POLICY ISSUE
NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Commissioner Wright

SUBJECT: SECY-20-0070: Technical Evaluation of the Security Bounding Time Concept for Operating Nuclear Power Plants

Approved X **Disapproved** X **Abstain** ____ **Not Participating** ____

COMMENTS: **Below** ____ **Attached** X **None** ____

David A. Wright

Digitally signed by David A. Wright
Date: 2021.08.02 13:57:14 -04'00'

Signature

August 2, 2021

Date

Entered in STARS

Yes X

No ____

Commissioner Wright's Comments on SECY-20-0070, "Technical Evaluation of the Security Bounding Time Concept for Operating Nuclear Power Plants"

I commend the staff for continuing to move the agency toward adopting a more modern, risk-informed approach in our oversight activities, including security. I appreciate the staff's application of the *Be riskSMART* framework to the issues in this paper. The staff's thoughtful use of this framework and consideration of data, including lessons learned from years of security baseline inspections and law enforcement response capabilities at operating nuclear power plants, resulted in decision-making that accepts well-managed risks without compromising the agency's mission.

The staff recommends using an interpretive rule to clarify that operating nuclear power plant licensees may meet the requirements of 10 C.F.R. § 73.55 by accounting for the contributions of law enforcement response when designing their physical protection program. This approach allows licensees to refine their protective strategies in a risk-informed manner and apply a site-specific security bounding time of less than 8 hours. This could include increasing law enforcement coordination, enhancing use of FLEX equipment, or implementing robust recall programs for licensee personnel that rely on offsite law enforcement assistance to defend against threats up to, and including, the design basis threat (DBT).

I agree with former Chairman Svinicki that the staff's interpretation of previous Commission direction is not entirely consistent with that direction as it has been the Commission's expectation that licensees and State and Federal authorities would use whatever resources necessary to respond to both DBT and beyond-DBT events.[1] In fact, the Commission encourages licensees and Government organizations to integrate and complement their respective security and incident response duties so that facilities subject to the DBTs have the benefit of all available incident response resources during the widest possible range of security events. However, I recognize the benefits of using an interpretive rule to clearly and effectively communicate to the public and other stakeholders that the NRC's current interpretation of our rules is that licensees may modify their physical protection program and consider law enforcement as a component of the program, and therefore rely on law enforcement assistance for defense against the DBT. An interpretive rule would also clarify other requirements in 10 C.F.R. § 73.55, such as training and qualifications for responders if law enforcement is included as a component of the licensee's protective strategy. Therefore, I support the staff's recommendation to publish an interpretative rule, subject to the attached edits to the rule language.

However, I do not approve the staff's recommended process for issuing the *Federal Register* notice (FRN) or providing a Commissioners Assistant's Note prior to issuing a final FRN. Instead, I approve issuing the interpretive rule following the process outlined in 10 C.F.R. § 2.804. Namely, the staff should immediately issue this interpretive rule and provide for a 30-day post-promulgation comment period. This process is consistent with the Administrative Procedure Act, the NRC's Principles of Good Regulation, and is reasonable given the Commission's past direction on the use of law enforcement in responding to the DBT and the significant stakeholder engagement that has already occurred on this issue.

I approve implementation Option 1(a), in which licensees would use the existing change processes to assess the impact of changes to the physical security program. This option is a

[1] Design Basis Threat, 72 Fed. Reg. 12,705 (Mar. 19, 2007); Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009); *see also* 10 C.F.R. § 50.47(c)(1)(iii)(B).

straightforward and effective way to implement a security bounding time, as reliance on local law enforcement would be permitted under 10 C.F.R. § 73.55 and would not be an alternative measure. Additionally, existing regulations already provide for a license amendment review process if a proposed change is expected to or does decrease the effectiveness of a licensee's security plan. Specifically, under 10 C.F.R. §§ 50.54(p) and 50.90, a license amendment may be required if the proposed change would decrease the effectiveness of a licensee's security plan or an amendment may be voluntarily requested by a licensee if increased certainty is desired. The staff should engage with stakeholders to ensure a common understanding of when a license amendment may be needed due to a decrease in safeguards effectiveness for licensees that rely on law enforcement response to meet the requirements of 10 C.F.R. Part 73. If existing guidance does not clearly delineate this, the staff should work with stakeholders to develop and provide objective standards for licensees and applicants.

