

NON-CONCURRENCE PROCESS COVER PAGE

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Employees are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, employees have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive, MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP), <http://nrcweb.nrc.gov:8600/policy/directives/catalog/md10.158.pdf>.

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to (if requested), and attach them to proposed documents moving through the management approval chain to support the decision-making process.

NRC Form 757, "Non-Concurrence Process" is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of a non-concurring NRC employee.

Section B of the form includes the personal opinions and views of the non-concurring employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

At the end of the process, the non-concurring employee(s):

- Concurred
- Continued to non-concur
- Agreed with some of the changes to the subject document, but continued to non-concur
- Requested that the process be discontinued

- The non-concurring employee(s) requested that the record be non-public.
- The non-concurring employee(s) requested that the record be public.

- This record is non-public and for official use only.
- This record has been reviewed and approved for public dissemination.



NON-CONCURRENCE PROCESS

NCP-2017-009
NCP PM 7/5/2017

SECTION A - TO BE COMPLETED BY NON-CONCURRING EMPLOYEE

TITLE OF SUBJECT DOCUMENT DISPUTED NOTICE OF NON-CITED VIOLATION 05000395/2017201-01	ADAMS ACCESSION NO. ML17160A183
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DOCUMENT SIGNER Marissa Bailey	SIGNER TELEPHONE NO. (301) 287-3778
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TITLE Director	ORGANIZATION Division of Security Operations
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NAME OF NON-CONCURRING EMPLOYEE(S) Joseph Willis	TELEPHONE NUMBER (301) 287-3667
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TITLE Team Lead	ORGANIZATION Security Performance Evaluation Branch
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DOCUMENT AUTHOR DOCUMENT CONTRIBUTOR DOCUMENT REVIEWER ON CONCURRENCE

NON-CONCURRING EMPLOYEE'S SUPERVISOR
Robert C. Johnson

TITLE Branch Chief	ORGANIZATION Security Performance Evaluation Branch
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I WOULD LIKE MY NON-CONCURRENCE CONSIDERED AND WOULD LIKE A WRITTEN EVALUATION IN SECTION B AND C.
 I WOULD LIKE MY NON-CONCURRENCE CONSIDERED, BUT A WRITTEN EVALUATION IN SECTIONS B AND C IS NOT NECESSARY.

WHEN THE PROCESS IS COMPLETE, I WOULD LIKE THE NCP FORM: PUBLIC NON-PUBLIC

REASONS FOR THE NON-CONCURRENCE, POTENTIAL IMPACT ON MISSION, AND THE PROPOSED ALTERNATIVES
(use continuation pages or attach Word document)

In the response to the licensee disputed violation request it states that Nuclear Security and Incident Response agrees with the licensee that the violation did not occur and that the site acted in accordance with site procedures. Based on my procedural reviews and interviews with site staff it is my assessment that the licensee functioned outside of their site procedures and for that reason I would like to non-concur on the NRC response to the licensee's disputed violation.

If this decision to reverse the violation is upheld the potential impact would be that not only this licensee but all licensee's could use deadly force at times that are not supported by state law, federal law and even their own procedures. Additionally, inspectors will not be able to adequately assess if the licensees meet their procedures related to their use of deadly force or evaluate the true effectiveness of a site's protective strategy.

As an alternative I would contend that the violation be upheld. I have included an SGI attachment with my assessment as to why the disputed violation should be upheld.

SIGNATURE <i>Joseph Willis</i>	DATE 7/3/17
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NON-CONCURRENCE PROCESS

NCP-2017-009

SECTION B - TO BE COMPLETED BY NON-CONCURRING EMPLOYEE'S SUPERVISOR

TITLE OF SUBJECT DOCUMENT

Disputed Notice of Non-Cited Violation 05000395/2017201-01

ADAMS ACCESSION NO.

