DPO Case File for DPO-2018-003

The following pdf represents a collection of documents associated with the submittal and disposition of a differing professional opinion (DPO) from an NRC employee involving the regulatory framework governing power reactor license security plan changes submitted under 10 CFR 50.54(p)(2).

Management Directive (MD) 10.159, "NRC Differing Professional Opinions Program," describes the DPO Program. https://www.nrc.gov/docs/ML1513/ML15132A664.pdf

The DPO Program is a formal process that allows employees and NRC contractors to have their differing views on established, mission-related issues considered by the highest level managers in their organizations, i.e., Office Directors and Regional Administrators. The process also provides managers with an independent, multi-person review of the issue (one person chosen by the employee). After a decision is issued to an employee, he or she may appeal the decision to the Executive Director for Operations (or the Commission, for those offices that report to the Commission).

Because the disposition of a DPO represents a multi-step process, readers should view the records as a collection. In other words, reading a document in isolation will not provide the correct context for how this issue was reviewed and considered by the NRC.

It is important to note that the DPO submittal includes the personal opinions, views, and concerns by NRC employees. The NRC's evaluation of the concerns and the NRC's final position are included in the DPO Decision.

The records in this collection have been reviewed and approved for public dissemination.

Document 1: DPO Submittal
Document 2: Memo Establishing DPO Panel
Document 3: DPO Panel Report
Document 4: DPO Decision

Document 1: DPO Submittal

NRC FORM 680
(09-2015)
NRCMD 10.159

U.S. NUCLEAR REGULATORY COMMISSION

DIFFERING PROFESSIONAL OPINION

DPO Case Number: DPO-2018-003

Date Received: 5/3/18

Name and Title of Submitter	Organization	Telephone Number (10 numeric digits)
Dennis Gordon, Security Specialist	NSIR/DPCP/RSB	(301) 287-3633

Name and Title of Supervisor	Organization	Telephone Number (10 numeric digits)
Alison Rivera, Chief, Reactor Security Branch	NSIR/DPCP	(301) 287-3750

When was the prevailing staff view, existing decision or stated position established and where can it be found?

Date: 09-15-2000 Where (i.e., ADAMS ML#, if applicable): ML003750432-OGC Legal Analysis (Attached)

Subject of DPO

Regulatory Framework governing power reactor licensee security plan changes submitted under 10 CFR 50.54(p)(2).

Summary of prevailing staff view, existing decision, or stated position. (Use continuation pages or attach Word document)

Reason for DPO, potential impact on mission, and proposed alternatives. (Use continuation pages or attach Word document)

Do you believe the issue represents an immediate pubic health and safety concern?	☑ No	☐ Yes, (Explain on continuation page(s) or attach Word document).
Is the issue directly relevant to a decision pending before the Commission?	☑ No	☐ Yes, Reference Document (i.e., ADAMS ML#)

☑ Informal discussions took place (Identify with whom and time frame of discussions)

NSIR Office Director in 2015
NSIR/DPCP Division Director in 2017 & 2018
NSIR/DPCP/RSB Branch Chief in 2017 & 2018

☐ Extenuating circumstances prevented informal discussions

Proposed panel members are (in priority order):

1.

2.

3.

☐ No names of potential panel members will be provided.

When the process is complete, I would like the DPO case file: ☐ Non-Public ☑ Public

SIGNATURE OF SUBMITTER: Dennis D. Gordon DATE: 5/3/18

SIGNATURE OF CO-SUBMITTER (If any): DATE:

SCAN THE SIGNED AND DATED FORM (INCLUDE ANY CONTINUATION PAGES OR WORD DOCUMENTS) AND E-MAIL TO: DPOPM.Resource@nrc.gov

SIGNATURE OF DPO PROGRAM MANAGER: DATE: 5/15/18

Delete Continuation Page ☒ DPO accepted ☐ DPO returned Add Continuation Page

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	DIFFERING PROFESSIONAL OPINION (Continued)	Date Received

March 21, 2018

Purpose and Scope:

The purpose and scope of this paper is to obtain a U.S. Nuclear Regulatory Commission (NRC) interpretation and clarification of the regulatory framework governing changes made to power reactor security plans under the provisions of Title 10 of the Code of Federal Regulations (10 CFR) Part 50 "Domestic Licensing of Production and Utilization Facilities," Section 50.54 "Conditions of licenses," paragraph (p)(2).

Problem Statement:

Lack of a clear and understandable regulatory framework governing the Commission's meaning and intent for security plan changes submitted under the provisions of § 50.54(p)(2) relative to:
1. Commission-approved security plans;
2. Security plan content/description requirements;
3. Baseline inspection activities, and;
4. Records collection as authorized under the Paperwork Reduction Act (Office of Management and Budget (OMB) control number 3150-0002).

Regulatory Basis:

The provisions of § 50.54(p)(2) state in part; "The licensee may make changes to the plans referenced in paragraph (p)(1) of this section, without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan. The licensee shall maintain records of changes to the plans made without prior Commission approval for a period of three years from the date of the change, and shall submit, as specified in § 50.4 or § 52.3 of this chapter, a report containing a description of each change within two months after the change is made."

Discussion:

The key words used in the above regulatory provision are "prior," "of the plan," and "a report." The focus of the discussion provided below is on the common use, understanding, and meaning of these words as they relate to the NRC's regulatory framework.

Consistent with § 50.34(c); § 50.34(d); § 52.79(a)(35); and § 52.79(a)(36), each application for an operating license subject to the provisions of § 73.55, must include a Physical Security Plan, Training and Qualification Plan, a Cyber Security Plan, and a Safeguards Contingency Plan. These four plans describe the licensee's planned physical protection system/program that will be used (or implemented) to prevent radiological sabotage in accordance with Commission requirements. These plans are collectively referred to as the "security plan(s)."

Section 8.3.1 of the NRC Enforcement Manual states, in part, that licensees subject to the requirements of § 73.55 must submit security plans to the NRC for approval and that once these plans are approved, they are incorporated into the license by amendment. Requirements for the license amendment process are addressed in § 50.90 "Application for amendment of license, construction permit, or early site permit."

As stated in the above "Regulatory Basis," the provisions in § 50.54(p)(2) regarding prior Commission approval and changes that do not decrease the safeguards effectiveness of the plan are ambiguous at best and the meaning of these provisions is unclear for the following reasons:

A licensee relies on the NRC's review and approval of programs (and the sufficiency of any written commitments upon which such approvals are based), and licensees should be able to rely on the Commission's conclusion that the facility has been built in accordance with the General Design Criteria (if applicable) and subsequent Principal Design Criteria and is being operated according to the approved license. This presumption stems from the fact that nuclear facilities are designed and licensed as an integrated system, and a patchwork reinterpretation of the General Design Criteria to force-fit individual changes on a licensed facility could be harmful if done without the benefit of integrating the impact of these changes across the whole system or plant. However, this should not prevent the staff from correcting situations where the as-built condition of the plant clearly does not conform to a prescriptive licensing basis requirement, or from imposing a new or different interpretation of the licensing or design basis in all circumstances. When the staff has formally accepted a licensee's program as adequate (via issuance of a Safety Evaluation), any subsequent staff-specified or imposed change in the program (licensing basis) would be classified as backfitting.

