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

February 22, 1991

MEMORANDUM FOR: Chairman Carr
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick

FROM: William C. Parler
General Counsel

SUBJECT: INSPECTOR GENERAL REPORT ON REVIEW OF NRC'S EMERGENCY PLANNING REGULATIONS AND GUIDANCE

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FROM: William C. Parler
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SUBJECT: INSPECTOR GENERAL REPORT ON REVIEW OF NRC'S EMERGENCY PLANNING REGULATIONS AND GUIDANCE

Your memorandum of February 15, 1991 requested my views on Recommendations 1 and 2 made in the Inspector General's January 16, 1991 Audit Report Review of NRC'S Emergency Planning Regulations and Guidance. (OIG Report). Specifically, the IG recommended that the EDO:

> [r]estate the objective of emergency planning, as stated in NUREG-0654/FEMA-REP-1, Rev. 1, to be consistent with the objective of 10 CFR 50.47 and the 16 planning standards contained therein" (Recommendation 1), and
>
> "[d]etermine if NRC has the authority to conduct its own reviews of offsite emergency preparedness" (Recommendation 2).

OIG Report at 25.

I conclude that the NRC has the authority to conduct is own reviews of offsite emergency planning and that, from a legal standpoint, there is no need for modification of NRC emergency planning regulations and guidance relating to the issue of "dose savings."

I agree completely with the correctness of the assumption stated in the footnote to your memorandum requesting my views. It is my opinion that there is no legal doubt about NRC's authority, indeed responsibility, to make findings on the overall adequacy of onsite and offsite emergency preparedness. Commensurate with the Commission's responsibility to make such findings, the Commission has the authority to collect, review and evaluate any information it needs to support its findings on emergency preparedness.

The attached legal analysis provides a detailed discussion of the legal aspects of my position regarding these two recommendations. Since your memorandum emphasized the issue of NRC's authority raised by recommendation 2, that issue is addressed first.

William C. Parler
General Counsel

Attachment

LEGAL ANALYSIS OF RECOMMENDATIONS 1 AND 2
OF OIG JANUARY 16, 1991 AUDIT REPORT

Discussion of IG Recommendation 2

The OIG Report recommends that the EDO "[d]etermine if NRC has the authority to conduct its own reviews of offsite emergency preparedness." OIG Report at 25.

The legal analysis provided to the IG (Attachments 1 and 2 to the Report) make quite clear that NRC has the ultimate decisionmaking authority with respect to emergency preparedness at nuclear facilities. However, OIG states:

> Our report did not focus on NRC's "ultimate authority" to make final decisions on emergency preparedness. Instead, we focused on NRC's authority to conduct its own reviews of offsite emergency planning. We believe NRC's authority is unclear since FEMA has been designated the lead Federal agency for offsite emergency planning. FEMA's role in assessing emergency plans is derived from the actions of the President, the Congress, NRC's Regulations and NRC's Memorandum of Understanding with FEMA. The response to our recommendation does not reflect consideration of the intent of the President or Congress.

OIG Report at 27.

The Office of the General Counsel believes that it is quite clear that NRC not only has the "ultimate authority" to make final decisions on offsite emergency preparedness but also has authority to "conduct" its own reviews of offsite emergency planning in support of that finding. Indeed, recent judicial pronouncements by four Courts of Appeals reaffirm NRC authority to make judgments on adequacy of offsite plans. Most recently, in Massachusetts v. NRC, No. 89-1306, slip op. at 22-23 (D.C. Cir. Jan. 25, 1991) the court stated:

> [P]etitioners' argument that the NRC lacks expertise in offsite emergency planning was expressly rejected in Massachusetts v. United States, 856 F.2d 378 (1st Cir. 1988), where the court held that "[t]he substantive area in which an agency is deemed to be expert is determined by statute, here, under the relevant congressional enactments ..., the NRC is specifically authorized and directed to determine whether emergency plans adequately protect the public." Id. at 382.

See also Massachusetts v. NRC, 878 F.2d 1516, 1524 (1st Cir. 1989); State of Ohio ex rel. Celebrezze v. NRC, 868 F.2d 810, 815-16 (6th Cir. 1989); Rockland County v. NRC, 709 F.2d 766, 770 (2nd Cir. 1983). These cases show the NRC is authorized to determine the adequacy of offsite emergency plans. We believe that, since this is the case, then NRC must also have the regulatory power to effect this determination including the power to conduct its own review.

