



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

August 21, 2008

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-08-0073

TITLE: DENIAL OF A PETITION FOR RULEMAKING SUBMITTED
BY DAVID LOCHBAUM ON BEHALF OF THE PROJECT ON
GOVERNMENT OVERSIGHT AND THE UNION OF
CONCERNED SCIENTISTS (PRM-50-83)

The Commission (with Chairman Klein and Commissioners Lyons and Svinicki agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of August 21, 2008. Commissioner Jaczko disapproved the paper.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Keneth R. Hart

for _____
Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
Commissioner Svinicki
OGC
EDO
PDR

VOTING SUMMARY - SECY-08-0073

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. KLEIN	X				X	7/31/08
COMR. JACZKO		X			X	6/17/08
COMR. LYONS	X				X	7/22/08
COMR. SVINICKI	X				X	8/04/08

COMMENT RESOLUTION

In their vote sheets, Chairman Klein and Commissioners Lyons and Svinicki approved the staff's recommendation and provided some additional comments. Commissioner Jaczko disapproved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on August 21, 2008.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN KLEIN
SUBJECT: SECY-08-0073 – DENIAL OF A PETITION FOR
RULEMAKING SUBMITTED BY
DAVID LOCHBAUM ON BEHALF OF THE
PROJECT ON GOVERNMENT OVERSIGHT AND
THE UNION OF CONCERNED SCIENTISTS
(PRM-50-83)

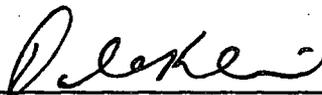
Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below XX Attached _____ None _____

I approve the staff's proposed denial of the petition. I also concur in the comments by Commissioner Lyons.

I recommend one edit: on page 5, 12th line, delete the following: "While this may be true,".



SIGNATURE

7/31/08

DATE

Entered on "STARS" Yes No _____

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

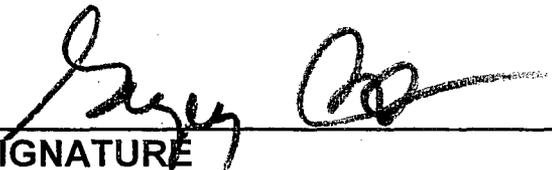
FROM: COMMISSIONER JACZKO

SUBJECT: SECY-08-0073 – DENIAL OF A PETITION FOR
RULEMAKING SUBMITTED BY
DAVID LOCHBAUM ON BEHALF OF THE
PROJECT ON GOVERNMENT OVERSIGHT AND
THE UNION OF CONCERNED SCIENTISTS
(PRM-50-83)

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____



SIGNATURE

6/17/08

DATE

Entered on "STARS" Yes X No _____

COMMISSIONER GREGORY B. JACZKO'S COMMENTS ON SECY-08-0073
Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of
the Project on Government Oversight and the Union of Concerned Scientists
(PRM-50-83)

I disapprove of this paper and vote to partially grant this petition. As I noted in my vote on the most recent petition for rulemaking (SECY-08-0036), I believe our approach to these types of requests is too bureaucratic and constrained. The agency appears only able to discuss rulemaking petitions in the context of fully granting them or fully denying them. We are less inclined to grant unless we are committing to the precise actions requested in the petition. Rulemaking petitions, however, are opportunities for our stakeholders to provide us with new ideas and approaches for how we regulate. By so limiting our responses, we limit our review of the request, and thus, we risk missing many potential opportunities to improve the way we regulate.

Denying this petition would potentially represent yet another example of such a missed opportunity. The petitioners are basically asking for a more formal approach to ensuring licensees, local, State, and federal officials are closely coordinated to respond to a range of potential security events. This is a valid issue and one I have repeatedly raised, including in my vote in December 2006 on the final design basis threat (DBT) rule in which I proposed additional integrated response efforts to deal with the potential of a beyond-DBT – so-called “enemy of the state” – issue.

While it is certainly true that the NRC does not have the authority to require offsite federal agencies to participate in nuclear power reactor exercises, it is also true that our emergency preparedness regulations clearly read as if we do – for example “Offsite plans for each site shall be exercised biennially with full participation by each offsite authority having a role under the radiological response plan.” 10 CFR Part 50 Appendix E Section IV. F. 2.c. or “A full participation exercise which tests as much of the licensee, State, and local emergency plans as is reasonably achievable without mandatory public participation shall be conducted,” as the footnote reads for the purpose of “testing major observable portions of the onsite and offsite emergency plans and mobilization of State, local and licensee personnel and other resources in sufficient numbers to verify the capability to respond to the accident scenario.” 10 CFR 50 Appendix E Section IV.F.2.a.