Consistent with the above desire for certainty, the Commission's meaning and intent for the word "prior" is not defined and therefore, should be considered according to the common use and understanding of this term. As such, the word "prior" should be applied to mean that the Commission will take an approval action after the change is made. As discussed in greater detail below, this understanding would be consistent with the above stated need for consistency, and may be necessary to justify (under the Paperwork Reduction Act) the requirement to submit a "report describing the change" which appears later in § 50.54(p)(2). Nonetheless, for the purpose of this discussion, because the word "prior" is explicitly used, the Commission's meaning and intent could be reasonably understood to mean that changes to an NRC-approved security plan will be subject to some form of Commission approval after the change is made. Without such an approval action, a "revised" security plan does not provide the certainty described above regarding the licensing basis and cannot be considered as the NRC-approved plan as the NRC has taken no approval action. If this position is not considered to be a reasonable approach, the word prior has no regulatory meaning or value and should be deleted from § 50.54(p)(2) to provide a clear and understandable regulatory framework such that a licensee may make changes "without Commission approval" provided the change does not decrease the safeguards effectiveness of the plan.

It is important to note that a licensee's proposed quality assurance program, emergency preparedness program, and security plan are each initially approved by the NRC. Subsequent changes to the quality assurance program may be made without prior NRC approval, provided that the change does not reduce the commitments made in the program or plan description (10 CFR 50.54(a)). Subsequent changes to the emergency preparedness program and security plan may be made without prior NRC approval, provided that the change does not reduce the effectiveness of the program for emergency preparedness, as opposed to the plan for security programs. The requirements of 10 CFR 50.54(q) apply to emergency plans and 10 CFR 50.54(p) applies to the security plans. Properly made changes affect the licensing basis, even if the NRC did not review and approve them prior to licensee implementation, and should be considered when comparing the licensing basis to a new position to determine whether a backfit exists.

Additionally, as used in § 50.54(p)(2) the Commission's meaning and intent for the phrase "if the changes do not decrease the safeguards effectiveness of the plan" is likewise not defined. Consistent with both § 50.34 and § 73.55, site-specific procedures that are used to implement the Commission-approved security plans are subject to inspection by the Commission, but are excluded from the security plan review and approval process. Consistent with this exclusion, the scope of each security plan review is limited to only an evaluation of the information and descriptions (programmatic elements) that are written/contained within each site-specific security plan. The scope of the NRC staff's review is clearly and explicitly stated in the NRC's approval of each licensee security plan as documented in the NRC staff developed Safety Evaluation Report (SER) for each security plan (revision 0) within the section titled "Limitations on NRC Approval." (Note: Licensee security plans, Revision 0, were reviewed and approved in 2004 per Commission Orders). This SER section can be summarized as follows:

In general, the NRC's review and approval of a licensee's security plans is focused on ensuring that the necessary programmatic elements are contained in these plans 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. The NRC has determined that if effectively implemented these plans will provide the required high assurance.

The burden to effectively implement these plans remains with the licensee. Effective implementation is dependent on the procedures and practices the licensee develops for each of its sites to satisfy the programmatic elements of its security plans. As such, the NRC's approval of the licensee's security plans is limited to the programmatic elements necessary to provide the required high assurance. Should deficiencies be identified with the programmatic elements addressed in these plans, the plans shall be corrected to address the deficiencies.

Based on the above statement from the "Limitations on NRC Approval" section of each SER, the "effectiveness" and subsequent "approval" of each security plan, is predicated upon the NRC staff's determination that each security plan contains/describes the programmatic elements needed for the staff to conclude that "if effectively implemented," the planned actions/activities would provide high assurance which in turn, directly impacts the licensing basis because it is a regulatory requirement. Consequently, the effectiveness of the security plan is limited to only the information and descriptions (or programmatic elements) that are described in each security plan, separate and independent of implementation (specifically, implementing procedures).

This understanding of "effectiveness of the plan" is demonstrated in § 73.55(c)(7)(iv) which excludes site-specific implementing procedures from the security plan review and approval process, and is further supported in the "Limitations on NRC Approval" section of each SER where it is stated that "the burden to effectively implement the Commission-approved security plans remains with the licensee" and "effective implementation is dependent on the procedures and practices" that the licensee develops for each of its sites to satisfy the programmatic elements of its security plans. Therefore, any determination regarding "effectiveness" of the security plans (as stated in § 50.54(p)(2)) is likewise limited to only the information and descriptions (or programmatic elements) that are written/described in each security plan and cannot be determined through a review of procedures which is a component of inspection.

Further, as stated in the "Limitations on NRC Approval," section in each SER, should deficiencies be identified with the programmatic elements addressed in these plans, the plans shall be corrected to address the deficiencies. As stated in the previous paragraph, security plan deficiencies do not consider implementing procedures and therefore, this condition of the NRC's security plan approval is important as it demonstrates the Commission's position that the content of the security plans is a crucial administrative component of the regulatory framework and meeting its obligation to protect the public health and safety. Additionally, consistent with the provisions in § 50.9 "Completeness and accuracy of information," each licensee is required to ensure that the content of the NRC-approved security plans, to include changes, is complete and accurate in all material respects. For the purpose of this discussion, "all material respects," is specific to the programmatic elements required or utilized by the licensee's physical protection program to meet Commission requirements (licensing basis) and is applicable to both the § 50.90 and § 50.54(p)(2) licensing processes.

Therefore, where a plan change submitted under § 50.54(p)(2) does not contain or describe the required programmatic elements, the "effectiveness" of the plan is decreased and the licensee is required to correct the deficiency to ensure certainty and clarity of the licensing basis. This standard to correct a security plan deficiency is important because it demonstrates that the "decrease the effectiveness" standard in § 50.54(p)(2) applies solely to the security plan descriptions as written and more importantly, does not apply to any level of effectiveness realized through implementation of the plan and is consequently, separate and unique from the NRC's Baseline Inspection Program conducted by NRC inspection staff and/or Reactor Oversight Program (ROP).

The provisions of § 50.54(p)(2) go on to require that "The licensee shall maintain records of changes to the plans made without prior Commission approval for a period of three years from the date of the change, and shall submit, as specified in § 50.4 or § 52.3 of this chapter, a report containing a description of each change within two months after the change is made." This requirement is not consistent with the provisions of § 73.55(q)(2) which requires that the security plans be kept until the Commission terminates the license for which the records were developed, and that superseded portions of these records be maintained for at least three years after the record is superseded, unless otherwise specified by the Commission. Contrary to § 73.55(q)(2) the provisions of § 50.54(p)(2) would permit a licensee to destroy the record of changes, to include the required report, three years after the change is made as opposed to maintaining these records until the license is terminated or until three after the change is superseded. However, this regulatory inconsistency also clearly demonstrates that the required "report" and the actual "revised plan" are separate and unique required documents.

This discrepancy also demonstrates that the Commission has not established a clear and understandable regulatory framework governing the requirement in § 50.54(p)(2) to submit a "report of changes" to the NRC and therefore, does not clearly establish the regulatory basis/need (or practical utility) for the collection of the report as is required under the Paperwork Reduction Act. This lack of a clear and understandable "practical utility/use" for the required report has been, and continues to be, the subject of debate both internal to the NRC as well as between the NRC staff and industry as to whether these types of security plan changes are "licensing actions" or "inspection items." It is important to note that § 50.54(p)(2) requires that the licensee submit, a "report containing a description" of each security plan change but does not require that a revised security plan be submitted. Consistent with the Paperwork Reduction Act, the NRC may require only those records and reports that are necessary, or have a practical utility, to carry out the regulatory mandates of the agency. As stated in the NRC's justification for this record collection under the OMB control number 3150-0002, "this information is essential to enable the NRC to make a determination about the adequacy of the licensee's planned physical protection system to prevent radiological sabotage in accordance with regulatory requirements."

