

STAFF TECHNICAL EVALUATION

Submission for Section 161A Preemption Authority
Exelon Generation Company, LLC
Nine Mile Point Nuclear Station, Units 1 and 2
Docket Nos. 50-220, 50-410 and 72-1036

1.0 INTRODUCTION

By submittal dated August 14, 2013, as supplemented by letters dated September 10, 2013, and May 14, 2014 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML13228A265, ML13260A257, and ML14139A342, respectively) Exelon Generation Company, LLC (Exelon or licensee) requested that the U.S. Nuclear Regulatory Commission (NRC) authorize it to use the preemption authority granted to the Commission under Section 161A of the Atomic Energy Act of 1954, as amended (42 United States Code (U.S.C.) 2201a), on behalf of the Nine Mile Point Nuclear Station, Units 1 and 2 (NMPNS). Use of Section 161A authority would permit security personnel at NMPNS, to transfer, receive, possess, transport, import, and use certain weapons, ammunition, and other devices not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations that prohibit such actions.

In the submittal, the licensee stated that this request is for preemption authority only, and is applicable to the firearms and devices presently in use at NMPNS in accordance with the NRC-approved NMPNS security plan, namely handguns, semiautomatic assault rifles, and large-capacity magazines. The licensee also stated that the firearms and devices identified in the submittal do not include enhanced weapons. The licensee stated that the types of firearms, ammunition, and other devices identified in the submittal are necessary in the discharge of official duties by security personnel to implement the NRC-approved NMPNS security plan. In the submittal, the licensee identifies the New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE Act), which was signed into law on January 15, 2013.

2.0 APPLICABLE REQUIREMENTS

Section 653 of the Energy Policy Act of 2005, Public Law 109-58 (119 Stat. 811), added Section 161A (42 U.S.C. § 2201a) to the Atomic Energy Act of 1954, as amended. Section 161A confers upon the Commission the authority to permit the security personnel of designated NRC-licensed facilities or certificate holders to transfer, receive, possess, transport, import, and use certain firearms and devices that were not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations, that prohibit such actions. The categories and types of firearms, ammunition, and devices that are subject to Section 161A are identified in Section 161A.b, which states that:

Notwithstanding subsections (a)(4), (a)(5), (b)(2), (b)(4), and (o) of section 922 of Title 18, section 925(d)(3) of Title 18, section 5844 of Title 26, and any law (including regulations) of a State or a political subdivision of a State that prohibits the transfer, receipt, possession, transportation, importation, or use of a handgun, a rifle, a shotgun, a short-barreled shotgun, a short-barreled rifle, a machinegun, a semiautomatic assault weapon, ammunition for any such gun or weapon, or a large capacity

ammunition feeding device, in carrying out the duties of the Commission, the Commission may authorize the security personnel of any licensee or certificate holder of the Commission (including an employee of a contractor of such a licensee or certificate holder) to transfer, receive, possess, transport, import, and use 1 or more such guns, weapons, ammunition, or devices

Section 161A became effective on September 11, 2009, when the Commission, with the approval of the Attorney General, published the “Notice of Issuance of Guidelines on Use of Firearms by Security Personnel; Notice of Effective Date of Statute” in the *Federal Register* (74 FR 46800), hereafter referred to as the “firearms guidelines.” These firearms guidelines were subsequently revised on June 25, 2014 (79 FR 36100).

On June 5, 2013, the NRC issued Enforcement Action (EA) 13-092 “Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161A of the Atomic Energy Act of 1954, as Amended” (ADAMS Accession No. ML13121A459), hereafter referred to as “the designation order.” The designation order accomplishes the following: (1) designates an interim class of NRC-licensed facilities as eligible to apply for Section 161A preemption authority; (2) provides a process through which the licensee of each designated facility may apply for Section 161A preemption authority; (3) outlines the type of information that must be addressed in a submittal for Section 161A preemption authority; and (4) requires the licensee of each designated facility to subject all personnel who have, or will have, access to covered firearms and devices in the performance of official duties, to a firearms background check as specified in Section 161A.c.

The designation order requires, in part, that requests must be submitted to the NRC for review and approval under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.90, “Application for Amendment of License, Construction Permit, or Early Site Permit” and that the licensee of each designated facility must notify the NRC in writing when a sufficient number of firearms background checks have been completed to staff the facility security organization.

3.0 TECHNICAL EVALUATION

In the submittal, the licensee stated that the request is for preemption authority at NMPNS. The NRC staff reviewed Attachment 1 to the designation order and confirmed that NMPNS is a member of the limited class of facilities designated by the Commission as eligible to apply for Section 161A preemption authority.