Finally, I disapprove the staff's request to stop providing the semi-annual updates to the Commission on the Integrated Response Program. I support reducing the reporting frequency to biennial given the current, diminished state of activity.

DAW Edits

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

[NRC-2020-XXXX]

The Role of Law Enforcement in the Physical Protection Program for Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of interpretation; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an ~~proposed~~ interpretive rule to clarify that a power reactor licensee could revise its security plans and/or site procedures to reflect the role of law enforcement in the site physical protection program. In doing so, the licensee ~~would~~ does not need to rely solely on its private security force to provide a complete defense of the site against the design basis threat (DBT) of radiological sabotage but could also consider the assistance provided by law enforcement responders. The licensee ~~would~~ is still ~~be~~ required to demonstrate that the physical protection program, to include law enforcement assistance, maintains the ~~capabilities~~ capability to defend against the DBT at all times in accordance with NRC regulations. In accordance with the requirements of 10 CFR 2.804, ~~Th~~the NRC is providing for a 30-day post-promulgation comment period on this interpretive rule~~requesting comment on this proposed interpretive rule~~.

DATES: Submit comments on the ~~proposed~~ interpretive rule by **[INSERT DATE ~~45~~30 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Comments

received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods:

- **Federal Rulemaking Web Site:** Go to https://www.regulations.gov and search for Docket ID <**INSERT:** NRC-20YY-XXXX>. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; e-mail: Carol.Gallagher@nrc.gov. For technical questions contact the <**SELECT:** individual or individuals> listed in the FOR FURTHER INFORMATION CONTACT section of this document.
- **E-mail comments to:** Rulemaking.Comments@nrc.gov. If you do not receive an automatic e-mail reply confirming receipt, then contact us at 301-415-1677.
- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Rebecca Richardson, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-3301; email: Rebecca.Richardson@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC-2020-XXXX when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- **Federal rulemaking Web Site:** Go to https://www.regulations.gov and search for Docket ID **NRC-2020-XXXX**.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly available documents online in the ADAMS Public Document collection at https://www.nrc.gov/reading-rm/adams.html. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

- **Attention**: The Public Document Room (PDR), where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via e-mail at PDR.Resource@nrc.gov or call 1-800-397-4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

Please include Docket ID NRC-2020-XXXX in your comment submission. The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment

submissions at https://www.regulations.gov as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Following the terrorist attacks on September 11, 2001, the Commission issued a series of orders to ensure that nuclear power plants and other licensed facilities continued to have effective security measures in place given the changing threat environment. ~~Through these orders, the Commission supplemented the DBT of radiological sabotage as well as mandated specific training enhancements, access authorization enhancements, and enhancements to defensive strategies, and mitigative measures.~~

The ~~four~~ following security orders were issued to power reactor licensees:

- EA–02–026, ‘‘Interim Compensatory Measures (ICM) Order,’’ issued February 25, 2002 (67 FR 9792; March 4, 2002);
- EA–02–261, ‘‘Access Authorization Order,’’ issued January 7, 2003 (68 FR 1643; January 13, 2003);

- EA–03–039, ‘‘Security Personnel Training and Qualification Requirements (Training) Order,’’ issued April 29, 2003, (68 FR 24514; May 7, 2003); and
- EA–03–086, ‘‘Revised Design Basis Threat Order,’’ issued April 29, 2003, (68 FR 24517; May 7, 2003).

Nuclear power plant licensees revised their physical security plans, access authorization programs, training and qualification plans, and safeguards contingency plans to incorporate the enhancements required ~~in response to~~by these orders. ~~The Commission completed its review and approval of the revised security plans on October 29, 2004. These plans incorporated the enhancements required by the orders.~~ While the specifics of these enhancements are protected as Safeguards Information consistent with § 73.21 of title 10 of the *Code of Federal Regulations* (10 CFR), the enhancements resulted in measures such as increased patrols; augmented security forces and capabilities; additional security posts; additional physical barriers; vehicle checks at greater standoff distances; enhanced coordination with law enforcement authorities; augmented security and emergency response training, equipment, and communication; and more restrictive site access controls for personnel including expanded, expedited, and more thorough employee background investigations. The Commission completed its review and approval of the revised security plans on October 29, 2004.

