

POLICY ISSUE NOTATION VOTE

February 17, 2012

SECY-12-0027

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PREEMPTION AUTHORITY PURSUANT TO SECTION 161A., "USE OF FIREARMS BY SECURITY PERSONNEL," OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

PURPOSE:

To request that the Commission designate the classes of U.S. Nuclear Regulatory Commission (NRC)-licensed facilities, radioactive material, or other property eligible to receive preemption authority and enhanced weapons authority under Section 161A. of the Atomic Energy Act of 1954, as amended (AEA). This authority would allow designated licensees and certificate holders to possess certain weapons notwithstanding State and Federal laws. The staff is also requesting that the Commission delegate to the staff the authority to approve an applicant's application for preemption authority, issue confirmatory orders to qualified facilities, and issue corresponding letters to relevant State officials. This paper does not address any new commitments or resource implications.

SUMMARY:

As part of a larger proposed rule entitled "Power Reactor Security Requirements," the proposed Enhanced Weapons rulemaking was published in the *Federal Register* (FR) (71 FR 62663) on October 26, 2006. In this proposed rule, the NRC informed the public that the NRC would consider granting preemption authority and/or the authority to possess certain enhanced weapons under Confirmatory Orders in advance of a final rulemaking.

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To date, the staff has received applications from three power reactor licensees for preemption authority, and an application from one category I fuel cycle facility for both preemption and enhanced weapons authority under Section 161A. Before the staff can act on these applications, Commission action is required to designate the classes of NRC-licensed facilities that are eligible to receive preemption authority and to establish the process to be used to implement this authority.

BACKGROUND:

Section 653 of the Energy Policy Act of 2005, amended the AEA by adding a new Section 161A. Section 161A. confers upon the Commission the authority to permit the security personnel of designated NRC licensees or certificate holders to possess and use firearms and large-capacity ammunition feeding devices that were not previously permitted to be owned or possessed under Commission authority.

The provisions of Section 161A. of the AEA became effective on September 11, 2009, with the publication in the FR of the guidelines approved by the NRC and the U.S. Attorney General, entitled, "Guidelines on the Use of Security Personnel in Protecting U.S. NRC-Regulated Facilities, Radioactive Material, and Other Property," (74 FR 46800) (hereafter referred to as the "Firearms Guidelines").

In accordance with the Firearms Guidelines, designated facilities may apply for preemption authority. Preemption authority, if granted, would allow designated NRC licensees to transfer, receive, possess, transport, import, and use weapons notwithstanding State, local, and certain Federal firearms laws that would prohibit such actions. Licensees may also apply for enhanced weapons authority. Enhanced weapons authority would permit designated NRC licensees to obtain weapons not previously permitted to be owned or possessed under previous Commission authority (i.e., machineguns). Licensees seeking enhanced weapons authority must also obtain preemption authority.

Consistent with Section 161A. of the AEA and the Firearms Guidelines, before granting preemption authority, the Commission must do the following through rulemaking or order.

- Designate the specific classes of NRC licensees or certificate holders and radioactive materials or other property for which application for preemption authority, or enhanced weapons and preemption authority, can be made.
- Establish a process for NRC-regulated entities to apply for and obtain preemption authority, or enhanced weapons and preemption authority, under Section 161A. of the AEA.

On February 3, 2011, the Commission published in the FR (76 FR 6199) a revised proposed enhanced weapons rule, entitled, "Enhanced Weapons, Firearms Background Checks, and Security Event Notifications." The Commission previously published in 71 FR 62663 a proposed Enhanced Weapons rule on October 26, 2006, as part of a larger proposed rule entitled "Power Reactor Security Requirements." However, based upon subsequent changes to the draft firearms guidelines, the NRC determined that a revised proposed enhanced weapons rule was necessary.

DISCUSSION:

In a letter dated April 27, 2011, Entergy Nuclear Operations, Inc. submitted an application for preemption authority on behalf of Indian Point Energy Center; in a letter dated August 23, 2011, Southern California Edison submitted an application for preemption authority on behalf of San Onofre Nuclear Generating Station; and in a letter dated December 22, 2011, Pacific Gas and Electric Company (PG&E) submitted an application for preemption authority on behalf of Diablo Canyon Power Plant (DCPP). These three power reactor applications request preemption authority and do not include a request for enhanced weapons authority.