As stated above, each licensee describes the planned (not implemented) physical protection system in the site specific security plans and the Commission approves the security plans based upon a determination that the necessary "programmatic elements" are contained in each of the security plans. This action was taken in 2004, where the NRC approved each licensee's Revision 0. Therefore, to satisfy the obligation for practical utility of all record collections under OMB control number 3150-0002, it can be reasonably understood that the "report" required under the provisions of § 50.54(p)(2) is necessary for the NRC to validate that the security plan continues to contain the necessary programmatic elements (or maintains the licensing basis) upon which the Commission's 2004, Revision 0 "approval" of the security plan is predicated. It can then also be said that, consistent with the NRC's justification for this record collection under the Paperwork Reduction Act, the NRC is obligated to affirm that each revision made to a licensee's security plan (with or without "prior" Commission approval) contains the information essential to maintain the licensing basis and enable the NRC to make a determination about the adequacy (or "effectiveness) of the licensee's planned physical protection system."

With this understanding, the NRC is obligated to review each "report" required by § 50.54(p)(2) to enable the NRC to make a determination about the adequacy (effectiveness) of the licensee's planned physical protection system to prevent radiological sabotage and/or provide high assurance. As such, the "decrease the safeguards effectiveness of the plan" standard stated in § 50.54(p)(2), is only met where the NRC has determined that the security plan continues to contain and describe the necessary programmatic elements. Absent such an affirmation by the NRC, the revised security plans cannot be categorized as NRC-approved and the NRC does not satisfy its obligation under the Paperwork Reduction Act.

It is important to note that this approach also clarifies the long standing regulatory confusion and uncertainty that has historically been the topic of disagreement among the NRC's staff and industry. Many attempts have been made to

define the phrase "decrease the safeguards effectiveness of the plan" as written in § 50.54(p)(2). Resolution of this problem is essential to clarifying the regulatory framework for, and understanding of the Commission's meaning and intent of the "decrease of effectiveness" standard as it continues to be problematic for both NRC staff and industry.

Currently, the NRC staff is proposing a definition of the phrase "decrease the safeguards effectiveness of the plan" as part of a proposed Decommissioning Rulemaking. However, the creation of a simple definition for this phrase does not resolve the underlying problem because it is not supported by a clear and understandable regulatory framework governing the Commission's meaning and intent for this phrase under the provisions of § 50.54(p)(2). As this is a proposed rulemaking, it is critical that the Commission provide a clear and understandable regulatory framework for this proposed definition.

Based on the above, it can be said that the security plan changes made under the provisions of § 50.54(p)(2) are not exempt from the Commission requirements governing the content/descriptions for the security plans. More specifically, as written in each SER, "should deficiencies be identified with the programmatic elements addressed in these plans, the plans shall be corrected to address the deficiencies" whether such deficiencies are identified during initial review or identified as a result of a plan change submitted under the provisions of § 50.90 or § 50.54(p)(2). To this point, the requirement in § 50.54(p)(2) explicitly limits security plan changes to only those changes that "do not decrease the safeguards effectiveness of the plan" and as discussed above, "effectiveness of the plan" is a content (or administrative) determination, not implementation (or inspection). Therefore, the Commission's meaning and intent of the "decrease the safeguards effectiveness of the plan" standard can reasonably be applied to only those administrative reviews where the NRC staff has "identified deficiencies with the content of a security plan" and not the licensee's implementation of the plan (inspection). This is important because the current NRC process for § 50.54(p)(2) reviews inappropriately includes "inspection" activities to determine if a plan change has decreased the safeguards effectiveness of the plan without consideration to correcting the identified deficiencies with the content of a security plan provided the licensee is found to be compliant with a requirement through site-specific implementing procedures.

As such, current NRC processes for reviewing security plan changes submitted under the provisions of § 50.54(p)(2) inappropriately focus the NRC staff's review on compliance and inspection. This approach is in direct conflict with the Paperwork Reduction Act and OMB control number 3150 0002 because the inspection process does not require the report to provide information essential to enable the NRC to make a determination about the adequacy of the licensee's planned physical protection system. The inspection approach provides information essential to enable the NRC to make a determination about the adequacy of the licensee's implemented physical protection system. Of particular concern is the fact that the current "validation through inspection" approach could mandate that only a violation of Commission requirements would constitute a "decrease in the safeguards effectiveness of the plan." If compliance (inspection) is the intended focus of § 50.54(p)(2) and not the plan text, then rulemaking is needed to delete the "decrease" statement and replace it with a statement such as "provided the change does not violate Commission requirements." Therefore, the inspection approach is not supported by the current regulatory framework of § 50.54(p)(2) and does not satisfy the "practical utility" standard associated with OMB control number 3150 0002, because it considers only deficiencies associated with the site-specific implementing procedures which negates any need for the required report and/or the security plans themselves.

Finally, contrary to the "Limitations on NRC Approval" section of each SER, the current NRC approach to § 50.54(p)(2) plan change reviews does not provide a clear and understandable means by which the NRC staff can address or correct deficiencies with the programmatic elements contained and described in the security plan changes. As discussed above, it is the NRC staff's determination regarding the content of the security plan that constitutes "effectiveness" of the security plans and provides the technical basis for the NRC's approval of each security plan (licensing basis). Absent a determination by the Commission that "the security plan contains/describes the programmatic elements necessary to provide the required high assurance" the Commission has not "approved" the

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revised security plan and therefore, has not satisfied the "Need for and Practical Utility of the Collection of Information" as stated by the Commission in its justification for records collection under the Paperwork Reduction Act. In this justification, the Commission states:

In general, the reports and records are necessary for one or more of the following reasons:

• Information describing the content and planned operation of the licensee's physical protection system (e.g., Security Plans). This information is essential to enable the NRC to make a determination about the adequacy of the licensee's planned physical protection system to prevent radiological sabotage in accordance with regulatory requirements.

• Information assuring the physical protection of plants and materials. This information is necessary to enable the NRC to fulfill its responsibilities to respond to, investigate, and correct situations which could adversely affect public health and safety or the common defense and security.

Recommendation/Solution:

Based upon the regulatory framework described above, current Commission processes for the review of security plan changes submitted to the NRC under the provisions of § 50.54(p)(2) are ambiguous at best, and are contrary to the requirements of the Paperwork Reduction Act.

Therefore, an agency interpretation and clarification is necessary for the establishment and implementation of a clear and understandable regulatory framework governing changes made to power reactor security plans under the provisions of § 50.54(p)(2). To accomplish this, the following options are provided:

Option 1:

The Commission retain current language in § 50.54(p)(2) and clarify that consistent with the Paperwork Reduction Act justification under OMB control number 3150-0002 for submittal of a "report" within two months of making a change, the NRC staff shall review the submitted report to validate/affirm that the revised security plans continue to contain and describe the necessary programmatic elements needed to provide high assurance and therefore, maintain the required licensing basis. Where the NRC staff identifies deficiencies (i.e., description of necessary programmatic elements), such deficiencies are considered to be a "decrease of safeguards effectiveness" and the licensee is "required" to correct the identified deficiencies. The NRC's Inspection Program will validate effective implementation of the programmatic elements described in each revised security plan.

Option 2:

The Commission initiate rulemaking to:

a. Delete the word "prior" and the phrase "decrease safeguards effectiveness" from the provisions of § 50.54(p)(2). In this manner licensees could make changes to the NRC approved security plans without Commission approval and the changes would be subject to NRC inspection for compliance with Commission regulations similar to the current approach.

b. Delete the requirement for submitting a report within two months. The absence of a practical use for this report invalidates the need as a record collection under OMB control number 3150-0002.