The NRC was also required by Section 651 of ~~T~~the Energy Policy Act of 2005 ~~(EPAct) contains several provisions relevant to security at nuclear power plants. Section 651 of the EPAct required the NRC~~ to conduct a rulemaking to revise the DBT.

The 2007 DBT rule reflected “the Commission’s determination of the composite set of adversary features against which private security forces should reasonably have to defend” (72 FR 12708). The Commission stated that the rule “affirmatively defines a

range of attacks and capabilities against which nuclear power plants … must be prepared to defend" (72 FR 12715). The Commission noted that:

> "[t]he defense of our nation's critical infrastructure is a shared responsibility between the NRC, the [Department of Defense], the [Department of Homeland Security], Federal and State law enforcement, and other Federal agencies. . . . Although licensees are not required to develop protective strategies to defend against beyond-DBT events, it should not be concluded that licensees can provide no defense against those threats.

While "[t]he Commission is confident that a licensee's security force would respond to any threat no matter the size or capabilities that may present itself," the Commission stated that it "expects that licensees and State and Federal authorities will use whatever resources are necessary in response to both DBT and beyond-DBT events" (72 FR 12714).

In 2009, the NRC amended its security regulations in § 73.55 and added new security requirements pertaining to nuclear power reactors (~~58~~74 FR 13926). The final rule established and updated generically applicable security requirements similar to those ~~previously~~ imposed by the~~Commission~~ security orders issued after September 11, 2001. Additionally, this final rule added several new requirements not derived directly from the security order requirements but developed as a result of insights gained by the NRC from the implementation of the security orders, the review of site security plans, the implementation of the enhanced baseline inspection program, and the NRC's evaluation of force-on-force exercises. The final rule also updated the NRC's security regulatory framework for the licensing of new nuclear power plants.

The NRC regulations in § 73.55(b)(1) through (3) provide a general performance objective and requirements that "the licensee shall establish and maintain a physical protection program" that must protect against the DBT of radiological sabotage, as stated in § 73.1. Specific requirements for the design and implementation of the physical protection program are provided in § 73.55(c) through (q). These regulatory

requirements establish that the licensee has the ultimate responsibility for protecting an operating power reactor site against an adversary force up to and including the DBT of radiological sabotage ~~rests with the licensee~~. The Commission further stated that "a licensee's ability to defend against the DBT of radiological sabotage is not dependent on the availability of offsite responders" (7~~2~~4 FR 13940).

Taken together, the comment responses on the 2007 and 2009 final rules may have been understood to establish~~ed~~ an interpretation of the security regulations that required licensees to establish a physical protection program, including a private security organization, that is capable of defending against the DBT without the assistance of local, State, or Federal law enforcement. Therefore, currently~~,~~ ~~As currently implemented, a~~ licensee~~'s~~ physical protection program~~s~~ do~~es~~ not include credit for law enforcement response. ~~Although~~ While § 73.55(k)(9) and paragraph II.B.3.d in appendix C to 10 CFR part 73 require licensees to document the capabilities of available law enforcement responders and to maintain agreements with law enforcement agencies, to the extent practicable, licensees do not recognize this response as an essential contributor for how the site will defend against the DBT. However, the Commission has not directly addressed the question of whether NRC licensees can rely on the assistance of law enforcement in responding to the DBT.

Consistent with Commission direction in ~~In~~ the Staff Requirements Memorandum to SECY-20-0070, the NRC is ~~Commission approved the issuance of~~issuing this ~~proposed~~ interpretive rule related to crediting law enforcement response. The ~~proposed~~ interpretive rule ~~would~~ makes clear ~~revise~~ the NRC's ~~previous~~ interpretation that licensees ~~to allow a licensee to~~ may consider the ~~assistance~~ role of law enforcement responders as part of the physical protection program to defend against the DBT and

revise its security plans and site procedures to reflect this reading of ~~the P~~part 73 regulations ~~in part 73~~.

