken time to share your concerns and document your views on this important subject. We value your experience and views on this topic, and your efforts to share these views during the development of SECY-06-0101.

Enclosure: As stated

Ex 6

Ex 6

**RESPONSES TO NON-CONCURRENCE COMMENTS
ON SECY-06-0101**

1. General Concern: EV-2 discusses "Evacuation Time Estimates" for this special population (schools, child care and nursery schools) "shall usually be done on an institute by institute basis". Every letter received from PEMA, the Mayor of Harrisburg, the Governor, and FEMA has documented that child care and nursery schools have not been required to have emergency plans (before 2004). Therefore, the accuracy of the evaluation time estimates submitted to the NRC may be questionable.
2. General Concern: How does a State retain overall responsibility for emergency plans developed by several thousands of nursery schools and day care centers?

Comment: In order for a State to not abdicate its responsibility, it must establish a mechanism to review and approve, against specific acceptance criteria, the emergency plans. The State must also establish a mechanism to integrate the child care facility emergency plans into the overall State plans.

Response:

These comments refer to a long-standing general concern about the state and local emergency planners' integration responsibilities, and the DHS responsibility to evaluate the adequacy of off-site planning and preparedness. Enclosure 5 of SECY-06-0101 provides a detailed discussion of this topic, and proposes for Commission consideration that States and Locals have overall responsibility for demonstrating, with reasonable assurance, adequate protective measures.

For your additional information, RIS-01-0016 encouraged licensees to update evacuation time estimates (ETEs). In January 2005, the NRC published NUREG/CR-6863 and NUREG/CR-6864 describing factors that affect evacuations and the development of ETEs, and has initiated a related study to evaluate alternate protective action recommendations. Included within are pertinent discussions regarding the role of ETEs with respect to planning and preparedness.

Also, the draft SRM from the May 2, 2006 Commission briefing included direction to ... assess whether NRC guidance for emergency planning can specify more clearly what emergency plans should accomplish to protect public health and safety. As part of that review, staff should look carefully at control, command, and communication and make recommendations for improvement. The staff should look at improving ETEs by reviewing how they have been developed, making sure they are updated, and then considering how evacuation times can be decreased. Alert notification systems (ANS) should keep pace with proven technologies and guidance on them should allow flexibility for local needs.

On this basis, I conclude that the Commission understands the role of the evacuation time estimates in the overall assessment of emergency planning capabilities and SECY-06-0101

Enclosure

adequately describes the evaluation basis to assess the state and local emergency planning provisions for daycare facilities.

3. Commission Paper: Page 2, Discussion, line 6; "PEMA and the DPW describe a comprehensive program mandated by Pennsylvania law for licensed daycare facilities..."

Comment: This statement is misleading in that the 2004 Pennsylvania law specifically applies only to "For profit" childcare facilities (see Governor's letter dated July 12, 2004). In fact, a phone call to Ms Sheri Rowe, Dept. Of Education, Director of Division of Non-public Private and Charter School Services, at (717) 783-9280 will confirm that today there are approximately 3000 schools throughout Pennsylvania without emergency plans.

Response:

The program mandated by Pennsylvania law is discussed in detail in Enclosure 1 of SECY-06-0101 as supplemented by Enclosure 2 including the aspects raised by this comment. Enclosures 1 and 2 provided comprehensive information on the state of preparedness and planning in the Commonwealth, including before and after the legislation and more specifically with respect to the applicability to special populations. As explained in the Commission paper, the PA daycare emergency planning regulations apply to "for profit" and "non-profit" licensed facilities. Unlicensed facilities would be treated as the general public for emergency planning purposes, unless the proprietors of the facilities identified themselves to the local EMA, in which case they would be treated a part of the special needs populations.

As discussed in SECY-06-0101, all of the 90 licensed daycare facilities in the TMI-EPZ have evacuation plans in place. The comment reference to other schools in the Commonwealth is not relevant to the status of plans for licensed daycare facilities in the TMI-EPZ. Also, as discussed in Enclosure 1, PA DPW staff estimated that 95% of the licensed daycare facilities in the Commonwealth had evacuation plans in place in January 2006.