That authority is grounded in the Atomic Energy Act of 1954, as amended, (AEA), 42 U.S.C. Sections 2011-2295 (1988), and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Sections 5841-5851 (1988). In particular, the NRC is specifically authorized under Section 161(b) of the AEA to "establish

by rule, regulation or order, such standards ... as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life and property."[1] In Power Reactor Development Co. v. International Union of Electrical Radio Machine Workers, 367 U.S. 396, 404 (1961), the Supreme Court stated that the AEA "clearly contemplates that the Commission shall by regulation set forth what the public safety requirements are as a prerequisite to the issuance of any license or permit under the Act." The Commission is also authorized under Section 161(c) to

> make such studies and investigations, obtaining such information ... as the Commission may deem necessary ... to assist it in exercising any authority provided in [the AEA] ... or any regulations or orders issued thereunder.

and under Section 161(o) to

> require ... such reports ... with respect to, and to provide for such inspections of... activities under licenses ..., as may be necessary to effectuate the purposes of this Act ....

Thus, before Three Mile Island (TMI), the NRC had broad statutory authority both to issue offsite emergency planning requirements and to conduct agency reviews of offsite emergency plans. None of the actions of the President and Congress following TMI removed the statutory authority of NRC in the offsite emergency planning arena.

OIG indicates its belief that NRC's authority to conduct reviews of offsite emergency preparedness is unclear in light of Presidential and Congressional intent to include FEMA in the process.

While President Carter issued Executive Order 12148 (44 FR 43239, July 20, 1979) assigning to FEMA responsibilities to coordinate the emergency planning functions of executive agencies, nothing in the Executive Order stripped NRC of its existing statutory authority. Further, although public remarks and a White House Fact Sheet, of December 7, 1979, indicate that President Carter directed FEMA to take the lead in offsite emergency planning and response,[2] the President never directed that FEMA's lead role in offsite emergency planning become the "exclusive" Federal role. Even if President Carter had intended an exclusive role for FEMA in offsite emergency planning, a role not suggested by the language in either the Executive Order or in the Remarks and Fact Sheet, the President could not have unilaterally diminished the statutory

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[1] Sections 161(i), 161(p) and 182(a) of the AEA also provide broad authority for agency regulatory actions necessary to effectuate the purposes of that Act.

[2] Two Public Papers of President Carter 2203; The White House Fact Sheet: The President's Response to the Recommendations of the President's Commission on the Accident at Three Mile Island, pp. 10-11, December 7, 1979.

authority vested in the NRC. Only subsequent legislation or a reorganization plan could accomplish such result.[3]

The legislative background also supports the conclusion that Congress did not strip NRC of its authority to conduct reviews of offsite emergency plans. In the period of time preceding the passage of the 1980 Authorization Act, (Public Law 96-295, June 30, 1980), a proposal was introduced on April 30, 1980, during the 1981 Authorization Hearings, to transfer to FEMA all of NRC's functions with respect to State and local emergency plans incident to NRC's licensing and regulatory responsibilities. That proposal, however, was not enacted.[4] As stated in Appendix II, page 4, of the OIG Audit Report:

> Section 109 [of Public Law 96-295], however, did not follow the course charted by the April 30 proposal. Rather than transferring authority to FEMA, it, in effect, emphasized the NRC's role in view of its overall responsibility for public health and safety as the licensing agency. Indeed, Section 109 authorized NRC to proceed with the issuance of new operating licenses if it could make the reasonable assurance finding by relying in part on a utility's offsite plan, and in the absence of consultation with FEMA.[5]

Far from removing the NRC's statutory authority to conduct reviews of offsite emergency planning, Section 109 reaffirmed the NRC's unqualified authority to conduct those reviews.[6] To be sure these provisions speak of NRC

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[3] Similarly, an unqualified acceptance of FEMA's views on offsite emergency planning without NRC review would have, in effect, amounted to a delegation of at least some portion of NRC's statutory licensing responsibility to FEMA. Such a delegation would not have been possible without legislation or a reorganization plan.

[4] The supplemental legal analysis appended to the OIG report discusses in considerable detail the April 30, 1980 proposal, and subsequent similar proposals along with their fates both prior to and subsequent to passage of Public Law 96-295.