3.1 Staffing

The designation order requires that all licensees within the designated class of facilities eligible to apply for Section 161A preemption authority shall subject all members of the security organization whose official duties require or will require access to any firearm to a firearms background check. In a letter dated September 10, 2013, the licensee stated that a sufficient

number of personnel have completed the required firearms background checks to meet the minimum required staffing level for the NMPNS security organization as stated in the NRC-approved NMPNS security plan, including the minimum number of armed responder and armed security officer positions required to effectively implement the licensee's protective strategy and to meet applicable fatigue requirements of 10 CFR Part 26. The NRC staff reviewed the NRC-approved NMPNS security plan, and determined that the licensee has identified the minimum number of armed responder and armed security officer positions that must be staffed at all times at NMPNS and for which the assigned personnel must successfully complete a firearms background check. The NRC staff further finds that the number of firearms background checks completed by the licensee is consistent with the minimum number of armed responder and armed security officer positions required to implement the NMPNS NRC-approved security plan and to meet applicable fatigue requirements.

3.2 Training and Qualifications

The designation order requires the licensee of each designated facility to revise their training and qualification program, as needed, to ensure that affected personnel receive instruction regarding the firearms background check's disqualifying events. Additionally, the designation order requires that licensees must provide training on the continuing responsibility of each individual to promptly notify the licensee of the occurrence of any such event or status. By letter dated May 14, 2014, the licensee responded to an NRC request for additional information and confirmed that site procedures had been revised to address the activities required to instruct all affected personnel on disqualifying events and their continuing responsibility to notify the licensee of a change in their status.

Based on its review of the licensee's information, the staff finds that the licensee has revised the NMPNS training and qualification program, including the development and implementation of supporting site procedures, needed to ensure that affected personnel receive instruction regarding the types of events that would disqualify the individual from continued access to firearms and devices, and the continuing responsibility to report such events to the licensee.

3.3 Firearms and Devices

Consistent with the firearms guidelines, before authorizing a licensee to use the authority granted by Section 161A, the Commission must determine that the weapons used by licensee security personnel are necessary in the discharge of their official duties. In its submittal, the licensee provided a list of the types of firearms and devices that are currently in use at NMPNS and confirmed that these firearms and devices are used to implement its protective strategy at the facility. The licensee also addressed the types of duties and responsibilities that are required of personnel who are assigned armed duties. The staff reviewed the NRC-approved NMPNS security plan to determine whether the use of the firearms and devices identified by the licensee in their submittal is adequately described as being necessary to the performance of official duties by personnel assigned to the armed responder and armed security officer positions at NMPNS.

The Commission's regulations require that NRC-licensed facilities develop, implement, and maintain a physical protection system that will protect the special nuclear material that each licensee is authorized by license to possess and use. The physical protection system for an NRC-licensed power reactor will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety. In establishing the specific level of physical protection that must be provided by each licensee at a power reactor facility, the Commission has defined a Design Basis Threat (DBT) of radiological sabotage in 10 CFR 73.1. Consequently, the Commission has assigned specific attributes and capabilities to the DBT of radiological sabotage to include the types of firearms, ammunition, and other devices and equipment that an adversary could use for the purpose of causing radiological sabotage. Conversely, the Commission has determined that it is also appropriate and necessary to ensure that those personnel who are assigned official duties required for the prevention of radiological sabotage at an NRC-licensed power reactor facility, are also provided with the types of firearms, ammunition, and other devices that will provide and ensure the ability of assigned personnel to counter the capabilities that the Commission has assigned to the DBT of radiological sabotage.

The licensee's description of the weapons and their use in the approved security plan identified the types of firearms and devices that are currently in use (specifically, handguns, semiautomatic assault weapons, and large-capacity ammunition feeding devices) and stated that these firearms and devices are necessary to satisfy Commission requirements for the physical protection of the NMPNS facility. The staff determined that the description contained in the NMPNS security plan is consistent with Commission regulations and the licensee's protective strategy for the NMPNS facility, including the types of firearms and devices needed to provide armed responders and armed security officers with the ability to counter the attributes of the DBT of radiological sabotage.

Based on its review, the staff finds that the licensee has demonstrated that the firearms and other devices currently possessed at the NMPNS facility are necessary in the performance of official duties required for the physical protection of a facility, radioactive material or other property NMPNS owns and operates. The NRC staff also finds that the firearms and devices identified in the submittal are within the types of firearms and devices described in Section 161A.b and the firearms guidelines.

3.4 Firearms Background Check Processes

Firearms background checks are submitted through the NRC to the Federal Bureau of Investigation (FBI's) Criminal Justice Information Services Division and include a check against the FBI Criminal History database and the FBI National Instant Criminal Background Check System, which was established by Section 103(b) of the Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536. All members of a licensee's security organization whose official duties require access to firearms and where the licensee has applied for use of preemption authority under Section 161A.b shall be subject to a firearms background check to determine whether the person is prohibited from possessing or receiving a firearm under Federal or State law.

The designation order requires the licensee of each designated facility to establish a program that addresses: (1) the removal of security personnel from duties requiring access to firearms on the receipt of an adverse firearms background check or other disqualifying information; (2) instruction for resolving a delayed response and/or appealing a denied response resulting from a firearms background check; (3) provisions for a firearms background check reinvestigation not to exceed five years; (4) the conduct of a firearms background check reinvestigation for individuals who have had a break in employment from the licensee or applicable security contractor of greater than one week; and (5) self-disclosure requirements and reporting requirements concerning a disqualifying event. Attachment 3 to the designation order contains provisions for establishing processes to ensure that security personnel maintain appropriate qualification and training as well as a process to establish periodic firearms background check re-investigations.