On this basis, I conclude that SECY-06-0101 is not misleading with regard to the description of the emergency planning legislation in Pennsylvania.

This statement could be considered an allegation; however, it would be referred to DHS as the appropriate and responsible regulatory agency. I concluded that the NRC need not treat this statement as an allegation nor refer it to DHS, since the subject is fully explained in SECY-06-0101.

4. Commission Paper: Page 2, Discussion, 2nd paragraph, last 2 lines; "that substantially enhances the existing emergency preparedness posture that was previously found by DHS to provide reasonable assurance that adequate protective measures can and will be taken".

Comment: Throughout SECY-06-0101 the DHS (FEMA) findings and determinations are not consistent with NRC regulations. When the original 1980 emergency planning regulations were drafted the Commission discussed extensively the specific findings that they wanted from the

FEMA. For initial reactor licensing (50.47 (a)(2)) the Commission felt that a more predictive finding (reasonable assurance) from FEMA was acceptable due to many uncertainties associated with initial reactor licensing. For operating reactors (50.54(s)(2)(ii)) the Commission specifically raised the standard by requiring that FEMA find that "State and Local government emergency plans are adequate and capable of being implemented" again, due to many less uncertainties associated with reactors that have been in operation for some time. Therefore, the correct DHS finding that must be made in Pennsylvania is that "State and Local emergency plans are adequate and capable of being implemented".

Response:

The comment only disputes the language choice not the substance of the information in the Commission paper.

5. Commission Paper: Page 2, Discussion, 2nd Paragraph, last 2 lines "that substantially enhances the existing emergency preparedness posture that was previously found by DHS to provide reasonable assurance".

Comment: The statement, that DHS did find reasonable assurance, while factually correct, contradicts every letter that NRC has received from PEMA, the Governor, the Mayor of Harrisburg, the Attorney General of Pennsylvania and FEMA. And in fact, the statement about the DHS previous findings throws logic and common sense out the window. How can FEMA make their reasonable assurance finding when in their letter dated October 6, 2004 it states: "In Pennsylvania, it is FEMA's understanding that licensed, non-profit and for-profit day care centers and government supported pre-schools and day care centers are on lists that the Offsite Response Organization (ORO) maintains. In the event of an emergency, the ORO will notify them so that they can implement their emergency procedures." even though almost all of the nursery and day care centers had no emergency plans, as documented by a December 3, 2002 letter from the Mayor of Harrisburg by stating that: "The exclusion of such facilities in present Radiological Emergency Plans is an omission that is certain to create confusion and chaos in the event that an evacuation would ever be ordered in one of the affected evacuation zones near to a nuclear power station. Parents and others would be attempting to reach the nursery schools and daycare centers, which would almost certainly delay any prospect of their orderly evacuation. Further, nursery schools and daycare centers have thus far generally not put into place any evacuation plan, which means there would be on-site confusion regarding the safety of the children entrusted to the facilities.". This apparent lack of emergency planning for child care and nursery schools prompted that "Pennsylvania enact a statute that became effective on September 12, 2004, which requires that all day care centers in the Commonwealth develop emergency plans."

Response:

The existence of contradictory statements in past correspondence and records does not preclude the opportunity for the state or any other party to establish a new and better position. The previous record has clearly been overtaken by the actions taken by Pennsylvania and the licensed daycare facilities since the concerns were raised by the petitioners.

6. Commission Paper: DHS did not concur with the SECY.
7. Recommendation #1 is not consistent with the findings necessary in 50.54(s)(2)(ii) thereby not permitting NRC to make its finding that "the integrated and overall emergency plans are adequate".
8. Enclosure 1, Page 4, NRC/DHS Follow-on Meeting, line 6 "...the emergency preparedness posture that (1) has been in place..." and in Enclosure 2 under purpose, 2nd paragraph, line 6, "that the Commonwealth has provided emergency preparedness for all segments of the population since 1980's".