Closing:

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The requested agency interpretation and clarification is necessary and consistent with, Staff Requirements Memorandum (SRM) COMKLS-17-0005 "Proposed Approach for Meeting Government Reform Requirements," dated June 28, 2017 (Agencywide Documents Access and Management System Accession No. ML17179A310) in which the Commission approved the NRC staff's proposed set of actions to implement and fulfill the requirements of two executive actions: (1) the "Presidential Memorandum Regarding the Hiring Freeze," issued on January 23, 2017; and (2) Executive Order 13781, entitled "Comprehensive Plan for Reorganizing the Executive Branch," issued on March 13, 2017, subject to the edits in the enclosures. Enclosure 1 to the SRM "Edits to Initial Proposed Agency Reform Plan" contained, in part, the following:

1. The NRC will perform a retrospective review of its regulations to identify administrative regulations that are outdated or duplicative that can be eliminated. This effort will not impact the NRC's mission as it will be limited to eliminating non-substantive administrative regulations.

2. The NRC will identify process efficiencies in support of mission functions within the programmatic and regional offices to reduce mission indirect costs and promote the delivery of consistent mission support services across the regions and program offices.

3. The agency will also continue to streamline centralized support provided by corporate offices to ensure that agency overhead activities are executed efficiently.

4. The NRC will evaluate existing inspection focus areas to determine whether any inspection activities can be eliminated, better prioritized and/or more efficiently conducted.

Dennis Gordon
Security Specialist
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(301) 287-3633
3WFN-08-A50

Document 2: Memo Establishing DPO Panel

May 17, 2018

MEMORANDUM TO: Russell Felts, Panel Chairperson
Office of Nuclear Reactor Regulation

Vince William, Panel Member
Office of Nuclear Security and Incident Response

Norman St. Amour, Panel Member
Office of the General Counsel

THRU: Anne T. Boland, Director **/RA/**
Office of Enforcement

FROM: Gladys Figueroa-Toledo **/RA Anne for/**
Differing Views Program Manager
Office of Enforcement

SUBJECT: AD HOC REVIEW PANEL - DIFFERING PROFESSIONAL OPINION INVOLVING THE REGULATORY FRAMEWORK GOVERNING POWER REACTOR LICENSEE SECURITY PLAN CHANGES SUBMITTED UNDER 10 CFR 50.54(p)(2) (DPO-2018-003)

In accordance with Management Directive (MD) 10.159, "The NRC Differing Professional Opinion Program;" and in my capacity as the Differing Professional Opinion (DPO) Program Manager; and in coordination with Anne Boland, Director, Office of Enforcement, Brian McDermott, Director, Office of Nuclear Security and Incident Response; and the DPO submitter; you are being appointed as members of a DPO Ad Hoc Review Panel (DPO Panel) to review a DPO submitted by an U.S. Nuclear Regulatory Commission (NRC) employee.

The DPO (Enclosure 1) involves the regulatory framework governing power reactor licensee security plan changes submitted under 10 CFR 50.54(p)(2). The DPO has been forwarded to Mr. McDermott for consideration and issuance of a DPO Decision.

CONTACT: Gladys Figueroa-Toledo, OE
(301) 287-9497

The DPO Panel has a critical role in the success of the DPO Program. Your responsibilities for conducting the independent review and documenting your conclusions in a report are addressed in the handbook for MD 10.159 in Section II.F and Section II.G, respectively. The DPO Web site also includes helpful information, including interactive flow charts, frequently asked questions, and closed DPO cases, including previous DPO Panel reports. We will also be sending you additional information that should help you implement the DPO process.

Disposition of this DPO should be considered an important and time sensitive activity. The timeliness goal for issuing a DPO Decision is 120 calendar days from the day the DPO is accepted for review. In this case, the DPO was accepted for review on May 15, 2018. The timeliness goal for issuing this DPO Decision is September 12, 2018.

Process Milestones and Timeliness Goals for this DPO are included as Enclosure 2. The timeframes for completing process milestones are identified strictly as goals—a way of working towards reaching the DPO timeliness goal of 120 calendar days. The timeliness goal identified for your DPO review task is 75 calendar days (July 31, 2018) from the date of this memorandum.

Although timeliness is an important DPO Program objective, the DPO Program also sets out to ensure that issues receive a thorough and independent review. The overall timeliness goal should be based on the significance and complexity of the issues and the priority of other agency work. Therefore, if you determine that your activity will result in the need for an extension beyond the 75-day timeliness goal, please send an e-mail to Mr. McDermott, the DPO submitter, and DPOPM.Resource@nrc.gov and include the reason for the extension request and a proposed completion date for your work. Mr. McDermott is responsible for subsequently forwarding the request for a new DPO Decision issuance timeliness goal to the EDO for approval.

An important aspect of our organizational culture includes maintaining an environment that encourages, supports, and respects differing views. As such, you should exercise discretion and treat this matter appropriately. Documents should be distributed on an as-needed basis. In an effort to preserve privacy, minimize the effect on the work unit, and keep the focus on the issues, you should simply refer to the employees as the DPO submitters. Avoid conversations that could be perceived as “hallway talk” on the issue and refrain from behaviors that could be perceived as retaliatory or chilling to the DPO submitters or that could potentially create a chilled environment for others. It is appropriate for employees to discuss the details of the DPO with their co-workers as part of the evaluation; however, as with other predecisional processes, employees should not discuss details of the DPO outside the agency. If you have observed inappropriate behaviors, heard allegations of retaliation or harassment, or receive outside inquiries or requests for information, please notify me or John Harrison.

On an administrative note, please ensure that all DPO-related activities are charged to Activity Code ZG0007.

We appreciate your willingness to serve and your dedication to completing a thorough and objective review of this DPO. Successful resolution of the issues is important for NRC and its

stakeholders. If you have any questions or concerns, please feel free to contact me or John Harrison.

We look forward to receiving your independent review results and recommendations.

Enclosures:
1. DPO-2018-003 Submittal
2. Process Milestones and Timeliness Goals

cc:
B. McDermott, NSIR
J. Lubinski, NSIR
D. Gordon, NSIR
M. Franovich, NRR
C. Safford, OGC
D. White, NSIR
A. Boland, OE
G. Figueroa-Toledo, OE
J. Harrison, OE

SUBJECT: AD HOC REVIEW PANEL - DIFFERING PROFESSIONAL OPINION INVOLVING THE REGULATORY FRAMEWORK GOVERNING POWER REACTOR LICENSEE SECURITY PLAN CHANGES SUBMITTED UNDER 10 CFR 50.54(p)(2) (DPO-2018-003) Date: 5/17/2018

ADAMS Package: ML18137A486
MEMO: ML18137A487
Enclosure 1 – ML18135A241
Enclosure 2 – ML18137A489 OE-011

OFFICE	OE: DPO/PM	OE: D
NAME	GFigueroa	ABoland
DATE	5/17/2018	5/17/2018

OFFICIAL RECORD COPY

Document 3: DPO Panel Report

Differing Professional Opinion (DPO)
On the Regulatory Framework Governing Power Reactor Licensee Security Plan Changes
Submitted Under 10 CFR 50.54(p)(2)
(DPO-2018-003)

DPO Panel Report

Russell Felts, Panel Chair

Norman St. Amour, Panel Member

Vince Williams, Panel Member

November 15, 2018

Introduction

A Differing Professional Opinion (DPO-2018-003) was submitted on May 3, 2018 and accepted for review on May 15, 2018. The concern expressed in the DPO involved the U.S. Nuclear Regulatory Commission's (NRC) implementation of the regulatory framework governing power reactor licensee security plan changes submitted under 10 CFR 50.54(p)(2). As identified below, the DPO raised several issues of concern associated with the implementation of the 10 CFR 50.54(p)(2) change process. On May 17, 2018, a memorandum from the Differing Professional Views Program Manager, Office of Enforcement, established the DPO Panel. The memorandum tasked the DPO Panel with conducting an independent review of the issues raised in the DPO and documenting the results of that review in a report.