By letter dated May 14, 2014, the licensee confirmed that appropriate processes and procedures have been established to maintain the requirements for the conduct of firearms background checks to include, periodic reinvestigations, instruction for appealing adverse results, notification/reporting requirements for disqualifying events, and the removal of individuals from armed duties when disqualifying information becomes known, as required in Attachment 3 to the designation order.

Based on its review of the NRC-approved NMPNS security plan and the licensee's letter dated May 14, 2014, the NRC staff finds that NMPNS has established background check processes and procedures that are consistent with the designation order requirements. In addition, the NRC staff finds that NMPNS has established, through these processes and procedures, a method to assure that affected security personnel are not barred under Federal or State law from receiving, possessing, transporting, or using any of the subject firearms or devices used at the facility.

3.5 State Law

Section 161A of the Atomic Energy Act of 1954, as amended, confers on the Commission the authority to permit the security personnel of designated NRC-licensed facilities or certificate holders to transfer, receive, possess, transport, import, and use certain firearms and devices that were not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations, that prohibit such actions. The categories and types of firearms, ammunition, and devices that are subject to Section 161A are identified in Section 161A.b.

In its submittal, the licensee states that the NY SAFE Act, which was signed into law on January 15, 2013, will restrict access to firearms and devices needed to implement the protective strategy at NMPNS. Therefore, the licensee has requested preemption authority.

The staff has reviewed applicable New York State law and found that New York State law makes it illegal to possess certain weapons or an ammunition feeding device that would include the types of firearms and devices that would be used by the licensee to implement its protective strategy as described in the NRC approved NMPNS security plan. Based on this review, the NRC staff finds that applicable New York State law would restrict the use of such firearms and

devices at NMPNS, and that the licensee uses such firearms and devices in performance of official duties necessary to implement the licensee's protective strategy at NMPNS. Therefore, the staff finds that the licensee has demonstrated a need for preemption authority.

4.0 CONCLUSION

Based on its review of the licensee's submittal, the NRC staff has determined that the firearms, ammunition, and devices utilized by the licensee are consistent with the types of firearms and devices described in Section 161A.b and that the request was submitted in accordance with the requirements of the designation order, Section 161A, and applicable Commission regulations. Accordingly, the staff recommends that NMPNS be approved for preemption authority.

REFERENCES

1. Spina, James A., VP-Corporate Operations, Constellation Energy Nuclear Group, LLC letter to Document Control Desk, U.S. Nuclear Regulatory Commission (NRC), "Submittal for Preemption Authority Pursuant to Section 161A of the Atomic Energy Act and License Amendment Request," August 14, 2013, ADAMS Accession No. ML13228A265.
2. Constanzo, Christopher R., Vice President – Nine Mile Point, Constellation Energy Nuclear Group, LLC, letter to Director, Office of Nuclear Regulation, U.S. Nuclear Regulatory Commission (NRC), "Notification of Completion of Firearms Background Checks in Accordance with NRC Order EA-13-092," September 10, 2013, ADAMS Accession No. ML13260A257.
3. Montgomery, Bruce S., Acting Manager, Licensing, Exelon Generation, "Response to Request for Additional Information Concerning Preemption Authority," May 14, 2014, ADAMS Accession No. ML14139A342.
4. Section 161A, "Use of Firearms by Security Personnel," of the Atomic Energy Act of 1954 (42 United States Code (U.S.C.) § 2201a), as added through Section 653 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 811 (August 8, 2005) and as amended.
5. New York Secure Ammunition and Firearms Enforcement Act of 2013 (NY SAFE Act), S.2230, A.2388, LBD12007-03-03 (January 15, 2013).
6. Section 922, "Unlawful Acts," and Section 925, "Exceptions: Relief from Disabilities," of Title 18, "Crime and Criminal Procedures," of the *United States Code* (18 U.S.C. §§ 922 and 925), as added through Section 902 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 226 (June 19, 1968), and as amended, particularly through the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (November 30, 1993).

7. Section 5844, "Importation," of Title 26, "Internal Revenue Code," of the *United States Code* (26 U.S.C. § 5844), as amended, particularly through Title II, "Machine Guns, Destructive Devices, and Certain Other Firearms," of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1227 (October 21, 1968).
8. *U.S. Code of Federal Regulations, General Provisions "Purpose and scope"* Part 73, Chapter I, Title 10, "Energy" (10 CFR 73.1).
9. NRC, "Notice of Issuance of Guidelines on Use of Firearms by Security Personnel; Notice of Effective Date of Statute," Vol. 74, No. 175, September 11, 2009, pp. 46800-46806 (74 FR 46800).
10. NRC, "Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161a of the Atomic Energy Act of 1954, as Amended," Commission Order EA-13-092, June 5, 2013, ADAMS Accession No. ML13121A459.
11. *U.S. Code of Federal Regulations, "Managing Fatigue,"* Subpart I of "Fitness for Duty Programs," Part 26, Chapter I, Title 10, "Energy" (10 CFR 26).
12. Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536 (November 30, 1993).