Comment: These as well as similar statements throughout the SECY are direct contradictions to letters on record. Specifically, In a letter from PEMA to the petitioners dated July 30, 2004, PEMA stated that "Childcare facilities are, for the most part, private business entities who in conjunction with the parents, should assume responsibility for the safety of their charges. Local government will not treat these businesses any differently than it does any citizen. Especially in rural areas, municipal government simply may not have the resources to provide shelter. In so far as municipal shelters are available, child care providers are encouraged to use them". Also see FEMA's letter to Congressman Platts dated October 13, 2004; the Governors letter to the Pennsylvania Senate dated July 12, 2004; PEMA's letter dated May 19, 2003 as well as several others.

Response:

DHS chose not to formally concur, as explained in the "Coordination" section of the paper. Therefore, Bill Kane directed that their comments be attached and they were included as Enclosure 8.

The recommendations in the paper are consistent with the need to update the MOU with DHS, to reflect the current organizational relationship between DHS and NRC. While Recommendation #1 does not appear to be inconsistent with existing regulations and OGC had no legal objection to the paper, the recommendation is proposed for Commission consideration and direction. The Commission will instruct the staff if they conclude that the recommendation will not permit the staff to make the findings necessary to ensure public health and safety.

The letters referred to in the comment were made available for the Commission's consideration prior to denying the Petition for rulemaking in October 2005.

9. Enclosure 2, Page 5, last sentence above Current Status states "FEMA using its core competency and experience in responding to numerous natural and technological emergencies, had been able to reach the conclusion that the Commonwealth had established an appropriate emergency preparedness statute".

Comment: Considering the aftermath of Hurricane Katrina, using this statement as a basis for any regulatory discussion is an insult to the intelligence of the public.

Response:

This personal opinion is not relevant to the purpose of the Commission paper. The statement should read ... "an appropriate emergency preparedness statute." This finding by the authors is appropriate and relevant to the purpose of the Commission paper.

10. Throughout SECY 06-0101, reference is made to the 2004 Act as directing "every custodial child care facility".

Comment: This act does not include "not for profit" child care facilities (See the Governor's letter to the Senate dated July 12, 2004).

Response:

See response to item 3.

11. FRN: Under Background, page 5, last paragraph is incorrect. The NRC emergency preparedness regulations are predicated on State and local governments proving to DHS that their plans are adequate and capable of being implemented to protect the public health and safety. While the Atomic Energy Act of 1954, as amended, requires that the NRC grant licenses only if the health and safety of the public is adequately protected. The Atomic Energy Act does not specifically require emergency plans and related preparedness measures, the NRC requires consideration of overall emergency preparedness as a part of the licensing process.
12. FRN: Page 5 and 6, 1st line, the statement "All emergency response is local" makes no sense in light of the extraordinary efforts necessary for Hurricane Katrina.
13. FRN: Page 6, first paragraph, 3rd line "The Commission's emergency preparedness regulations allow..." is not correct, the regulations say no such thing. The Commission certainly may interpret the regulations to allow this, but the current regulations do not allow this.
14. FRN: Page 6, first paragraph, last 3 lines should read "...for demonstrating to FEMA that the State and local plans are adequate and capable of being implemented.
15. FRN: Page 6, 2nd paragraph, 2nd and 3rd lines should be revised to read 50.47(b) and the requirements in 50.54 and Appendix E and 44 CFR Part 350 is amplified by supporting regulatory guidance.

Comment: To cite the correct regulations and to note that regulations are not "informed" by guidance.

Response:

These comments are primarily editorial. While regulations are not literally "informed by guidance," it is appropriate to say the regulatory compliance is informed by relevant guidance. These comments do not demonstrate that the content of the Commission paper is factually inaccurate or misleading.