10 CFR 50.47 (c) does include provisions for determining that reasonable assurance exists even if States and local officials refuse to participate in exercises. Thus it is implicit that we can not require their participation but we certainly, at the least, fully encourage it. Clearly the regulations could be modified to also encourage State and local participation in security exercises, if a policy decision was reached concluding that was a good approach. Rather than searching for a legalistic reason to dismiss the petition, the agency would be much better served by doing an analysis of the substance of the proposal and basing its petition for rulemaking decision on the merits. It is especially awkward to hang our hats on a legal prohibition against pursuing the petition when the legal basis for our authority over security is so similar to that for emergency preparedness.

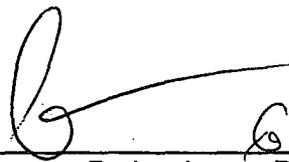
It would also be better to be more transparent about all the work the agency is doing to ensure the very outcome the petition seeks. As helpfully documented in the addendum to the staff package, the NRC has worked with the Homeland Security Department and other agencies to conduct comprehensive reviews of the capabilities of first responders around nuclear power plants and on a buffer zone protection program. The goal of both of these programs, which admittedly has not yet been fully realized, is to strengthen the ability of emergency response organizations and law enforcement around critical infrastructure including nuclear power plants to respond to events including potential beyond-DBT threats. Along the same lines, the agency has participated with the FBI in pilot integrated response planning activities.

Most relevant to the petition, is that the agency has also worked with licensees to develop hostile action drills as part of the emergency preparedness exercise program designed to test the ability of licensee personnel to coordinate with State and local responders under the National Incident Management System to take appropriate actions in the event of a terrorist attack on a plant. The lessons learned from this effort are being incorporated into a proposed emergency preparedness rulemaking. While the proposal currently contemplated appears to be short of what the petitioner has in mind (it is a terrorist-initiated EP exercise rather than a beyond DBT security exercise) there is certainly a lot of overlap between the two ideas.

Because that proposed rule has not even been drafted yet, I suggest the agency partially grant this petition and include it as a question for public comment in the context of the rulemaking process. The question should be framed by an analysis of the policy issues and practicality of incorporating the security program proposed by the petitioners – either as a requirement for an expanded hostile action drill or through some other vehicle – into our regulations.

The draft correspondence and federal register notice included with the SECY paper should be revised accordingly.

Finally, I note for the benefit of my colleagues that Appendix E Section IV.F.2.h referenced in the SECY paper is not included in the paper copies of the 2008 edition of the 10 CFR. According to Office of General Counsel, “d.” – “h.” of that section were inadvertently deleted from the paper copy during printing but still apply and are included in the CFR available on the NRC website.



Gregory B. Jaczko 6/17/08
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER LYONS

SUBJECT: SECY-08-0073 – DENIAL OF A PETITION FOR
RULEMAKING SUBMITTED BY
DAVID LOCHBAUM ON BEHALF OF THE
PROJECT ON GOVERNMENT OVERSIGHT AND
THE UNION OF CONCERNED SCIENTISTS
(PRM-50-83)

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____


Peter B. Lyons
SIGNATURE

7/22/08
DATE

Entered on "STARS" Yes X No _____

Commissioner Lyons' Comments on SECY-08-0073 – Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of Project on Government Oversight and the Union of Concerned Scientists (PRM-50-83)

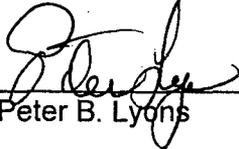
I approve the staff's proposal to deny the Petition for Rulemaking (PRM-50-83) from Mr. Lochbaum on behalf of the Project on Government Oversight and the Union of Concerned Scientists. The Petitioners requested that the NRC add an appendix, similar to Appendix E, to 10 CFR Part 50, which would require periodic demonstrations of adequate protection by offsite federal, state and local authorities against radiological sabotage of nuclear power plants above the design basis threat (DBT) level. There is no question that offsite federal, state and local authorities are a critical part of a nuclear power plant's ability to successfully respond to attempted radiological sabotage greater than the design basis threat (DBT). However, as the staff pointed out in its response to the petition, the NRC does *not* have the authority to require such participation and the NRC cannot create that authority through a rulemaking. The President directed FEMA to assume lead Federal responsibility for all offsite nuclear emergency planning and response and in Homeland Security Presidential Directive-7, "Critical Infrastructure Identification, Prioritization, and Protection," the lead role for coordinating offsite security responses was assigned to the Department of Homeland Security. To that end, as Commissioner Jaczko referenced in his comments on this petition, the NRC has worked with the Department of Homeland Security and other agencies to conduct comprehensive reviews of the capabilities of first responders around nuclear power plants and on a buffer zone protection program.

As the staff has also pointed out, Mr. Lochbaum has misinterpreted the requirements in Appendix E to 10 CFR Part 50 when modeling the requirements proposed in this petition. Although Appendix E requires nuclear power plant licensees to involve offsite authorities having a role in the emergency preparedness plan in biennial emergency preparedness demonstrations, it also recognizes the agency's lack of jurisdiction to require offsite federal, state, or local agencies to take part in these exercises. In that regard, the agency has structured our regulations to include provisions for determining that reasonable assurance exists.