In a letter dated January 13, 2012, Babcock & Wilcox Nuclear Operations Group submitted an application for both preemption authority and enhanced weapons authority, on behalf of their Lynchburg, Virginia facility (B&W NOG-L) a Category I fuel cycle facility. The staff believes that the technical details for enhanced weapons authority in advance of a final rule are sufficiently different from preemption authority as to warrant discussion in a separate SECY Paper. Therefore, for the purpose of this SECY Paper, the staff will address only preemption authority in response to the B&W NOG-L application.

These four licensees are requesting that the NRC grant them preemption authority because certain Federal and State laws would prohibit the possession, use, purchase, and maintenance of weapons and large-capacity ammunition feeding devices these licensees are currently using for protection of their facilities. The need for preemption authority is based on recent changes to certain Federal firearms laws and the reconsideration of previous determinations made by State officials regarding the applicability of certain State laws at these facilities. These changes have resulted in legal uncertainties that directly impact each licensee's ability to meet Commission requirements. For example, in the case of the three power reactors, the requirement of Title 10 of the *Code of Federal Regulations* Part 73, section 73.55(n)(1)(i) states that the licensee shall "Establish, maintain, and implement a maintenance, testing, and calibration program to ensure that security systems and equipment...maintained in operable condition, and are capable of performing their intended functions." Inability to maintain existing contingency response equipment will adversely impact physical protection at these sites and could result in violations of current regulatory requirements.

The staff has initiated the technical review of these applications consistent with the criteria established by Section 161A. of the AEA and the Firearms Guidelines. However, in accordance with the Firearms Guidelines, the staff cannot make the required determinations on these applications until the Commission has designated the specific classes of facilities that are eligible to receive preemption authority. Therefore, the staff is recommending that the Commission designate the classes of facilities for which licensees and certificate holders are authorized to use the preemption authority of Section 161A. of the AEA. Additionally, the staff is recommending that the Commission delegate to the staff the authority to make determinations on individual preemption applications to include the authority to take associated actions related to those determinations. Making this designation and delegation of authority will enable the staff to finish the timely review of these preemption applications prior to implementation of the final enhanced weapons rule. Without such a designation and delegation of authority, the staff will have to submit each application for preemption authority to the Commission for its review and approval prior to making necessary determinations and taking associated actions in advance of a final enhanced weapons rule. The staff anticipates that the final rule will be submitted to the Commission no earlier than December 2012.

In the course of conducting its preliminary reviews of these applications, the staff has identified the following policy considerations:

- The staff is continuing to work with the Federal Bureau of Investigation (FBI) to establish and test the process through which the required firearms background checks and reinvestigations will be requested and made. This process must be completed prior to submission of any request for a firearms background check. Licensees must complete these checks before receiving either preemption authority or enhanced weapons authority.
- By application, PG&E requested preemption authority for the two power reactor units and one co-located independent spent fuel storage installation (ISFSI) at DCP. In doing so, the licensee has requested that the Commission designate ISFSIs as an eligible class of NRC-licensed facilities for which preemption authority is considered appropriate. However, the revised proposed enhanced weapons rulemaking does not contemplate ISFSIs under the applicability statement, but rather identifies ISFSIs as a class of facility that would be considered for inclusion under a future rulemaking. The staff's intent for the revised rulemaking was to establish the regulatory framework for granting preemption and enhanced weapons authority to those facilities deemed to be of most significance first, with consideration being given to adding other classes of facilities in future rulemakings. In light of the PG&E application, the staff is recommending that the Commission designate ISFSIs as an eligible class of licensees to receive preemption authority. The same security organization is responsible for protection of both the power reactors and the co-located ISFSI at the DCP site, and the protective measures applied to both the reactors and the ISFSI are contained in the current NRC-approved DCP security plans. Therefore, the staff believes that including ISFSIs within the class of facilities eligible to receive preemption authority will help to ensure regulatory consistency at DCP. However, the staff recognizes that this recommendation has implications for the scope of the ongoing enhanced weapons rulemaking. These implications have been discussed with the staff responsible for that rulemaking.
- Should the Commission approve delegating to the staff the authority to review and approve preemption applications, the staff intends to use the confirmatory order process to issue confirmatory orders granting preemption authority to designated licensees that the staff has determined should be granted preemption authority. The confirmatory order will set forth the requirements that the staff has determined are appropriate for the licensee's exercise of the granted preemption authority. The staff plans to develop requirements that are, to the maximum extent possible, consistent with the proposed requirements in the enhanced weapons rule. However, the staff acknowledges that the issuance of confirmatory orders may create a regulatory condition in which the requirements placed on each licensee by order may be different than those requirements contained in the final rulemaking. Upon the effective date of a final enhanced weapons rule, the staff will take appropriate steps to modify or rescind the confirmatory orders.
- The staff anticipates that orders may be issued to applicants on or about May 2012. These orders would be issued by the Directors, Office of Nuclear Reactor Regulation (NRR) for operating reactor facilities, the Office of Federal and State Materials and