ML17160A183

NAME

Robert C. Johnson

TITLE

Chief, Security Performance Evaluation Branch

TELEPHONE NUMBER

(301) 287-3688

ORGANIZATION

NSIR/DSO

COMMENTS FOR THE NCP REVIEWER TO CONSIDER (use continuation pages or attach Word document)

[REDACTED]

This type of issue was adjudicated through the Security Findings Review Panel in 2011 and the staff, management and OGC made the collective determination that overly permissive use of force was a regulatory issue for several reasons. First, as a regulatory agency, the NRC may be liable for accepting permissive use of force as a defense in court by a licensee or licensee staff should an actual use of force incident occur. Next, accepting this condition may limit the ability of the NRC to conduct evaluations of the licensees protective strategy since engagements could be made under any circumstance without regulatory concern. While use of force is covered by Federal, State and local laws, the role of the NRC is to ensure that the licensee can demonstrate adequate performance in response to a contingency event. In this case, the licensee responded outside of normal operating procedures and training.

In the NRC's Strategic Plan, Security Strategy 2 states: Maintain effective and consistent oversight of licensee performance to drive continued licensee compliance with NRC security requirements and license conditions. The decision not to support the violation is a new and major change to oversight of licensee performance.

The staff has only sought enforcement in egregious cases based on their technical expertise and years of experience. NRC's guidance is contained in the January 19, 1989 Information Notice, 89-05, "Use of Deadly Force by Guards Protecting Nuclear Power Reactors Against Radiological Sabotage." This guidance is still consistent with most Federal, State, and local laws.

In the last cycle there were significant issues with the employment of force at [REDACTED] (January 2014 Minor), [REDACTED] (March 2015 GNCV), and [REDACTED] (April 2015 GNCV) {See Attachment - Safeguards Information}. This violation at [REDACTED] is a repetition of the previous violation issued in 2011 which was adjudicated by the SFRP and resulted in a Green Non-Cited Violation. From a regulatory perspective this is also a failure of the corrective action program to adequately address the prior use of force issue and brings into question the licensees exercise and drill program threshold for identifying deficiencies, correcting those deficiencies and evaluating the actual effectiveness of their protective strategy.

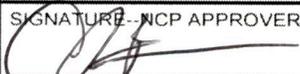
Finally, the perspective that the NRC Force-on-Force inspection program should allow for licensee actions outside their written policies, training programs and licensing basis documents (Security Plan) due to the artificial environment undermines the concept of performance based evaluations and the NRC compliance with the Energy Policy Act of 2005 as well as the fundamental concepts of the Reactor Oversight Process. It has been stated that the licensees would not "actually" do what was demonstrated during a regulatory inspection activity and that made the performance acceptable. In fact, this is exactly the circumstance in which the performance is unacceptable and should receive a regulatory response not only for the nature of the action, but for the failure to identify and correct deficiencies as required by the Energy Policy Act of 2005.

SIGNATURE



DATE

7/19/2017

NRC FORM 757 NRC MD 10 158 (11-2016)		U. S. NUCLEAR REGULATORY COMMISSION		NCP TRACKING NUMBER NCP-2017-009	
NON-CONCURRENCE PROCESS					
SECTION C - TO BE COMPLETED BY NCP COORDINATOR					
TITLE OF SUBJECT DOCUMENT Disputed Notice of Non-Cited Violation 05000395/2017201-01				ADAMS ACCESSION NO. ML17160A183	
NAME Andrea D. True					
TITLE Sr. Security Training Specialist / Reactor Security Inspector				TELEPHONE NUMBER (423) 855-6675	
ORGANIZATION OCHCO/HRTD/STTB (on rotation to NSIR/DSO/SOSB)					
AGREED UPON SUMMARY OF ISSUES (use continuation pages or attach Word document) See attached					
EVALUATION OF NON-CONCURRENCE AND RATIONALE FOR DECISION (use continuation pages or attach Word document) See attached					
TYPED NAME OF NCP COORDINATOR Andrea D. True			TITLE Sr. Security Training Specialist / Reactor Security Inspector		
ORGANIZATION OCHCO/HRTD/STTB (on rotation to NSIR/DSO/SOSB)					
SIGNATURE--NCP COORDINATOR 				DATE 7/25/2017	
TYPED NAME OF NCP APPROVER Marissa Bailey			TITLE Director, Division of Security Operations		
ORGANIZATION NSIR/DSO					
SIGNATURE--NCP APPROVER <i>for</i> 				DATE 8/17/17	

[REDACTED]

Section C – To Be Completed by NCP Coordinator

Agreed Upon Summary of Issues:

Background:

The Non-Concurring Inspector (NCI) believes the licensee failed to demonstrate the required requisite knowledge, skills, and abilities with regard to their use of force during an NRC graded Force-on-Force (FOF) exercise, as required by Title 10 *Code of Federal Regulations* (CFR) Part 73, Appendix B, Section VI.C.3.(d).