I would also like to provide the following editorial comments:

The FRN should be revised. On page 5, the last sentence of Public Comments, delete the initial phrase: "While this may be true". On page 6, the third sentence, revise to read: "Appendix E requires nuclear power reactor licensees to ~~involve~~ participate in emergency preparedness demonstrations planned by the off-site authorities having a role in the emergency preparedness plan."

In the letter to the petitioner, Mr. Lochbaum, make a conforming change in the third paragraph, second sentence to read: "Appendix E requires nuclear power reactor licensees to ~~involve~~ participate in emergency preparedness demonstrations planned by the off-site authorities having a role in the emergency preparedness plan." Also revise the fourth sentence of this paragraph to read: "Nor does ~~Further~~, the NRC ~~does not~~ have the authority to require offsite federal agencies to participate in a nuclear power reactor licensee's exercises."


Peter B. Lyons
7/22/08
Date

SUPPLEMENT

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER LYONS

SUBJECT: SECY-08-0073 – DENIAL OF A PETITION FOR
RULEMAKING SUBMITTED BY
DAVID LOCHBAUM ON BEHALF OF THE
PROJECT ON GOVERNMENT OVERSIGHT AND
THE UNION OF CONCERNED SCIENTISTS
(PRM-50-83)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached X None

Josephine M. Piccone
for Peter B. Lyons
SIGNATURE

8/20/08
DATE

Entered on "STARS" Yes X No

Commissioner Lyons' Supplemental Comments on SECY-08-0073
Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of Project
on Government Oversight and the Union of Concerned Scientists (PRM-50-83)

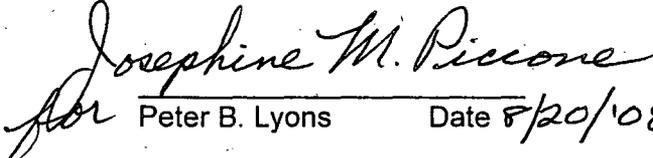
Commissioner Lyons wishes to supplement his vote on SECY-08-0073 by revising only the editorial comments he initially provided.

The FRN should be revised on page 6 to read:

In addition, the petitioner has misinterpreted Appendix E to 10 CFR Part 50. The petitioner states that "Appendix E to 10 CFR part 50 currently requires periodic demonstrations that plant owners and external authorities can successfully meet their responsibilities during nuclear plant emergencies...." While offsite authorities having a role under the radiological response plan are encouraged to participate in emergency preparedness demonstrations, Section IV. F. 2. h. of Appendix E and 10 CFR 50.47 (c) recognize that such entities are at liberty to refuse to participate. This recognition is based on the fact that the NRC does not have the authority to require offsite authorities to participate in a nuclear power reactor licensee's exercises. Thus, the petitioner's reliance on Appendix E to 10 CFR Part 50 to support...

In the letter to Mr. Lochbaum, make a conforming change in the third paragraph to read:

In support of the petition, you state that "Appendix E to 10 CFR part 50 currently requires periodic demonstrations that plant owners and external authorities can successfully meet their responsibilities during nuclear plant emergencies...." While offsite authorities having a role under the radiological response plan are encouraged to participate in emergency preparedness demonstrations, Section IV. F. 2. h. of Appendix E and 10 CFR 50.47 (c) recognize that such entities are at liberty to refuse to participate. This recognition is based on the fact that the NRC does not have the authority to require offsite authorities to participate in a nuclear power reactor licensee's exercises. Thus, the Commission has


for Peter B. Lyons Date 8/20/08

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-08-0073 – DENIAL OF A PETITION FOR
RULEMAKING SUBMITTED BY
DAVID LOCHBAUM ON BEHALF OF THE
PROJECT ON GOVERNMENT OVERSIGHT AND
THE UNION OF CONCERNED SCIENTISTS
(PRM-50-83)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached XX None


SIGNATURE

8/4/2008
DATE

Entered on "STARS" Yes No

Commissioner Svinicki's Comments on SECY-08-0073 – Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of the Project on Government Oversight and the Union of Concerned Scientists (PRM-50-83)

I approve the staff's proposal to deny the Petition for Rulemaking (PRM-50-83) from Mr. Lochbaum on behalf of the Project on Government Oversight and the Union of Concerned Scientists.

The NRC does not have the authority to compel the activities requested by the petitioner and cannot confer such authority to itself through rulemaking. Further, the U.S. Department of Homeland Security is responsible for the oversight and coordination of local, State, and Federal entities for all terrorist threats, including those beyond the design basis.

I endorse the two editorial comments provided by Commissioner Lyons in his vote.



Kristine L. Svinicki 08/9/2008