

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**


**TO:** Carrie M. Safford, Secretary  
**FROM:** Commissioner Caputo  
**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      

**Entered in STARS**

Yes  ✓   
No      

  
\_\_\_\_\_  
**Signature**  
5-3-2024  
\_\_\_\_\_  
**Date**

**Commissioner Caputo Comments on SECY-20-0070  
Technical Evaluation of the Security Bounding Time Concept for Operating  
Nuclear Power Plants**

I approve the staff's Policy Option "1" and Implementation Option "a" subject to the modifications included in these comments.

In his vote on SECY-17-0100, "Security Baseline Inspection Program Assessment Results and Recommendations for Program Efficiencies," Commissioner Burns noted the following:

In SECY-17-0100, the staff states that it is "current Commission policy to defend against the [Design Basis Threat (DBT)] without external assistance." In support of this statement, the staff cites language from the Statements of Consideration for the 2007 DBT rulemaking and the 2009 Power Reactor Security Rulemaking. Although I do not dispute that the Commission noted concerns about reliance on law enforcement agencies to augment a licensee's ability to defend nuclear power plants, I do challenge the view that the Commission has taken a particular policy position on the matter. This question was not specifically put to the Commission in either of these rulemakings relied on by the staff. The staff's references cited above were, in actuality, responses to comments on those rulemakings, and I would suggest that the comments that resulted in those responses were not precisely germane to the question of whether licensees can rely on the assistance of law enforcement. I appreciate the regulatory challenge in giving credit to licensees for something that is beyond the control of both the licensee and the NRC, but I would observe that the NRC has considered such matters in another context, emergency preparedness. In its regulations on emergency preparedness, the NRC has codified its recognition of "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). I would suggest the staff take these observations under advisement as it develops its recommendation to the Commission.

The Commission agreed with Commissioner Burns and directed the staff to accomplish the following:

[D]evelop and submit a framework for a revised security inspection program to the Commission for review and approval within 6 months from the date of this SRM. . . . The paper should also include recommendations for providing credit for a broader set of operator actions, including the use of FLEX equipment, and providing credit for response by local, State, and Federal law enforcement in our security inspection program.

The staff's paper should take into consideration that the NRC has already codified its recognition of "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" in 10 CFR 50.47(c)(1)(iii)(B).<sup>1</sup>

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<sup>1</sup> Staff Requirements Memorandum (SRM) to SECY-17-0100, dated October 9, 2018.

On July 30, 2020, the staff provided SECY-20-0070, “Technical Evaluation of the Security Bounding Time Concept for Operating Nuclear Power Plants,” to the Commission. In that paper, the staff committed to update Regulatory Guide (RG) 5.76, “Physical Protection Programs at Nuclear Power Reactors (Safeguards Information),” to incorporate a new concept, the “Reasonable Assurance of Adequate Protection Time” (RAPT), which is described as follows:

The RAPT reflects the staff’s determination that a licensee’s current physical protection program meets the general performance objective of 10 CFR 73.55(b)(1) to provide reasonable 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” when that program is capable of independently defending against the DBT for a timeframe of at least 8 hours (the formulation of which is discussed later in the paper). After the RAPT, there is a reduced risk profile and licensees can reasonably expect to have additional resources available, such as law enforcement and/or recalled off-duty personnel, to provide support for the licensee to continue to defend against the DBT.<sup>2</sup>

In addition to this commitment, the staff presented for Commission consideration policy options for site-specific security bounding times (SBTs) “that would allow licensees to voluntarily develop site-specific SBTs and further refine protective strategies by increasing law enforcement coordination, enhancing use of FLEX equipment,<sup>3</sup> or by implementing robust recall programs for licensee personnel.”<sup>4</sup> These options were intended to “change policy to allow law enforcement assistance to be used, along with other factors, to justify changes to licensee protective strategies.”<sup>5</sup> The staff also offered two implementation options for its first policy option, utilizing existing processes for assessing the impact of changes to physical security programs or utilizing the license amendment request process.

On November 10, 2020, former Chairman Svinicki cast her vote on SECY-20-0070, citing the Commission’s skepticism of the staff’s interpretation of the regulations in this area as expressed by Commissioner Burns in his vote on SECY-17-0100 and the regulatory history of the regulations. I join former Chairman Svinicki and former Commissioner Burns in their skepticism of the staff’s interpretation in this area, and I incorporate former Chairman Svinicki’s related comments in my vote for my colleagues’ consideration.