[5] As stated in the legal analysis appended to the OIG Audit Report, subsequent authorization acts did not alter the emergency planning provisions contained in Public Law 96-295. The last act with emergency planning provisions was the 1984/1985 Authorization Act. The provisions of that act have expired without reenactment. No subsequent legislative efforts have been successful (see supplemental legal analysis appended to the OIG Report and S. .. introduced on January 6, 1987 at p.S284 of the Congressional Record).

[6] The supplemental legal analysis appended to the OIG Report, agrees as well, since the analysis concludes with the following statement: "The relationship between NRC and FEMA does not appear to contemplate a FEMA role that would preclude NRC reconsideration of offsite emergency planning issues under the auspices of the AEA's health and safety dictates, inasmuch as legislative proposals to that extent were never adopted by Congress."

determinations rather than review. But the power to make a determination or finding on offsite emergency planning, to be at all meaningful, must imply the power to review as well. See generally, e.g., U.S. v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) for the underlying legal principle.

FEMA and NRC entered into a memorandum of understanding (MOU) on December 16, 1980 (45 FR 82713), superseding an earlier version of January 14, 1980 (45 FR 5847). The MOU establishes responsibilities for each agency based on the underlying authority granted to each agency. Under the authority of the AEA, the NRC is: "To make decisions with regard to the overall state of emergency preparedness (i.e., integration of emergency preparedness onsite as determined by the NRC and offsite as determined by FEMA and reviewed by NRC) ..." 45 FR at 82715, (emphasis added). The authority to review offsite emergency preparedness necessarily embraces the authority to conduct such reviews. Likewise, the provision of 10 C.F.R. 50.47 that FEMA's findings are to be treated as rebuttable presumptions, to be meaningful at all, also demonstrates that the NRC must be able to conduct its own review. Evidence contrary to that of FEMA must be reviewed by NRC in the adjudicatory process before the FEMA findings can be considered to be rebutted.

After nearly five years experience of working together in the area of offsite emergency planning, NRC and FEMA entered into a new MOU on April 18, 1985, superseding the initial MOU. The 1985 MOU similarly reaffirmed the principles agreed to in 1980.[7]

NRC has obligated itself to obtain receipt of FEMA views on offsite planning adequacy in connection with the licensing of nuclear power reactors. 10 CFR Section 50.47(a)(2). For operating reactors, the regulation contemplates receipt of FEMA views before taking adverse enforcement action, but is silent on the need for FEMA views where no enforcement action is contemplated. 10 CFR Section 50.54(s)(2),(3). Section 50.54(s)(3) places no requirement on the NRC to obtain FEMA views prior to an NRC decision to allow restart or to permit continued operations, and in fact Section 50.54(s)(3) provides: "Nothing in this paragraph shall be construed as limiting the authority of the Commission to take action under any other regulation or authority of the Commission or at any time other than that specified in this paragraph." In conducting its own review of offsite emergency preparedness, the NRC would use as criteria the 16 planning standards under Section 50.47(b) along with NUREG-

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[7] Among the NRC responsibilities delineated:

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3. To review the FEMA findings and determinations as to whether offsite plans are adequate and can be implemented.

4. To make radiological health and safety decisions with regard to the overall state of emergency preparedness (i.e., integration of emergency preparedness onsite as determined by the NRC and offsite as determined by FEMA and reviewed by NRC) ...

0654/FEMA-REP-1 (rev. 1), Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants.[8]

In conclusion, the NRC has obligated itself by regulations and the MOU with FEMA, to cooperate fully in the task of assuring that the state of offsite emergency preparedness provides for the protection of the public health and safety required by the AEA. However, in the absence of explicit Presidential direction by reorganization plan or legislation to remove the Commission from the process of reviewing offsite emergency preparedness, for the purpose of carrying out its statutory responsibilities under the AEA, the NRC has the "ultimate authority" under the AEA to make necessary decisions with respect to offsite emergency preparedness, and by necessity that authority includes the authority to conduct its own reviews of offsite emergency preparedness in the absence of FEMA findings.[9]

While NRC's authority is quite clear, since the MOU is silent about the FEMA role following a circumstance in which FEMA withdraws its finding of "reasonable assurance" in connection with emergency planning for a plant licensed to operate, the Office of the General Counsel supports the EDO's proposal to have the staff work with FEMA to clearly state responsibilities in such a situation.[10]