The Panel met with the DPO submitter on June 13, 2018, to establish a concise summary of issues. The DPO submitter approved the summary of issues in an email dated July 23, 2018. The Panel performed its review by interviewing the DPO submitter, reviewing documents, and identifying and interviewing relevant subject matter experts on the issues raised in the DPO. These subject matter experts included Security Specialist licensing reviewers in the Office of Nuclear Security and Incident Response (NSIR), licensing Senior Project Managers in the Office of Nuclear Reactor Regulation (NRR), Security Inspectors in several regions, Security Inspectors in NSIR, an Enforcement Specialist in the Office of Enforcement (OE), and several attorneys in the Office of the General Counsel (OGC). The following reflects the agreed upon summary of issues identified by the DPO Panel in conjunction with the DPO submitter:

Summary of Issues (SOI)

Based on a review of the DPO submittal and associated references as well as an interview and follow up interactions with the DPO submitter, the following concerns were identified by the Panel:

1. The existing regulatory framework for the 50.54(p)(2) change process lacks clarity.
    - This lack of clarity makes it difficult to determine if plan changes implemented through the 10 CFR 50.54(p)(2) process constitute an NRC-approved security plan.

2. A licensee's prior approved security plan becomes part of the site licensing basis. Therefore it is critical for the security plan to contain adequate written descriptions of how the licensee intends to implement required programmatic elements rather than relying on implementation of the plan through site procedures.
    - A security plan change implemented without prior NRC approval is, in effect, a change to the site licensing basis without NRC approval.
    - Lack of clarity in the regulatory framework blurs the line between licensing and oversight.
    - This lack of clarity creates uncertainty for inspectors, particularly with respect to enforcement of the plan and associated regulatory requirements.

3. Approval of the security plan is predicated on the plan containing appropriate programmatic elements to implement applicable security requirements.
    - Failure of the 10 CFR 50.54(p)(2) report to adequately describe how a 10 CFR 50.54(p)(2) change meets appropriate programmatic elements constitutes a decrease in effectiveness of the plan.
    - The current 10 CFR 50.54(p)(2) review process does not allow licensing staff to require the licensee to correct deficient security plan text.

4. The records retention requirements in 10 CFR 50.54(p)(2) are inconsistent with the record retention requirements relating to security plans in 73.55(q)(2).

5. The requirements for the submission of a report in 10 CFR 50.54(p)(2) are inadequate.

Background

The review of security plan changes through the 10 CFR 50.54(p)(2) was initially an inspection activity conducted by regional security inspectors. Regional staff submitted several differing professional views concerning the execution of the 10 CFR 50.54(p)(2) inspection activity and the inconsistencies found within its implementation. In the aftermath of the 9/11 terrorist attacks, the review of security plan changes under the 10 CFR 50.54(p)(2) process was transferred to NSIR to address the issue of inconsistency and to manage licensee security plan changes for the implementation of various post 9/11 orders. In 2004, all power reactor licensees submitted security plans demonstrating compliance with the post-9/11 security orders, and safety evaluation reports (SERs) were written for each of these security plans. Since 2004, NSIR staff in the Division of Security Policy (now the Division of Physical and Cyber Security Policy) have conducted reviews of power reactor security plans.

After the post-9/11 security plans were submitted and approved, NSIR security specialists continued to review changes to these security plans via the 10 CFR 50.54(p)(2) process and interacted with licensees via teleconferences to discuss the descriptions that changed from those that were captured in 2004 SERs. In 2009, new regulatory requirements for power reactors were made effective with a compliance date of March 2010. Each licensee was required to submit security plans that addressed the new security requirements. Many of these security plan submittals were provided via the 10 CFR 50.54(p)(2) process because the Commission determined that the implementation of the new requirements did not decrease the safeguards effectiveness of security plans.[1] Headquarters staff reviewed the security plans to: 1) ensure that the plans met the new requirements, 2) maintained the licensing basis established in the 2004 SERs, and 3) addressed site-specific conditions that uniquely met new requirements and order implementation.

Evaluation

Issue 1:

The existing regulatory framework for the 50.54(p)(2) change process lacks clarity.

Discussion and Conclusions:

The 10 CFR 50.54(p)(2) change process allows a licensee to make a change to its security plan without prior Commission approval if the licensee determines that the change does not decrease the safeguards effectiveness of the plan. The licensee must submit a report containing a description of each change within 2 months after the change is made. The regulatory framework currently does not provide a definition of what is meant by the terms “prior Commission approval” or “a decrease in safeguards effectiveness.”

Security inspectors communicated during interviews that the current regulation and associated guidance

[1] 74 FR 58, March 27, 2009 at 13929

documents and inspection procedures do not contain a definition of what constitutes "a decrease in safeguards effectiveness." Inspectors stated that a definition of what constitutes a decrease in safeguards effectiveness would improve the 10 CFR 50.54(p)(2) process. There is similar ambiguity in what is meant by the term "prior Commission approval."

Security specialists also identified during interviews that defining the term "a decrease in safeguards effectiveness," as well as clarifying what constitutes an NRC approved security plan would improve the 10 CFR 50.54(p)(2) change process. They indicated that the regulation is ambiguous with respect to whether a 10 CFR 50.54(p)(2) security plan change is approved by the NRC as part of its licensing review and therefore becomes the licensee's NRC approved security plan. Security specialists interviewed by the DPO Panel suggested that information clarifying these areas of ambiguity would improve the licensing review process and also aid inspectors in the field evaluating compliance with regulatory requirements. They also suggested that improved guidance on the 10 CFR 50.54(p)(2) change process was needed.

The DPO Panel agrees that the existing regulatory framework for the 50.54(p)(2) change process lacks clarity for the following reasons:

- The regulatory requirement does not define the terms, "change" or "decrease in safeguards effectiveness" for a security plan.
- The contents of the description contained within the report of security plan changes are not identified within requirements.
- The regulatory requirement does not explicitly identify that NRC staff review security plan changes, however, there is an inference within the citation of an approval for the change (i.e., "without prior Commission approval" is read by many to imply that Commission approval subsequent to submission of the report will happen).
- There is confusion as to whether the NRC review of the required licensee report constitutes approval of the change if NRC doesn't timely object to the change.

The DPO Panel is aware that the proposed decommissioning rulemaking currently before the Commission has proposed changes to the 10 CFR 50.54(p)(2) language to more closely align with the language in 10 CFR 50.54(q), including the addition of a definition of the term "decrease in safeguards effectiveness." The DPO panel believes that the proposed decommissioning rulemaking changes will address some of the ambiguities identified by security specialists and inspectors.

Issue 2:

A licensee's prior approved security plan becomes part of the site licensing basis, which is predicated on written descriptions contained in the plan, not implementation of the plan through site procedures. A security plan change implemented without prior NRC approval is, in effect, a change to the site licensing basis without NRC approval. Lack of clarity in the regulatory framework blurs the line between licensing and oversight, creating uncertainty for inspectors, particularly with respect to enforcement.

Discussion and Conclusions:

There are several concerns interwoven in this issue statement.

A site's security licensing basis includes all applicable security requirements contained in the NRC's regulations, the site security plans (physical security plan, safeguards contingency plan, training and

qualification plan, and cyber security plan), and applicable security orders that remain in effect. Notably, security regulations are written with an intent to avoid publication of information that would aid a potential adversary in planning an attack. As such, these regulatory requirements are high level and performance-based – detailed requirements are in orders or site security plans. Security plans are conditions of the site's license, and thus contain obligations, on par with regulatory requirements.