Specifically, on January 31, 2017, the NCI identified that the licensee's security force (SF) failed to adequately demonstrate the appropriate use of force, to include the use of deadly force, directed at [REDACTED] when the SF engaged and neutralized the [REDACTED] prior to any hostile or overt actions by the [REDACTED].

NRC Inspection Report #: 05000395/2017201-01 was issued on March 10, 2017, and contained a Green Non-Cited Violation (NCV) of Title 10 of the *Code of Federal Regulations* (CFR) Part 73, Appendix B, Section VI.C.3.(d) for failure of participants assigned security duties and responsibilities to demonstrate the requisite knowledge, skills, and abilities as identified in the licensee protective strategy and implementing procedures.

The licensee contested this violation in their response dated April 6, 2017. Subsequently, NRC management determined that the licensee acted in accordance with site procedures regarding the licensee's use of deadly force, and made the decision to rescind the violation.

Concern #1:

The NCI believes the licensee did not follow the appropriate use of force, specifically the use of deadly force, consistent with the licensee's protective strategy and implementing procedures.

Concern #2:

The NCI believes that if the decision to rescind the violation stands, this and all other licensees could be free to use deadly force at times not supported by federal regulation, applicable state laws, and internal licensee procedures.

Concern #3:

The NCI believes that if the decision to rescind the violation stands, the inspectors will not be able to adequately evaluate the licensee's protective strategy or determine whether or not they are adhering to applicable use of force procedures, to include the use of deadly force.

[REDACTED]

Evaluation of Non-Concurrence and Rationale for Decision

The following documents were reviewed (or applicable portions thereof) and the following persons interviewed:

NRC Non-Concurrence Process Documents

- NCP Form 757 – Section “A” Completed Form with SGI Attachment
- NCP Form 757 – Section “B” Completed Form with SGI Attachment
- NRC Non-Concurrence Process Website (<http://drupal.nrc.gov/node/24526>)
- NRC MD 10.158 – “NRC NCP Process”
- Non-Concurring Inspector’s Response to Licensee Contested Green NCV

NRC Inspection-Related Documents

- NRC Inspection Report: 05000395/2017201-01, dated March 10, 2017
- NRC Response to the Licensee’s Challenge of the Violation
- 10 CFR 73.55 (K)(3)
- 10 CFR 73.55 (K)(8)
- 10 CFR 73.55, Appendix B, Section VI.C.3
- NRC Information Notice 89-05, “Use of Deadly Force by Guards Protecting Nuclear Power Reactors against Radiological Sabotage”
- NRC Inspection Report Examples of “Like Issues,” [REDACTED]
- Google Earth Aerial View of the Licensee Site
- [REDACTED]

Licensee Documents

- Licensee Response to Green NCV issued in Report: 05000395/2017201-01, dated April 6, [REDACTED]
- [REDACTED] Code of Laws, Title 16, “Crimes and Offenses,” Chapter 11, Article 6, Section 16-11-440, (A)(2) and (C)
- [REDACTED] Protection of Persons and Property Act
- [REDACTED] Security Plan, SP-001
- [REDACTED] Security Plan Procedure, SPP-015, Rev 0, “Deadly Force”
- [REDACTED] Safeguards Contingency Procedure, SCP 200, Rev 1, “Protective Strategy Procedure”
- [REDACTED] Lesson Plan 1114, Rev 4, “Use of Force”
- Licensee Condition Report: CR-17-00572

[REDACTED]

[REDACTED]

[REDACTED]

Evaluation of Concern #1:

The NCI believes the licensee did not follow the appropriate use of force, specifically the use of deadly force, consistent with the licensee’s protective strategy and implementing procedures.