On November 30, 2020, the staff revised RG 5.76 to include the RAPT concept and announced the availability of this new guidance in the *Federal Register*.<sup>6</sup> Under the RAPT concept included in RG 5.76, Revision 1, a licensee may refine its protective strategy in a risk-informed manner to

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<sup>2</sup> SECY-20-0070 (Redacted) at 2 (emphasis added).

<sup>3</sup> FLEX equipment is that equipment described in Nuclear Energy Institute (NEI) document 12-06, “Diverse and Flexible Coping Strategies (FLEX) Implementation Guide,” initially required under NRC Order EA-12-049, “Order Modifying Licenses with regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events,” and now required under 10 CFR 50.155, “Mitigation of beyond-design-basis events.”

<sup>4</sup> SECY-20-0070 (Redacted) at 3.

<sup>5</sup> *Ibid.* The policy options presented were for reinterpretation of security regulations through an interpretive rule or revision of the regulations through the rulemaking process.

<sup>6</sup> “Physical Protection Programs at Nuclear Power Reactors Safeguards Information,” (85 FR 76625; November 30, 2020).

reflect the reasonable expectation that additional resources such as law enforcement and/or recalled off-duty personnel will be available to provide support for the licensee to continue to defend against the DBT after a set period of time (8 hours).<sup>7</sup>

Given that the staff has implemented this change to the regulatory guidance, an interpretive rule in this instance is redundant and unnecessary. That ship has sailed. There is no credible distinction between assistance from law enforcement at 7 hours and 59 minutes and the same assistance after 8 hours. As a result, the staff's draft proposed interpretive rule<sup>8</sup> is either moot, or the staff is making an unfounded distinction between law enforcement response after a set time or such a response at a time based on a fuller analysis.

The question that remains is how a power reactor licensee should be able to take into account law enforcement assistance prior to the 8-hour point. I agree with Chair Hanson that the staff's approach of incorporating RAPT and SBT is technically viable and sound, and that it would improve regulatory clarity while providing a framework for licensees to design their physical protection programs with increased realism. While I agree with former Chairman Svinicki that adopting this approach is within the staff's existing delegated authorities, including the use of existing processes under Management Directive 6.6, "Regulatory Guides," that option is not addressed in SECY-20-0070. I therefore approve a modified version of policy option "1". The staff should seek to harmonize the use of an interpretive rule with the regulatory guide development process rather than accomplishing them in series. The interpretive rule should be appropriately revised to acknowledge that the agency's current regulatory guidance in this area already allows power reactor licensees to reasonably rely on law enforcement assistance and seek comment on incorporation of SBT in RG 5.76. The interpretive rule should be provided to the Commission 10 working days prior to its issuance under the process outlined in 10 CFR 2.804.

With regard to the staff's proposed implementation options, utilizing the license amendment request process (Implementation Option "b") would require deeming the use of a site-specific SBT as a "measure for protection against radiological sabotage other than one required by 10 CFR 73.55" as described in paragraph (r) of 10 CFR 73.55. Licensees of Nuclear Power Reactors, however, are required to "document and maintain current agreements with applicable law enforcement agencies to include estimated response times and capabilities" under 10 CFR 73.55(k)(9), "Law enforcement liaison," and to "[u]pon receipt of an alarm or other indication of a threat . . . [n]otify law enforcement agencies (local, State and Federal law enforcement agencies (LLEA)), in accordance with site procedures" under 10 CFR 73.55(k)(8), "Protective strategies." Because these measures are **actually** required in 10 CFR 73.55, they cannot be categorized as measures other than those required in 10 CFR 73.55 and should not be subjected to the need for implementation by license amendment request under 10 CFR 73.55(r). Such a categorization would not be in keeping with our Principle of Reliability and could result in additional mandatory reviews inconsistent with the Principle of Efficiency. Because site-specific SBTs are merely a means of analyzing and planning for law enforcement assistance as a measure of protection against radiological sabotage and not an independent measure to accomplish that end, I disapprove Implementation Option "b" and approve

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<sup>7</sup> See SECY-20-0070 (Redacted) at 2 and 6.

<sup>8</sup> SECY-20-0070, Enclosure 7 (Redacted) at 7 *et seq.*

Implementation Option "a" for licensees to utilize existing site/fleet processes for assessing the impact of changes to the physical security program.