The objective of security licensing review is to verify that the security plans describe the programmatic security elements necessary to provide an effective security program in accordance with regulatory requirements. In contrast, the objective of a security inspection is to verify that implementation of site security programs meets the requirements in the security licensing basis.

The DPO submitter has expressed the concern that security plan requirements, consisting of written descriptions within the plans, will be eroded over time if the NRC relies on inspection to evaluate security plan changes made by licensees without prior NRC approval. Inspection focuses on effectiveness of implementation (site procedures), and not on the adequacy of the security plan written descriptions. The DPO submitter is therefore concerned that inspection activities measure the wrong attributes for determining the adequacy of security plan descriptions, which is inherently a licensing review. This is discussed further under Issue 3.

A second concern is that the security licensing basis becomes unclear as licensees change their security plans without NRC approval. Although the DPO submitter recommended removing the word "prior" from 10 CFR 50.54(p)(2), it is included in the statement of this issue to distinguish NRC approval that occurs as part of a license amendment from NRC tacit approval that is perceived to occur after a licensee implements a security plan change without prior NRC approval. Once the licensee reports a change implemented without prior NRC approval, should the NRC not object to the change, the licensee and many within the NRC consider the new plan to have superseded the previous plan in the licensing basis. For example, security inspectors indicated that they inspect the licensee's security program for compliance with requirements in the current plan, without considering previous security plans.

The third concern is that the lack of clarity in the regulatory framework creates uncertainty for inspectors, particularly with respect to enforcement. If a licensee's implemented security program fails to meet regulatory requirements, but meets the licensee's security plan requirements, it is unclear if the NRC will have to perform a backfit analysis to determine whether or not to enforce a security regulation. If a licensee implements a security plan change without NRC approval, and the NRC does not recognize that the change decreased security plan effectiveness and thus does not object, perhaps so.

Some security specialists interviewed by the DPO Panel stated that only those changes to security plans supported by a SER) properly change a licensee's licensing basis. Others stated that security plans are a condition of the license, and therefore all changes to the security plan consistent with NRC regulations change a licensee's licensing basis.

The DPO Panel agrees that it is not clear whether or not a 10 CFR 50.54(p)(2) security plan change is a change to the licensee's licensing basis. The DPO Panel agrees that the written descriptions in NRC-approved security plans are part of the site licensing basis. The DPO Panel agrees that the lack of clarity in the regulatory framework blurs the line between licensing and oversight and creates uncertainty with respect to enforceability of security plans and associated regulatory requirements.

The DPO Panel view is that security plan changes implemented without prior NRC approval which should have properly been approved prior to implementation through a license amendment (i.e., decrease

in safeguards effectiveness of a security plan, alternative measure, exemption) are not approved (tacitly nor explicitly) by the NRC. Such security plan changes, should they constitute a decrease in security plan effectiveness, are subject to enforcement action to restore compliance. However, the DPO Panel acknowledges that backfit concerns will likely arise if NRC is slow to identify that a security plan change decreased safeguards effectiveness of the plan.

Issue 3:

The DPO submitter asserts that NRC approval of a licensee's security plan is predicated on the plan containing the appropriate programmatic security elements needed to implement applicable NRC security requirements. Inclusion of the appropriate programmatic security elements in the security plan is necessary to enable the NRC to determine that the facility can be operated in a safe and secure manner that is not inimical to the common defense and security and does not constitute an undue risk to public health and safety. If a security plan change implemented in accordance with 10 CFR 50.54(p)(2) does not contain or adequately describe the required programmatic security elements, the NRC is unable to determine if the security plan adequately meets NRC security requirements. The incorporation of these inadequately documented changes constitutes a decrease in the safeguards effectiveness of the plan. Licensees are currently not required to correct the deficient security plan text associated with a 10 CFR 50.54(p)(2) change.

Discussion and Conclusions:

The NRC's regulations do not define what constitutes an approval of a licensee's security plan or modifications to its security plan. There are two principal methods by which a licensee may make changes to their security plan. In accordance with 10 CFR 50.54(p)(1), a licensee must obtain Commission approval for any change that decreases the safeguards effectiveness of the plan. This is accomplished by the licensee submitting an application for amendment to the license under 10 CFR 50.90. Requests for approval of alternative measures in accordance with 10 CFR 73.55(r) must also be submitted for NRC approval using the 10 CFR 50.90 license amendment process. In both cases, the NRC reviews the amendment request and then develops and issues a SER documenting its analysis of the amendment request and the basis for approving or denying the request. This process results in a clear and logical analysis documenting the NRC's approval of a security plan change.

In accordance with 10 CFR 50.54(p)(2), licensees may make changes to their security plans without prior Commission approval if the change does not decrease the safeguards effectiveness of the plan. Licensees must provide a report describing that change to the NRC within two months. NRC security specialists review that report but do not prepare a SER documenting their analysis of that report or the security plan change described in the report. Currently, security specialists reviewing these reports are limited to concluding if the change appears to or does not appear to decrease the safeguards effectiveness of a licensee's security plan. This process does not result in a clear and logical analysis documenting the NRC's approval of the security plan change.

There is not a clear and consistent understanding of what constitutes an NRC "approved" security plan. According to several security inspectors interviewed by the DPO Panel, licensees typically believe that any 10 CFR 50.54(p)(2) change not objected to by the NRC is approved and becomes part of the licensee's NRC approved security plan. NSIR security specialists articulated during interviews that the lack of specificity in the rule allows for inconsistencies in the level of information that is provided by licensees for security plan changes. NSIR security specialists also identified during interviews that the evaluation of whether or not safeguards effectiveness is maintained is completed by using a series of

reviewer documents (e.g., requirements, SRPs, accepted-for-use industry documents), experience, and professional judgment.

According to the DPO submitter and several of the security specialists interviewed by the DPO Panel, approval of a security plan change requires a formal process supported by an adequate analysis that is properly documented. The DPO submitter takes the position that without such supporting analysis and documentation, the 10 CFR 50.54(p)(2) change is not approved and incorporation of such a change into the licensee's security plan could decrease the safeguards effectiveness of the plan. Some reviewers believe that a formal review of security plan changes ensures that licensees maintain their licensing basis, which was established in the 2004 SERs that were written by NSIR staff for the implementation of several post 9/11 orders. During the interviews, it was also communicated that reviews of security plan changes are a licensing function and not an inspection activity because the emphasis of the review is on the adequacy of plan descriptions and not site procedures and practical implementation by a site security organization.

Security inspectors interviewed by the DPO Panel indicated that the information compiled by licensing reviewers to support 10 CFR 50.54(p)(2) reviews was accessible via NSIR SharePoint sites, but that that information was not being used to support baseline inspections. In certain instances, inspectors have been asked to support headquarters 10 CFR 50.54(p)(2) reviews with the collection of certain information during baseline inspections to assist NSIR staff in their determinations of whether or not safeguards effectiveness was maintained for specific security plan changes. During one interview, a physical security inspector stated that the determination of whether or not safeguards effectiveness is maintained is not resolved by completing determinations during performance-based inspections because these types of activities are not designed to evaluate specific changes to a security plan (e.g., reduction of armed response team members and the use of different types of equipment). Security inspectors do not routinely determine if a 10 CFR 50.54(p)(2) change incorporated into a licensee's security plan has been approved by the NRC. They conduct their inspections using the current plan provided to them by the licensee to determine if the licensee is in compliance with the plan and existing NRC regulations. These inspectors assume that the security plan provided to them is the plan approved by the NRC.