16. FRN: Page 6, 2nd paragraph, 6th line from the bottom, after the words "methods acceptable to DHS" add "and NRC".

Comment: The FRN should be consistent with the NRC/FEMA MOU and the last paragraph in GM EV-2 which states that "GM EV-2 is issued subsequent to review and concurrence by NRC staff who have determined that it provided clarification and interpretation of existing NUREG-0654/FEMA-REP-1 criteria applicable to protective actions for "special populations."

Response:

The NRC / FEMA MOU is admittedly outdated and the working relationship will be assessed and revised in accordance with the actions described in SECY-06-0101 and the Commission's direction in the October 2005 SRM.

17. Page 6, 4th line from the bottom is not consistent with FEMA's Radiological Assistance Committee (RAC) charter and the REP Exercise Program.

Comment: The FEMA rule, 44 CFR 350, establishes the policies and procedures for FEMA's initial and continued approval of State and local government REP planning and preparedness for commercial nuclear power plant accidents. This approval is contingent, in part, on State and local government participation in joint exercises with licensees. Under 44 CFR Part 350, FEMA reviews and evaluates emergency plans submitted by State and local governments participating in integrated emergency planning with NRC licensees. FEMA evaluates exercises to assess whether or not State and local government can adequately implement these plans.

The planning standards of NUREG-0654, as incorporated in 10 CFR Part 50, are regulatory requirements for offsite response organizations (ORO) participating in radiological emergency planning and preparedness for commercial nuclear power plan accidents. The evaluation criteria of NUREG-0654, as clarified and applied by NRC, FEMA, and other Federal agencies, such as GM EV-2 constitute guidance for Federally-approved approaches for meeting the intent of NUREG-0654 planning standards. OROs may propose other approaches to this guidance by submitting such proposals in writing to the appropriate FEMA Regional Office for review and approval recommendation to FEMA Headquarters. FEMA will coordinate the review of proposals with RAC members and their respective Headquarters' staff when issues raised in such proposals impact their expertise and missions.

No state has ever requested approval of an alternative approach to GM EV-2. Since Pennsylvania has never complied with EV-2 and never requested approval to an alternative approach, the basis for the FEMA findings are in question.

Pennsylvania's non-compliance with GM EV-2, NUREG-0654, and the standards in 50.47 is documented in many letters from Pennsylvania governmental authorities but is especially noteworthy in the FEMA letter dated October 13, 2004, to Congressman Platts where FEMA finds "continued reasonable assurance" while stating that "if a municipality [in Pennsylvania] finds itself lacking adequate resources during an emergency, they will contact the appropriate County and request assistance in fulfilling the unmet need. If the County cannot fill the request, they can contact neighboring counties for assistance or they may contact State to fill the request for assistance. If by some chance the Commonwealth cannot provide the assistance, there is an option of requesting it from the Federal Government", all to be carried out during an emergency while the sirens are sounding an alarm.

Response:

Pennsylvania's alleged "non-compliance" with Guidance Memorandum (GM) EV-2 and §50.47 is predicated on an outdated record. As discussed in SECY-06-0101, GM-EV-2 is guidance that was issued after initial TMI-licensing. Pennsylvania is not required to meet the guidance in GM-EV2 since FEMA found that the Pennsylvania plans met the applicable requirements of 10 CFR 50.47(b) and the evaluation criteria of NUREG-0654 prior to the publication of GM-EV-2. Nevertheless, SECY-06-0101 better establishes the current basis for concluding that the emergency plans in Pennsylvania are adequate and capable of being implemented pursuant to §50.47.

18. FRN: Page 11, Public Comments, there are now 56 public comment letters.
19. FRN: Throughout the FRN the words "organizational officials" should be clarified by adding "(school district or school board officials)" while "school officials" would be clarified by adding "(the individual school principle or designate)".

Comment: To meet the original intent of EV-2.

Response:

These clarifications are not necessary for the purpose of the Commission paper, nor is meeting "the original intent of EV-2." The objective of the paper is to establish the current basis for concluding whether there is reasonable assurance that children in Pennsylvania schools and daycare centers can be adequately protected in the event of an emergency, for the three purposes listed at the beginning of SECY-06-0101.