Response:

On January 31, 2017, the NRC conducted a graded Force-on-Force (FOF) exercise. The following scenario ensued:

Upon detecting [REDACTED] the licensee initiated a response deploying the SF to defensive positions and tracking [REDACTED] moving in the direction of the Protected Area (PA).

The [REDACTED] did not respond to verbal commands from the licensee [REDACTED] to stop.

As they continued to proceed, [REDACTED] was challenged directly by [REDACTED] Officer. When the protestor did not obey commands, the [REDACTED] Officer deployed less-lethal [REDACTED] use of force measures to subdue the [REDACTED].

As the other [REDACTED] proceeded onward, walking parallel to the PA [REDACTED], one [REDACTED] broke away from the group and commandeered a [REDACTED] vehicle [REDACTED]. The [REDACTED] began driving the [REDACTED] vehicle parallel to the PA [REDACTED] along the same route as the other [REDACTED].

Multiple responders then began engaging the [REDACTED] with deadly force, neutralizing all remaining [REDACTED], to include the [REDACTED] driving the [REDACTED] vehicle. The drill was terminated at this time.

The licensee appears to have acted in accordance with their protective strategy and use of force procedures when they neutralized the [REDACTED] adversaries using deadly force. The evaluation considered, and weighed heavily on, the following factors:

- Although it was not clearly visible, the [REDACTED] adversaries were armed [REDACTED].
- The [REDACTED] adversaries ignored warning signs as they traversed the first barrier in the [REDACTED]. The signs are placed approximately every [REDACTED] feet along the [REDACTED] barrier and state: “Halt! Nuclear Exclusion Area. Absolutely No One Allowed Entry Beyond This Point Without Prior Notification. Premises Defended By Armed Security.” (Actual Picture Below) This could be construed as the first real act of aggression or defiance toward the licensee.



[REDACTED]

[REDACTED]

- The [REDACTED] adversaries ignored challenges to stop issued [REDACTED]. It is important to note that some inspectors said they could hear the announcement while others could not. However, it does appear the licensee issued the challenge in accordance with their processes and procedures.
- The licensee's [REDACTED] Officer followed the use of force continuum in accordance with licensee procedure SPP-015 as he deployed less-lethal use of force measures when subduing one [REDACTED] adversary who failed to comply with the officer's commands. [REDACTED]
- One [REDACTED] adversary commandeered a [REDACTED] vehicle, [REDACTED]. The [REDACTED] adversary then began moving the vehicle parallel to the PA [REDACTED]. However, given the location of the vehicle and the responder's position, it is conceivable that the responder that engaged the vehicle and/or driver believed the vehicle to be moving toward the PA [REDACTED] at an angle, rather than strictly parallel.
- The [REDACTED] adversaries used radios [REDACTED] to communicate anti-nuclear messages. If the SF members switched to an alternate channel they would have been told that they were only hearing white noise. This type of [REDACTED] could have been viewed as a [REDACTED], in accordance with licensee procedure SCP-200.
- The remaining [REDACTED] adversaries were neutralized, beginning with those walking and the eventual neutralization of the last [REDACTED] adversary driving the [REDACTED] vehicle. The NCI believes that a perceived threat could have been posed by the [REDACTED] vehicle and, if so, this [REDACTED] adversary should have been neutralized prior to the neutralization of the other protestors/adversaries (if they were neutralized at all).

It appears that the [REDACTED] adversaries were viewed as one, not as individuals, as the group as a whole crossed the first [REDACTED] barrier, ignoring warning signs, and walked toward the PA [REDACTED] together. Additionally, [REDACTED] members of this group engaged in what could be construed as acts of hostility/aggression when one [REDACTED] adversary refused to comply with the [REDACTED] Officer's commands and had to physically be subdued and the other [REDACTED] adversary commandeered a [REDACTED] vehicle.

