

August 21, 2008

MEMORANDUM TO: R. W. Borchardt  
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary **/RA Kenneth R. Hart for/**

SUBJECT: STAFF REQUIREMENTS – SECY-08-0073 – DENIAL OF A  
PETITION FOR RULEMAKING SUBMITTED BY DAVID  
LOCHBAUM ON BEHALF OF THE PROJECT ON  
GOVERNMENT OVERSIGHT AND THE UNION OF  
CONCERNED SCIENTISTS (PRM-50-83)

The Commission has approved the staff's recommendation to deny the petition for rulemaking, forward a letter to the petitioner notifying him of this decision, and to publish the *Federal Register* notice of the denial, subject to the changes noted below.

1. In the Federal Register Notice; on page 5, the last sentence of Public Comments, delete the initial phrase: "While this may be true,". On page 6, revise the paragraph to read: "In addition, the petitioner has misinterpreted Appendix E to 10 CFR Part 50. The petitioner states that "Appendix E to 10 CFR part 50 currently requires periodic demonstrations that plant owners and external authorities can successfully meet their responsibilities during nuclear plant emergencies...." While licensees must make a good faith effort to secure the participation in emergency preparedness demonstrations of offsite authorities having a role in the emergency preparedness plan, Section IV.F.2.h. of Appendix E and 10 CFR 50.47(c) recognize that such entities are at liberty to refuse to participate. This recognition is based on the fact that the NRC does not have the authority to require offsite authorities to participate in a nuclear power reactor licensee's exercises. Thus, the petitioner's reliance on Appendix E to 10 CFR Part 50 to support...."
2. In the letter to the petitioner, Mr. Lochbaum; make a conforming change in the third paragraph to read: "In support of the petition, you state that "Appendix E to 10 CFR part 50 currently requires periodic demonstrations that plant owners and external authorities can successfully meet their responsibilities during nuclear plant emergencies...." While licensees must make a good faith effort to secure the participation in emergency preparedness demonstrations of offsite authorities having a role in the emergency preparedness plan, Section IV. F. 2. h. of Appendix E and 10 CFR 50.47 (c) recognize that such entities are at liberty to refuse to participate. This recognition is based on the fact that the NRC does not have the authority to require offsite authorities to participate in a nuclear power reactor licensee's exercises. Thus, the Commission has ...."

SECY NOTE: THIS SRM TO MADE PUBLICLY AVAILABLE 5 WORKING DAYS  
AFTER DISPATCH OF THE LETTERS TO THE PETITIONERS

Commissioner Jaczko's dissenting view and the Majority View of the Commission (attached) should be included at the end of the *Federal Register* Notice.

Attachment: Dissenting views of Commissioner Jaczko and the Majority View of the Commission

cc: Chairman Klein  
Commissioner Jaczko  
Commissioner Lyons  
Commissioner Svinicki  
OGC  
CFO  
OCA  
OPA  
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)  
PDR

## **Commissioner Gregory B. Jaczko's Dissenting View on the Commission's Decision to Deny the Petition for Rulemaking Concerning Integrated Response**

I respectfully disagree with the decision to deny the petition for rulemaking as included in this Federal Register notice. The petitioners are asking for a more formal approach to ensuring licensees, local, State, and federal officials are closely coordinated to respond to a range of potential security events. The requested approach is modeled on the emergency preparedness exercises which currently take place, and I believe this proposal warrants further consideration.

While it is certainly true that the NRC does not have the authority to require offsite federal agencies to participate in nuclear power reactor exercises, it is also true that our emergency preparedness regulations clearly read as if we do – for example: “Offsite plans for each site *shall be exercised biennially with full participation by each offsite authority having a role under the radiological response plan*” (10 CFR Part 50 Appendix E Section IV. F.2.c., emphasis added), and “*A full participation exercise which tests as much of the licensee, State, and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted...*” (10 CFR Part 50 Appendix E Section IV.F.2.a., emphasis added) As footnote 4 of that section makes clear, these exercises are for the purpose of “*testing major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.*” (Id., emphasis added)

10 CFR 50.47 (c) does include provisions for determining that reasonable assurance exists even if States and local officials refuse to participate in exercises. Thus it is implicit that we can not require their participation, but at the least we can certainly fully encourage it. Clearly, the regulations could be modified to require licensees to participate in Federal and State integrated response exercises that Federal, State and local agencies decide to pursue. They could also be drafted in such a way as to encourage interagency participation in these types of exercises, if a policy decision was reached concluding that was a good approach.