Discussion of Recommendation 1

The OIG Report recommends that the EDO "[r]estate the objective of emergency planning, as stated in NUREG-0654/FEMA-REP-1, Rev. 1 to be consistent with the objective of 10 C.F.R. 50.47 and the 16 planning standards contained therein." OIG Report at 25. OIG indicates that it believes that NRC's emergency planning regulations and implementing guidance "contain two conflicting objectives." OIG refers to 10 CFR 50.47 which "states that the objective of emergency planning is to provide 'that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency'" and the statement in NUREG-0654/FEMA-REP-1, Rev.1, that "the objective of emergency planning is 'dose savings'." OIG indicates

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[8] In Massachusetts v. NRC, No. 89-1306, slip op. at 23-24 (D.C. Cir. Jan. 25, 1991), the court upheld the NRC's position that adequacy of the emergency plans is to be judged by conformity with the 16 planning standards of Section 50.47(b).

[9] "NRC is specifically authorized and directed to determine whether emergency plans adequately protect the public." Massachusetts v. United States, 856 F.2d 378, 382 (1st Cir. 1988); Massachusetts v. NRC, No. 89-1306, slip op. at 22-23 (D.C. Cir. Jan. 25, 1991).

[10] See Memoranda dated October 1 and October 4, 1990, from J.M. Taylor, EDO, to the Commission concerning the Pilgrim Emergency Preparedness Lessons Learned Task Force, Lesson Learned 2.

that it believes "NRC's use of the term 'dose savings' presents an inherent contradiction. (OIG Report at 10-11, emphasis in original).

From a legal standpoint modification of 10 CFR 50.47 or NUREG-0654/FEMA-REP-1, Rev. 1, is not required. There is no legal requirement that the underlying purpose of a regulation be set forth as an explicit criterion of that regulation. For example, ensuring an adequate margin of performance of the ECCS should a design basis LOCA ever occur is the underlying purpose of the ECCS rule (39 F.R. 1001, Nov. 13, 1973). However, that purpose is achieved not by requiring the computation of the margin of performance but by requiring compliance with the criteria and the calculational methodology prescribed by 10 CFR 50.46.

With respect to emergency planning, the Court of Appeals in Massachusetts v. NRC, ___ F.2d ___, No. 89-1306, D.C. Cir., January 25, 1991, concluded that the Commission could properly seek to achieve adequate protection of the public health and safety through the use of standards to judge emergency plans, rather than by weighing the doses or savings which might be achieved by various plans in the hypothetical situations at various nuclear plants. As recognized by the court, "This approach is thought [by the Commission] most likely to produce a flexible plan that offers the best feasible means for minimizing harm to the public from unpredictable accidents .... " Slip op. at 20. As the court further indicated, "the core of the Commission's inquiry is compliance with generic standards" and not a weighing of specific doses from imagined accidents. Id., at 23-24. The court further recognized that, "In emergency planning . . . the goal of mitigating dose consequences . . . is attained through the application of generalized planning standards and without consideration of actual levels of dose savings." Id. at 28 (emphasis added), see also id. at 33.

The words "dose savings" do not appear in the substantive part of the guidance document dealing with the evaluation of individual plans. Rather, they appear in the "Background" section which provides an explanatory context to the development of the "Planning Basis" for the 16 generic planning standards under which individual plans are to be evaluated. The paragraph recounts that the standards were developed for a spectrum of accidents and that "no specific accident should be isolated as the one for which to plan because each accident could have different consequences in both nature and degree," again indicating that individual plans are not to be considered against specific or quantified "dose savings". As the Court of Appeals recognized, the criteria for the evaluation of emergency plans is not a consideration of hypothetical dose savings from individua hypothetical accidents, but the evaluation of the plans against the planning standards which were developed for a very wide range of unpredictable accidents and their consequences. The text of NUREG-0654 makes this clear and no change therein is needed. See CLI-90-02, 31 NRC 197, 214-215 (1990).

Although on its face 10 C.F.R. 50.47 left a number of areas subject to dispute, over the course of years of litigation, the Commission's adjudicatory decisions have amplified and given context to the language of the regulation. These decisions have generally been upheld on appeal by the courts.

Specifically, in Massachusetts v. NRC, the Court of Appeals for the District of Columbia Circuit upheld the Commission decision that it need not consider specific dose savings in determining adequacy of emergency plans. Thus, as a legal matter there is no need for modifying the 10 C.F.R. 50.47 or NUREG-0654. However, adding some additional background material to NUREG-0654 to explain NRC emergency planning adjudicatory decisions might help people not fully familiar with the background of the development of the NRC's emergency planning requirements.