- It appears that ability, opportunity, and jeopardy existed with the commandeered [REDACTED] vehicle, in that the [REDACTED] adversary operating the vehicle had the ability to cause damage to the station; the opportunity to use it in that they were in close proximity to the PA [REDACTED] and members of the SF; and that jeopardy existed with the imminent threat posed by the vehicle to do bodily harm or damage to the station.
- Licensee Security Plan Procedure, SPP-015, Rev 0, "Deadly Force," Section 5.10.7,

[REDACTED]

[REDACTED]

- [REDACTED]
- Finally, it is important to note that, in interviews with the NRC Inspectors on-site for this exercise, two (2) FOF inspectors believed the licensee violated the use of force policy and two (2) inspectors, one (1) FOF and one (1) regional inspector, believed the licensee acted in accordance with their procedures. When asked why these inspectors did not ‘non-concur’ with the original report which issued the licensee a violation, the regional inspector stated he discussed the issue with [REDACTED] management and that the [REDACTED] security inspection branch does not typically ‘non-concur’ on FOF Green NCV’s. The regional representative also sent an email to a member of the inspection team expressing his disagreement with the violation and the reasoning behind his opinion. Likewise, the FOF inspector stated he expressed his opinion to the FOF Team Leader and made his position clear. Neither inspector believed the issue rose to the non-concurrence level.

Evaluation of Concern #2:

The NCI believes that if the decision to rescind the violation stands, this and all other licensees could be free to use deadly force at times not supported by federal regulation, applicable state laws, and internal licensee procedures.

Response:

All licensees are required to deploy the appropriate use of force, to include deadly force, in accordance with applicable licensee procedures, and state and federal laws. Each licensee is inspected to this requirement during both Baseline and FOF inspections. Likewise, each FOF exercise is evaluated independently of others.

The evaluation of a licensee’s use of deadly force can be extremely subjective due to the selected exercise scenario. It is very difficult for regulators to apply an objective standard to a subjective scenario given that each member of the SF will have an independent perception of the unfolding events which will ultimately drive their decision on the amount of force necessary in a situation. This subjectivity can be somewhat managed by the FOF team when considering the appropriate exercise scenario and what, exactly, they wish to measure. As we inject highly subjective events into a scenario it will become more difficult to measure the results.

However, in this case, it does appear the licensee followed the use of force continuum and their policies and procedures, notwithstanding the exercise subjectivity.

Evaluation of Concern #3:

The NCI believes that if the decision to rescind the violation stands, the inspectors will not be able to adequately evaluate the licensee’s protective strategy or determine whether or not they are adhering to applicable use of force procedures, to include the use of deadly force.

Response:

Each licensee’s protective strategy is evaluated during both Baseline and FOF inspections. Use of force is only a portion of the licensee’s strategy. As in the response above, each licensee must be inspected independently to ensure adherence to applicable licensee procedures, and state and federal laws.

[REDACTED]

Examples were provided in past inspection reports where similar violations were written, and upheld, for improper use of deadly force. However, in three (3) of the four (4) examples, the licensees did not use any type of escalated force, such as challenges to the adversaries, nor did they use less-lethal force options, [REDACTED]. The one (1) example report considered to be most relevant to the current situation actually came from the same licensee in their last NRC graded FOF exercise. And, again, the licensee used verbal challenges and considered the use of less-lethal force before deciding that using [REDACTED] on an adversary [REDACTED] could potentially cause the adversary [REDACTED]. Deadly force was eventually deployed by the security officers on the scene. (It should be noted that the regional security inspection branch involved with this exercise objected to the chosen exercise scenario and subsequently disagreed with the decision to issue a violation in this instance, as well).

It is difficult to relate the actions of one licensee to another given the different circumstances involved with each scenario. It is also difficult to compare how individual members of the SF react under varying conditions and perceived threats. In this particular case the responders reasonably believed a direct and imminent threat existed with an intent to do damage to the station, lesser means were not or would not be effective and the use of deadly force was necessary to prevent intrusion into the facility.

The goal of the FOF team is to develop scenarios to test the licensee's entire overall strategy. While this includes the use of force continuum, to include the use of deadly force, it also encompasses many other facets of the licensee's strategy, perhaps most importantly, the licensee's ability to protect vital station equipment. The FOF Team will continue to adequately evaluate each licensee's protective strategy independent of one another.

Summary:

Considering the totality of events, the licensee appropriately exercised escalation of force in the use of force continuum and was justified in their use of deadly force to protect themselves from bodily harm/death and to protect the station from significant damage.