The NRC is currently participating in integrated response initiatives with the Homeland Security Department and the Federal Bureau of Investigations to strengthen the ability of emergency response organizations and law enforcement around nuclear power plants to respond to events including potential beyond-DBT threats. The challenge to further pursuing integrated response exercises is not in securing the participation of government agencies which are eager to make additional progress, but rather with the willingness of the NRC's licensees to volunteer support for those efforts. That is a challenge that can be addressed by exercising the agency's authorities to compel such participation on the part of licensees. The NRC should pursue such a requirement if a substantive analysis by agency staff and the results of a public rulemaking determine it would provide additional protection to the common defense and security.

Rather than searching for a legalistic reason to dismiss the petition, the agency would be much better served by analyzing the substance of the proposal and basing its decision on the petition for rulemaking on the merits. It is especially awkward to hang our hats on a lack of authority to pursue the petition when the legal basis for our authority over integrated response so closely parallels our authority in the emergency preparedness arena. Such an approach risks creating challenges to the important radiological emergency preparedness program we now have in place.

**The Majority View of the Commission Regarding the Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of Project on Government Oversight and the Union of Concerned Scientists (PRM-50-83)**

The Commission majority does not share Commissioner Jaczko's dissenting view on the denial of PRM-50-83. The petitioner requested that the NRC add an appendix (or comparable regulation) similar to Appendix E of 10 CFR Part 50 which, the petitioner asserts, requires offsite entities having a role under the radiological response plan, to participate in biennial exercises designed to verify the capability of these entities to respond to the accident scenario. The petitioner has misconstrued Appendix E which, in fact, recognizes the NRC's lack of authority to require offsite entities to participate in biennial exercises. While Appendix E states in part that it requires nuclear power plant licensees to involve offsite authorities having a role in the emergency preparedness plan in biennial emergency preparedness demonstrations, it further states that "[t]he participation of State and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities...." (10 CFR Part 50, Appendix E Section IV.F.2.h.).

The Commission majority points out that the NRC does not have the statutory authority to require the participation of offsite authorities and that the NRC cannot confer such authority upon itself through rulemaking. We have reviewed the substance of the petition and are satisfied that adequate protection is, indeed, provided by the current integrated response framework. Therefore, we find no basis for granting PRM-50-83 or for initiating a rulemaking that would purport to require offsite authorities to participate in nuclear power plant licensees' exercises or to "encourage" such participation.

The lead role for coordinating offsite security responses was assigned to the Department of Homeland Security (DHS) (Homeland Security Presidential Directive-7, "Critical Infrastructure Identification, Prioritization, and Protection"). To that end, the NRC has worked with DHS and other agencies to improve the capabilities of first responders as part of the National Infrastructure Protection Plan. Part of this effort included the conduct of Comprehensive Reviews (CRs) at all commercial nuclear power plants which has resulted in the identification of numerous readily-adaptable protective measures for increased first responder readiness and preparedness in the event of a terrorist attack or natural disaster. The NRC also assisted DHS in the Buffer Zone Protection Program designed to support state, local and tribal law enforcement and other first responders to enhance the security of a range of "Critical Infrastructures and Key Resources," which include nuclear power plants. In addition, the NRC has helped to advance offsite response capabilities by meeting with a range of federal stakeholders to ascertain their support and concurrence on a path forward for integrated response planning. The NRC continues to maintain regulatory attention on the effectiveness of emergency preparedness as extended to security-related scenarios. The NRC has been working with the Federal Emergency Management Agency as part of the ongoing Emergency Preparedness (EP) rulemaking to incorporate hostile action-initiated scenarios into periodic biennial exercises under Appendix E. These exercises are intended to test the ability of licensee personnel to coordinate with state and local responders under the National Incident Management System/Incident Command Structure to take appropriate actions to mitigate the impact of a terrorist attack on a commercial nuclear power plant. The NRC staff is also working with the power reactor industry, as part of a voluntary initiative response to NRC Bulletin 2005-02, where each reactor site is conducting a hostile action-based drill within a 3-year period. The NRC staff will be incorporating the lessons-learned from these drills into its proposed EP rulemaking.

As stated in our votes on this matter, we do not question the important role that offsite federal, state and local authorities play in a nuclear power plant's ability to successfully respond to attempted radiological sabotage greater than the design basis threat. The Commission majority believes that the current framework provides reasonable assurance that adequate protective measures can and will be taken in the event of radiological sabotage.