The DPO panel agrees that the security plan description of appropriate programmatic elements is necessary to demonstrate the adequacy of the security plan, and that deficient descriptions in the security plan constitute a decrease in security plan effectiveness. The DPO panel agrees that the current practice for 10 CFR 50.54(p)(2) reviews does not enable headquarters licensing staff to compel licensees to correct deficient text.

There were several views shared by the physical security inspectors and headquarters security specialists to revise the process for determining whether or not safeguards effectiveness is maintained for a security plan:

- Relocate the 10 CFR 50.54(p)(2) reviews to the regions.
- The 10 CFR 50.54(p)(2) reviews should be a combined effort between headquarters security specialists and regional inspectors.
- Develop more effective criteria and guidance for conducting 10 CFR 50.54(p)(2) reviews to align more closely with the criteria and guidance for the10 CFR 50.54(q) change process.

Issue 4:
The records retention requirements in 50.54(p)(2) are inconsistent with the record retention requirements

relating to security plans in 10 CFR 73.55(q)(2).

Discussion and Conclusions:

The DPO submitter asserts that the records retention requirements in 10 CFR 50.54(p)(2) are inconsistent with the similar records retention requirements in 10 CFR 73.55(q)(2). The DPO submitter does not discuss any potential consequences of this alleged inconsistency. In addressing this assertion, the DPO Panel reviewed the relevant regulatory language as well as the statements of consideration for these two regulatory provisions.

The relevant regulatory language in 10 CFR 50.54(p)(2) requires that licensees "maintain records of changes to the plans made without prior Commission approval for a period of three years from the date of the change…." A plain reading of the regulatory language implies that a licensee may dispose of these records once the three-year retention period has expired. The regulatory language in 10 CFR 73.55(q) states: "The licensee shall maintain all records required to be kept by Commission regulations, orders, or licensee conditions, until the Commission terminates the license for which the records were developed, and shall maintain superseded portions of these records for at least three (3) years after the record is superseded, **unless otherwise specified by the Commission**." (emphasis added) A plain reading of this regulatory language implies that relevant records must be kept until the license is terminated or for three years after the record has been superseded.

On its face, this would appear to be an inconsistency between the two record keeping requirements. However, the regulatory language in 10 CFR 73.55(q)(2) contains the phrase "unless otherwise specified by the Commission." In promulgating the regulatory requirements in 10 CFR 50.54, the Commission has specified a retention period for records associated with 10 CFR 50.54(p)(2) changes that differs from the retention period specified in 10 CFR 73.55(q)(2). Therefore, the DPO Panel has determined that there is no inconsistency between 10 CFR 50.54(p)(2) and 10 CFR 73.55(q)(2).

Issue 5:

The requirements for the submission of a report in 50.54(p)(2) are inadequate.

Discussion and Conclusions:

Licensees are required to submit a report to the NRC containing a description of each change made in accordance with 10 CFR 50.54(p)(2) within 2 months after the change is made. The regulation does not specify what information should be included in the report.
Since the review of security plans submitted after the 2009 security rulemaking, NSIR staff continued to review each 10 CFR 50.54(p)(2) change to confirm that licensees appropriately concluded that the changes did not decrease the safeguards effectiveness (i.e., the program and/or requirements) of their Commission-approved security plans. The NSIR staff review verified that changes to security programs did not result in (1) a noncompliance or violation of established regulatory requirements, or (2) reduced or decreased availability or reliability of security measures (systems, personnel, or programs) previously established by license condition or by Commission-approved security plans. The NSIR technical review consisted of: (1) comparing specific changes with descriptions of programs and obligations in Commission-approved security plans, (2) (if provided) reviewing the adequacy of the licensee's evaluation of changes, (3) reviewing the consistency of changes with staff guidance, including generic communications such as information notices and security advisories, security frequently asked questions, and NSIR Reports on Interaction, (4) reviewing changes with descriptions in NRC-endorsed Nuclear

Energy Institute (NEI) security plan templates or guidance, (5) reviewing consistency of changes with NRC-approved alternatives or amendments specific to the site, and (6) reviewing compliance of changes with regulatory requirements (including NRC orders).

Reviewers identified significant issues or concerns, including possible omissions, to ensure that regulatory requirements were met by security statements or obligations described in the security plans. The items were discussed with a branch chief before the items were discussed with a licensee. During this process, issues have been communicated with licensees through clarification teleconferences during which licensees discussed the changes to their security plans. In certain instances, licensees agreed to change certain security plan descriptions to clarify the change that was previously submitted through the 10 CFR 50.54(p)(2) process. For a short period several years ago, NRC headquarters staff were interacting with licensees through requests for additional information with docketed licensee responses.

In both approaches, when headquarters staff were unable to determine that a specific change maintained safeguards effectiveness, regional inspector support was requested to assist with resolving open items from a review. Currently, NSIR staff do not engage licensees for 10 CFR 50.54(p)(2) security plan changes.

During this DPO process, interviewees have indicated to the DPO Panel that relevant staff guidance documents currently do not provide adequate guidance on the type of information that should be included in a 10 CFR 50.54(p)(2) report. Due to this lack of clarity in the regulatory requirement and associated guidance, licensees have provided a range of information in their reports. Some licensee descriptions have provided a table of changes for the submitted security plan and the page(s) where change(s) were completed. Other licensees have provided reports that contained the information described previously and an evaluation of how safeguards effectiveness of the plan was maintained for each change. The lack of guidance for staff and licensees has created inconsistent approaches for submitting and reviewing 10 CFR 50.54(p)(2) reports which has led to an inability to determine if safeguards effectiveness was maintained in each security plan change.

The DPO panel agrees that the 10 CFR 50.54(p)(2) report requirement is inadequate because it lacks clarity concerning the information that is required within the report and if this information is required to demonstrate how safeguards effectiveness is maintained in a security plan change.

The DPO Panel is aware that the proposed decommissioning rulemaking currently before the Commission has proposed changes to the 10 CFR 50.54(p)(2) language to more closely align with the language in 10 CFR 50.54(q). The revised regulation would require the submission of a summary of an analysis of the security plan change to demonstrate that a change does not decrease the safeguards effectiveness of the security plan. These proposed changes would help address the lack of clarity for what is described within a submitted 10 CFR 50.54(p)(2) report.

Conclusion

The DPO Panel concludes that the 10 CFR 50.54(p)(2) process lacks clarity, leading to ambiguity in the security licensing basis and blurring the distinction between licensing activities and inspection activities.

The DPO submitter recommended that the agency resolve the identified issues with the regulatory framework for power reactor licensee security plan change control using one of two options: (1) clarify that 10 CFR 50.54(p)(2) implies that the Commission will review and approve security plan changes

implemented by licensees without "prior Commission approval" after the required report is received, ensure that NRC staff review such security plan changes to identify any plan language deficiencies, treat such deficiencies as a decrease in security plan effectiveness, and clarify that licensees are required to correct such deficiencies; or (2) conduct rulemaking to revise 10 CFR 50.54(p)(2) to clarify its language and remove the requirement for licensees to submit a report of changes made to security plans without NRC approval, which would remain subject to inspection.