I note that Implementation Option "a" leaves the use of a license amendment request available as a means for a licensee to implement a physical protection program change whether they could otherwise conclude that such a change would not constitute a decrease in safeguards effectiveness under 10 CFR 50.54(p). Some licensees may choose to seek a license amendment even in borderline cases in order to obtain regulatory certainty.

I also disapprove the staff's request to cease providing semi-annual updates on the Integrated Response Program under SRM-COMSECY-13-0005. I agree with my colleagues that the reporting frequency for this should be reduced to every two years.

**POLICY ISSUE**  
**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** CHAIRMAN SVINICKI  
**SUBJECT:** SECY-20-0070: Technical Evaluation of the Security Bounding Time Concept for Operating Nuclear Power Plants

Approved  Disapproved  Abstain  Not Participating

COMMENTS: Below  Attached  None

Kristine L. Svinicki  
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Kristine L. Svinicki  
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**SIGNATURE**

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11/10/2020  
**DATE**

Entered on "STARS" Yes  No

**Chairman Svinicki Comments on SECY-20-0070  
Technical Evaluation of the Security Bounding Time Concept for Operating  
Nuclear Power Plants**

The staff, in this paper, proposes to update regulatory guidance to provide for a risk-informed method to protect against the design basis threat (DBT) by defining a “reasonable assurance of protection time” concept and seeks Commission consideration of a concept initially proposed by industry to implement a security bounding time (SBT) concept. The staff recommends approval of Policy Option 1 to use an interpretive rule process to reinterpret existing security regulations to allow licensees to account for external assistance in physical protection using the SBT concept. Because no reinterpretation of what the Commission requires is necessary for the staff to implement this concept under its existing delegations of authority, I disapprove Policy Option 1. I similarly disapprove Policy Option 2, as unnecessary.

The staff’s recommendation relies on interpreting extracted portions of the Commission’s commentary in the Statements of Considerations provided for the Design Basis Threat (DBT) Final Rule (72 FR 12705; March 19, 2007) and the Power Reactor Security Requirements Final Rule (74 FR 13925; March 27, 2009). Because the staff has failed to interpret the extracted statements in the appropriate context, the meaning they ascribe to them is flawed. As a result, the staff’s recommended means of achieving the outcome of implementing the SBT concept is inappropriate; this outcome may be achieved more simply.

In SECY-17-0100, the staff previously advanced a similar interpretation, prompting Commissioner Burns to state the following in his vote:

In SECY-17-0100, the staff states that it is "current Commission policy to defend against the DBT without external assistance." In support of this statement, the staff cites language from the Statements of Consideration for the 2007 DBT rulemaking and the 2009 Power Reactor Security Rulemaking. Although I do not dispute that the Commission noted concerns about reliance on law enforcement agencies to augment a licensee’s ability to defend nuclear power plants, I do challenge the view that the Commission has taken a particular policy position on the matter. This question was not specifically put to the Commission in either of these rulemakings relied on by the staff. The staff’s references cited above were, in actuality, responses to comments on those rulemakings, and I would suggest that the comments that resulted in those responses were not precisely germane to the question of whether licensees can rely on the assistance of law enforcement. I appreciate the regulatory challenge in giving credit to licensees for something that is beyond the control of both the licensee and the NRC, but I would observe that the NRC has considered such matters in another context, emergency preparedness. In its regulations on emergency preparedness, the NRC has codified its recognition of "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).

I joined Commissioner Burns in his skepticism of that interpretation of current Commission policy, as did the majority of the Commission in its deliberations on SECY-17-0100. The staff’s proffered basis for that interpretation in SECY-20-0070 is similarly unconvincing.

First, the staff relies on the statement of the Commission in the DBT rule that “[t]he capabilities of off-site responders are beyond the scope of [the DBT rule]” (72 FR 12720) as part of its basis for concluding that the Commission had expressed a policy that licensees must

defend against the DBT without external assistance.<sup>1</sup> However, it is important to read the Commission's statement in its context and for what it is expressing. Of particular note, the statement in question was made in the resolution of public comments received on the DBT rule and does not purport to express what any regulation means or requires. In fact, the comments the Commission addressed were that licensees should have self-sufficient defense capabilities that do not rely on off-site responders because of the communications and transportation difficulties in some areas that would make assistance impossible. The Commission disagreed and explained that the comments were outside the scope of that regulation. This comports with the Commission's response to comments within the scope of that rulemaking suggesting that "the DBT rule should define clearly demarcated boundaries where the responsibilities of the licensee and those of the Government begin for defending nuclear facilities." The Commission responded that "establishing set boundaries demarcating a division of responsibilities is neither possible nor desirable." This response suggests that the Commission indeed envisioned some role for offsite response in facility defense. When read in context, the isolated statement identified by the staff only reflects the Commission's observation that it did not need to consider the exact capabilities of such responders for the DBT rulemaking. Moreover, as an outgrowth of this contextual reading, the earlier Statement of Considerations for the DBT rulemaking is fundamentally contradictory to the staff's proposed reading.

