

POLICY ISSUE NOTATION VOTE

January 10, 2013

SECY-13-0006

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: COMMISSION ORDER TO DESIGNATE AN INTERIM CLASS OF U.S. NUCLEAR REGULATORY COMMISSION-LICENSED FACILITIES THAT ARE ELIGIBLE TO APPLY TO THE COMMISSION FOR PREEMPTION AUTHORITY UNDER SECTION 161A OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

PURPOSE:

The purpose of this paper is to request Commission approval of a draft designation order (Enclosure) designating a limited class of U.S. Nuclear Regulatory Commission (NRC) licensed facilities eligible to apply for the authority granted to the Commission pursuant to Section 161A of the Atomic Energy Act of 1954 (AEA), as amended. This draft designation order responds to Commission direction in SRM-SECY-12-0125 that the order be limited to those licensees that have a near-term need for interim action prior to completion of the final rule implementing the Commission's authority under Section 161A. This paper does not address any new commitments or resource implications.

BACKGROUND:

In SECY-12-0125, "Interim Actions to Execute Commission Preemption Authority Under Section 161A of the Atomic Energy Act, As Amended" (Agencywide Documents Access and Management System Accession No. ML12164A839), the staff recommended, among other things, that the Commission designate a limited class of facilities (i.e., six nuclear power plants, a Category I special nuclear material facility and a specific-license Independent Spent Fuel Storage Installation (ISFSI) co-located with a nuclear power plant) eligible to apply for the authority granted the Commission pursuant to Section 161A of the AEA.

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In SRM-SECY-12-0125, the Commission approved all staff recommendations and directed the staff to: (1) provide a draft final order for Commission review and approval, and (2) limit the addressees to those that the NRC has determined have a near-term need for interim action before completion of the final rulemaking implementing the Commission's preemption authority.

DISCUSSION:

The enclosed draft designation order responds to the Commission's direction in SRM-SECY-12-0125. The list of proposed eligible licensees is in Attachment 1 to the draft order. Attachment 2 to the draft order sets forth the process to be used by licensees when submitting applications to the NRC requesting that they be granted preemption authority. Attachment 3 sets forth the process to be used by licensees within the designated class when completing the mandatory firearms background checks required by Section 161A.c of the AEA and the Firearms Guidelines issued by the Commission in the *Federal Register* on September 11, 2009.¹

Accordingly, if approved by the Commission, the draft designation order would designate a limited interim class of NRC-licensed facilities eligible to apply for Section 161A preemption authority. It also would establish the process for submitting applications to the NRC and the process for requesting firearms background checks in accordance with Section 161A.c of the AEA and the Firearms Guidelines. Section 161A.c contains a specific provision for mandatory firearms background checks for security personnel at designated facilities. These background checks would be required at facilities within the designated class upon issuance of the order, if approved.

To date, the NRC has received a request for preemption authority from the licensees of the following four facilities: Babcock & Wilcox Nuclear Operation Group—Lynchburg; Indian Point Nuclear Generating, Units 1, 2, and 3; San Onofre Nuclear Generating Station, Units 2 and 3; and Diablo Canyon Nuclear Power Plant, Units 1 and 2. The Pacific Gas and Electric request also includes the Diablo Canyon specific-license ISFSI.

The Firearms Guidelines require that the Commission designate the class of facilities eligible to apply to the Commission for the authority granted under Section 161A. The Commission may designate classes by rule or order. The Enhanced Weapons rulemaking, which would designate by rule the classes of facilities eligible to apply for preemption authority, has not yet been completed. Therefore, without an order designating a limited interim class of facilities, the staff cannot process the requests currently submitted to the NRC.

¹ The Firearms Guidelines currently require that all licensees within the designated class must complete the mandatory firearms background checks. The Office of the General Counsel is working with the Department of Justice to revise the guidelines so that only those licensees within the designated class that actually apply for preemption authority will have to complete background checks. The Department of Justice has agreed in principle to this approach

Accordingly, the staff has developed a draft designation order that includes the three nuclear power plant facilities identified above, the Category I facility, and the Diablo Canyon ISFSI. In reviewing requests already received from the affected licensees, the staff determined that each facility has a near-term need for preemption authority based upon the types of firearms and devices currently in use at these facilities and the current State firearms laws that could adversely impact the ability of these licensees to maintain the capabilities described in their current NRC-approved security plans. In addition, the staff has also determined that the licensees of three other New York State facilities are in a situation similar to Indian Point Nuclear Generating Units 2 & 3. These facilities include: James A. Fitzpatrick Nuclear Power Plant; Nine Mile Point Nuclear Station, Units 1 and 2; and R. E. Ginna Nuclear Power Plant. The staff determined that inclusion of three additional facilities in the State of New York is necessary based upon the applicability of State firearms laws that are the subject of the Indian Point licensee's request. While these licensees have not yet applied for preemption authority, the staff expects that they will submit applications once the Indian Point application is processed. Therefore, the staff has also included these three licensees in the interim class of licensees encompassed by the draft designation order.

The staff evaluated the requirements of this draft order in accordance with the backfit provisions in Title 10 of the *Code of Federal Regulations* (10 CFR), Parts 50, 70, and 72, specifically, sections 10 CFR 50.109, 70.76 and 72.62. As a result of this evaluation, the staff concluded that the requirements of the draft order do not constitute backfitting because the decision to request preemption authority is voluntary in nature and the order provisions implement statutory requirements contained in Section 161A, particularly the mandatory firearms background checks. Also, the application requirements do not impose modifications or additions to existing systems, structures, components, or designs of a facility or the procedures or organization required to design, construct, or operate a facility and, therefore, are not backfits.

To the extent that some of the implementing details described in the draft order, such as revisions to NRC-approved security plans of licensees, are not specifically mandated by statute, or the Firearms Guidelines issued by the Commission with the approval of the U.S. Attorney General, the staff has determined that such measures are administrative in nature and are essential for the effective implementation of the statute and Firearms Guidelines. Provisions of this draft order that relate to or amend existing information collection and reporting requirements or impose new information collection and reporting requirements are not considered to be backfits, as presented in the charter for the NRC's Committee to Review Generic Requirements. Therefore, for the reasons stated above, a backfit analysis has not been completed for any of the provisions of this draft order.

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RECOMMENDATIONS:

The staff recommends that the Commission approve the enclosed draft designation order, including attachments, and direct the staff to issue the order to the licensees listed in Attachment 1 of the order.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosure:
Draft Designation Order

The Commissioners

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