III. ~~Proposed~~ Interpretive Rule

Under th~~e proposed~~ is interpretive rule, operating power reactor licensees may meet the general performance objective and requirements of § 73.55(b)(1) through (3) by including law enforcement response as part of the physical protection program.

The NRC does not have regulatory authority over law enforcement agencies, and licensees ~~lack the ability to~~cannot compel law enforcement agencies to maintain the capabilities documented in their agreements. Nevertheless, the NRC has confidence that in a real emergency, law enforcement agencies will honor their commitments. As ~~the Commission stated~~ noted in the statement of considerations for the DBT final rule, "[t]~~T~~he Commission expects that licensees and State and Federal authorities will use whatever resources are necessary in response to both DBT and beyond-DBT events." (72 FR 12714). Additionally, as codified in NRC's emergency planning regulations § 50.47(c)(1)(iii)(B), the Commission ~~has recognized in regulation, in the emergency planning context,~~recognizes "the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." ~~10 CFR § 50.47(c)(1)(iii)(B).~~ The NRC expects that these "best efforts" would extend to law enforcement response to a security emergency, consistent with the existing agreements between licensees and law enforcement agencies. Accordingly, it is reasonable and prudent to allow licensees to consider the assistance that law enforcement will provide when designing their physical protection programs.

The inclusion of law enforcement response in the licensee's physical protection program does not mean that law enforcement responders must be trained by the licensee. As reflected in ~~NRC regulations in~~ § 73.55(d)(3), ~~require that~~ "[t]~~T~~he licensee may not permit any individual to implement any part of the physical protection program unless the individual has been trained, equipped, and qualified to perform their assigned duties and responsibilities in accordance with appendix B" to Part 73. Further, § 73.55(k)(1) states that "[t]he licensee shall establish and maintain, at all times, properly trained, qualified and equipped personnel required to interdict and neutralize threats up to and including the design basis threat of radiological sabotage." These provisions are properly applied solely to the licensee's own personnel (i.e., employees or contractors), as they are today, and not to any law enforcement responders who may be part of the law enforcement response that would be credited in the physical protection program. Although law enforcement responders may be considered a part of the licensee's physical protection program, they should not be considered to comprise part of a licensee's "security personnel" or the "security organization" required by § 73.55(d)(1).

IV. Discussion

The interpretive rule~~, if issued, would~~ appl~~y~~ies to any operating power reactor. The NRC expects that ~~the~~ this interpretive rule ~~would~~ will allow licensees ~~to take into consideration when~~ designing their physical protection programs to take into consideration ~~the reality~~ that law enforcement agencies will exercise their best efforts to protect the health and safety of the public.

The interpretive rule ~~would~~ does not supplant any physical protection strategies currently authorized under the NRC's regulations. Rather, the interpretive rule explains

that licensees could consider the expected law enforcement response as part of the physical protection program and revise its security plans and/or site procedures to reflect this. The interpretive rule ~~would~~ recognizes how, over time, following initiation of an attack, the security at a site evolves and additional support from law enforcement would be reasonably provided to the licensee to continue to defend against the DBT. Recognizing this support from law enforcement does not reduce the NRC's confidence that licensees ~~can~~ must maintain adequate physical protection of their sites against the DBT.

V. Backfitting, Issue Finality, and Forward Fitting

The NRC considered whether the ~~proposed~~ interpretive rule would constitute a backfit. Backfitting occurs when the NRC imposes new or changed regulatory requirements or staff interpretations of the regulations or requirements on nuclear power reactor licensees, certain nuclear power reactor applicants, or select nuclear material licensees. The backfitting requirements for nuclear power reactor licensees are in § 50.109~~.~~. The ~~proposed~~ interpretive rule ~~would~~ expands the options available for licensee physical protection programs to meet NRC requirements. The licensee could continue to comply with the requirements of its current licensing basis or voluntarily choose to adopt the alternative method by revising its security plans and/or site procedures to reflect the role of law enforcement in the site protective strategy. This is not backfitting, because it is an additional available option that the licensee may choose to adopt.

Dated Month, XX, 202~~0~~1.

For the Nuclear Regulatory Commission.

Shana Helton
Director
Division of Physical and Cyber Security Policy
Office of Nuclear Security and Incident Response