Second, the staff relies upon the statement of the Commission in the Power Reactor Security Requirements rulemaking that "a licensee's ability to defend against the [DBT] of radiological sabotage is not dependent on the availability of offsite responders" (74 FR 13940). As noted by Commissioner Burns, who had served as the NRC Deputy General Counsel at the time of that rulemaking, that statement was made in response to comments; it was not a specific explanation of the rule's requirements. In addition, this statement by the Commission is a purely factual statement that should not be taken to mean any more than it says. Moreover, the Commission specifically considered and rejected the potential interpretation that the "design basis threat is a requirement on licensee personnel to defend the facility without the need for additional response personnel" in the "Integrated Comment Responses Supporting Final Rule: Power Reactor Security Requirements," (ML083390333).

Finally, in the Power Reactor Security Requirements Statement of Considerations, the Commission explained that 10 CFR Part 73, Appendix C, Section II.B.3, "Licensee Planning Base," requires the following (emphasis added):

The licensee planning base must document the site-specific organizational structure of the security response organization, site physical layout considerations, safeguards systems, the protective strategy, **law enforcement assistance**, policy constraints and assumptions and administrative and logistical considerations that could have bearing on the implementation of the licensee's [safeguards contingency plan] SCP. While implementing details are appropriate for procedures and need not be included in the SCP, licensees are expected to provide a sufficient level of detail in the SCP for the information to be meaningful. Within this category of information, licensees must document coordination with off-site entities and explain how the level of protection required by § 73.55(b) during safeguards contingency events will be maintained.

In sum, rather than expressing a Commission policy that power reactor licensees may not take into account offsite response in their physical protection planning, the Commission explicitly required power reactor licensees to document offsite response as part of the planning

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<sup>1</sup> Moreover, the Staff relies on this statement to conclude that the Commission found licensees could not rely on external assistance to meet the requirements of § 73.55. But that regulation was promulgated in the Power Reactor Security Requirements Rulemaking two years later. I find it difficult to conclude that the Commission had the foresight to explain the requirements of a regulation two years prior to its imposition. Nonetheless, I will assume that this quotation bears on the requirements of that regulation for the sake of argument.



base for their physical protection planning. This requirement of the Commission cannot be reasonably interpreted as having been modified by the Commission's recognition that the capabilities of offsite responders were outside the scope of the DBT rule or the Commission's observation that at the time of the Power Reactor Security Requirements rulemaking, licensees were capable of defending against the DBT of radiological sabotage without the assistance of offsite responders.

In light of this, the staff should review and remove any instances of implied or stated interpretations in guidance documents such as regulatory guides (RGs) purporting to require that licensees protect against the DBT without external assistance. As stated in Management Directive (MD) 6.6, "Regulatory Guides," "RGs do not impose requirements. The methods, techniques, or data described in an RG are acceptable to the NRC staff for meeting NRC regulations. However, applicants or licensees may use alternatives as long as sufficient information is provided that demonstrates the requirements in NRC's regulations are satisfied." In addition, the staff should continue to work with stakeholders on developing guidance on how power reactor licensees should meet the existing Commission requirement to document law enforcement assistance and coordination with off-site entities as part of the planning base for their SCPs by giving due consideration to the industry proposal of the SBT concept or by other means, as appropriate, under existing processes such as those of MD 6.6.

For the reasons given above, I disapprove Policy Options 1 and 2. I take no position on the Implementation Options proposed by the staff. Rather, the staff should determine the appropriate process by which a licensee could implement any new or revised methods of meeting the Commission's security requirements using its existing delegated authorities.

I disapprove the staff's request to terminate the semi-annual updates to the Commission on the Integrated Response Program; however, in acknowledgement of the current, diminished state of activity, the reporting frequency should be reduced to biennial.

Kristine L. Svinicki



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Kristine L. Svinicki

11/10/2020