Environmental Management Programs (FSME) for decommissioned reactor facilities, and the Office of Nuclear Materials Safety and Safeguards (NMSS) for materials facilities. The final enhanced weapons rule would be submitted to the Commission for review and approval on or about December 2012, with publication in the FR around the middle of 2013. It is important to note that the final enhanced weapons rule will mandate the firearms background check for all armed personnel at NRC-licensed facilities. Because the firearms background check will be mandatory, the issuance of confirmatory orders in advance of the final rulemaking will avoid overburdening the firearms background check system with a large volume of requests submitted within a short time frame in response to the final rulemaking.

- The staff notes that because granting preemption authority has implications to State firearms laws, the staff believes that it is prudent to inform the Governors of affected States, Commonwealths, and Territories of the issuance of a confirmatory order by sending a letter concurrent with a confirmatory order. This letter will inform the appropriate State authorities that the NRC has taken such an action and will facilitate dialogue between the recipient and the NRC where appropriate.

In the event that the Commission does not approve the staff's recommendations, the staff requests that the Commission provide the staff with guidance on how to process these applications for preemption authority, as well as any future applications that may come in prior to implementation of the final enhanced weapons rulemaking.

RECOMMENDATIONS:

The staff recommends that the Commission take the following actions:

1. Designate all power reactor facilities, ISFSIs, and Category I special nuclear material facilities as the specific classes of facilities for which licensees and certificate holders are authorized to use the preemption authority of Section 161A. of the AEA.
2. Delegate to the staff the authority to make determinations on individual applications for preemption authority. This action will allow the staff to process current and future applications for preemption authority from designated facilities without the need to request a notation vote from the Commission for each application received in advance of the final enhanced weapons rule.
3. Authorize the Directors, NRR, FSME, and NMSS to grant or deny preemption authority applications and issue confirmatory orders to licensees of designated facilities requesting preemption authority.
4. Authorize the Directors, NRR, FSME, and NMSS to issue courtesy letters to the relevant State officials (i.e., Governor and/or Attorney General) informing the State officials that the NRC has granted or denied preemption authority, as authorized under Section 161A. of the AEA to an eligible NRC-licensee within that State. A courtesy copy of the notification letter will be provided to the applicable State Liaison Officer.

RESOURCE:

This paper does not address any new commitments or resource implications that are not already budgeted for; however, enabling the staff to respond to preemption authority applications as they are received will facilitate agency efficiency and effectiveness by extending the processing of these applications over multiple fiscal years in lieu of processing multiple concurrent applications in fiscal year 2013 in response to the final rule.

COORDINATION:

The Office of Administration is coordinating with the FBI to establish and implement a system for processing firearms background checks and reinvestigations. The Office of General Counsel has reviewed this paper and has no legal objection.

/RA by Martin J. Virgilio for/

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