DPO Panel Recommendations

The DPO Panel recommends that:

1. agency management support the changes to 10 CFR 50.54(p) that are in the decommissioning rule.
2. agency management clarify whether or not a 10 CFR 50.54(p)(2) change results in a change to a licensee's licensing basis.
3. agency management support the development of effective guidance for reviewing security plan changes.
4. agency management implement one of the following two options:
    a. continue security plan change reviews by security licensing reviewers at HQ, with greater ability to follow up with licensees to correct deficient security plan descriptions or other issues when concerns are identified and with regional inspection staff as needed for inspection follow-up (preferred), or
    b. terminate reviews by security licensing reviewers at HQ, and incorporate a review of security plan changes into the security baseline inspection program, including revisions to inspection procedures and training on licensing review skillsets to meet the new inspection requirements and to ensure consistency across regions.

Document 4: DPO Decision

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

February 1, 2019

MEMORANDUM TO: Dennis Gordon, Reactor Security Specialist
Reactor Security Branch
Division of Physical and Cyber Security Policy
Office of Nuclear Security and Incident Response

FROM: Brian E. Holian, Director ***/RA/***
Office of Nuclear Security and Incident Response

SUBJECT: DIFFERING PROFESSIONAL OPINION REGARDING POWER REACTOR LICENSEE CHANGES TO SECURITY PLANS SUBMITTED UNDER TITLE 10 OF THE *CODE OF FEDERAL REGULATIONS* 50.54(P)(2) (DPO 2018-003)

On May 3, 2018, in accordance with Management Directive 10.159, "The NRC Differing Professional Opinions Program," you submitted a differing professional opinion (DPO) involving the U.S. Nuclear Regulatory Commission's (NRC) implementation of the regulatory framework governing power reactor licensee changes to security plans submitted under Title 10 of the *Code of Federal Regulations* (10 CFR) 50.54(p)(2). Specifically, you stated that there is a lack of a clear and understandable regulatory framework governing the Commission's meaning and intent for security plan changes submitted under the provisions of 10 CFR 50.54(p)(2) relative to Commission-approved security plans, security plan content/description requirements, baseline inspection activities, and records collection requirements. The purpose of this memorandum is to respond to your DPO.

On May 17, 2018, a DPO Ad Hoc Review Panel (the Panel) was established and tasked to meet with you, review your DPO submittal, and issue a DPO report, including conclusions and recommendations to me regarding the disposition of the issues presented in your DPO. On November 15, 2018, after reviewing the applicable documents, completing internal interviews of relevant individuals and completing their deliberations, the Panel issued their report to me.

In order to make a decision with regard to your DPO, I reviewed your DPO submittal and the Panel's report, and had brief discussions with you and the Panel chair.

CONTACT: David Curtis, NSIR/DPCP
(301) 287-3607

D. Gordon

Statement of Concerns Identified by the Panel

1. The existing regulatory framework for the 10 CFR 50.54(p)(2) change process lacks clarity.

2. A licensee's prior approved security plan becomes part of the site licensing basis. Therefore, it is critical for the security plan to contain adequate written descriptions of how the licensee intends to implement required programmatic elements rather than relying on implementation of the plan through site procedures.

3. Approval of the security plan is predicated on the plan containing appropriate programmatic elements to implement applicable security requirements.

4. The record retention requirements in 10 CFR 50.54(p)(2) are inconsistent with the record retention requirements relating to security plans in 10 CFR 73.55(q)(2).

5. The requirements for the submission of a report in 10 CFR 50.54(p)(2) are inadequate.

Panel Recommendations

The Panel offered the following four recommendations regarding the DPO (additional detail and bases regarding each recommendation is provided in the enclosed Panel Report):

1. Agency management should support the changes to 10 CFR 50.54(p) that are in the decommissioning rule.

2. Agency management should clarify whether a 10 CFR 50.54(p)(2) change results in a change to a site's licensing basis.

3. Agency management should support the development of effective guidance for reviewing security plan changes.

4. Agency management should implement one of the following two options:

    a. Continue security plan change reviews by security licensing reviewers at HQ [headquarters], with greater ability to follow up with licensees to correct deficient security plan descriptions or other issues when concerns are identified and with regional inspection staff as needed for inspection follow-up (preferred); or,

    b. Terminate reviews by security licensing reviewers at HQ, and incorporate a review of security plan changes into the security baseline inspection program, including revisions to inspection procedures and training on licensing review skillsets to meet the new inspection requirements and to ensure consistency across regions.

After considering all the information, I agree in principle with the recommendations provided by the Panel. They have thoroughly and conscientiously endeavored to address your articulated concerns. I have the following comments, additions, and clarifications to the recommendations.

Regarding Recommendation 1, management has already concurred on the proposed decommissioning rule that includes changes to 10 CFR 50.54(p). To the extent that the Commission directs those changes to move forward in the rulemaking process and based on

public comment resolution, those changes would create a definition in regulation for the term "decrease in safeguards effectiveness."

Regarding Recommendation 2, I have directed staff to enhance existing guidance for processing of 10 CFR 50.54(p(2 change reports submitted by licensees. Within that guidance, I have directed staff to clarify the impact of a 10 CFR 50.54(p(2 change to a site's licensing basis. Section 50.54 of 10 CFR is entitled "Conditions of licenses" and 10 CFR 50.54(p(2 makes as a condition of power reactor licenses that they "may make changes to the plans… without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan." Paragraph 73.55(a(3 of 10 CFR states that "***the licensee is responsible*** for maintaining the onsite physical protection program in accordance with Commission regulations through the implementation of ***security plans*** and written security implementing procedures" ***(emphasis added)***. Historic agency practices indicate that 10 CFR 50.54(p(2 changes generally do result in a change to the site's licensing basis. In confirming my understanding, I have directed staff to coordinate with appropriate internal stakeholders and consider the comparison of 10 CFR 50.54(p to other change processes (e.g. 10 CFR paragraphs 50.54(a, 50.54(q, and section 50.59. I further directed staff to document this understanding in the updated guidance.

Regarding Recommendation 3, I have directed staff, in the updated guidance discussed in the response to Recommendation 2, to address how submitted reports should be periodically sampled for review, including the frequency and percentage of that sampling and how the sampling should be documented. This will be a change from some historical staff reviews that included extensive review scopes, and development of detailed staff reports. The guidance will also clarify how a 10 CFR 50.54(p(2 submission review differs from a license amendment review. I have directed staff that the guidance will indicate that the scope of a 10 CFR 50.54(p(2 review is to determine whether the change results in a decrease to the effectiveness of the security plans.

Regarding Recommendation 4, I have directed staff to implement a variant of the Panel's preferred option "a": "continue security plan change reviews by security licensing reviewers at HQ, with greater ability to follow up with licensees to correct deficient security plan descriptions or other issues when concerns are identified and with regional inspection staff as needed for inspection follow-up." In the response to Recommendation 2, I noted that the purpose of 10 CFR 50.54(p(2 changes is to allow licensees to make changes to their security plans within certain limits. The updated guidance for the 10 CFR 50.54(p(2 submission review process described in the Recommendation 2 response will include discussion on follow-up activities between inspection staff at HQ and in the regions to assess specific security measures that have been modified by a licensee to evaluate if the licensee has decreased safeguards effectiveness. If there are questions after the HQ and regional interaction, then additional interaction with the licensee may be warranted.

The Panel identified a final concern that you raised in your DPO regarding inconsistency in the records retention requirements between 10 CFR 50.54(p(2 and 10 CFR 50.54(q(2. The Panel concluded, and I agree, that there is no inconsistency.

Thank you for raising your DPO and for your active participation in the DPO process. An open and thorough exploration of how we carry out our regulatory processes is essential to keeping these programs effective. Your willingness to raise concerns with your colleagues and

managers to ensure that your concerns are heard and understood is admirable and vital to ensuring a healthy safety culture within the NRC.

Enclosure:
DPO-2018-003 Panel Report Final,
dated November 15, 2018 (ADAMS
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D. Gordon

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