

RULEMAKING ISSUE
(Notation Vote)

May 22, 2008

SECY-08-0073

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: 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)

PURPOSE:

To obtain Commission approval of the staff's proposal to deny a petition for rulemaking (PRM) to amend the U.S. Nuclear Regulatory Commission's (NRC's) regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50, "Domestic Licensing of Production and Utilization Facilities," to require local, State, and Federal entities to participate in biennial demonstrations of their capability to respond adequately to terrorist attacks that exceed the design basis threat (DBT). This paper does not address any new commitments of resource implications.

BACKGROUND:

On February 23, 2007, the NRC received a PRM from Mr. David Lochbaum on behalf of the Project on Government Oversight (POGO) and the Union of Concerned Scientists (UCS) (PRM-50-83). The petitioner requested that the NRC amend its regulations in 10 CFR Part 50 to add an appendix (or comparable regulation), similar to the existing 10 CFR Part 50, Appendix E, "Emergency Planning and Preparedness for Production and Utilization Facilities," which would require periodic demonstrations by local, State, and Federal entities to ensure that nuclear

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(301) 415-3092

SECY NOTE: THIS SECY PAPER TO BE RELEASED TO THE PUBLIC 5 WORKING
DAYS AFTER DISPATCH OF THE LETTER TO THE PETITIONER.

power plants can be adequately protected against radiological sabotage by adversaries with capabilities that exceed those in the DBT. In the *Federal Register* of March 29, 2007 (72 FR 14713), the NRC published a notice of receipt of the PRM and requested public comment.

DISCUSSION:

In support of the requested rule change, the petitioner cites the recent DBT final rule (72 FR 12705; March 19, 2007), which states that the rule reflects the Commission's determination of the most likely composite set of adversary features against which a private security force should reasonably be required to defend. The petitioner states that the DBT rule requires plant owners to demonstrate periodically that they can successfully meet their responsibilities to adequately protect nuclear power plants from sabotage threats up to, and including, the DBT but fails to include provisions requiring periodic demonstrations that applicable local, State, and Federal entities can successfully meet their responsibilities to adequately protect nuclear power plants from sabotage threats by adversaries with capabilities that exceed those in the DBT. The petitioner urges the NRC to remedy this situation by amending its regulations to require demonstrations similar to those required by Appendix E to 10 CFR Part 50, which the petitioner claims requires plant owners and external authorities to periodically demonstrate that they can successfully meet their responsibilities during nuclear plant emergencies. According to the petitioner, Appendix E to 10 CFR Part 50 requires biennial exercises at each nuclear plant site and evaluation by the Federal Emergency Management Agency (FEMA) of the performance of local, State, and Federal entities.

PUBLIC COMMENTS:

In response to its notice of receipt of the PRM, the NRC received 16 comment letters (1 from the Nuclear Energy Institute (NEI) on behalf of the nuclear energy industry, 13 from NRC-licensed power reactor operators or their affiliates, and 2 from private citizens). Fifteen of the commenters cited the NRC's lack of authority to impose requirements on local, State, and Federal entities. Several industry commenters also agreed with the NEI observation that the NRC and the U.S. Department of Homeland Security (DHS) are working together to develop and improve preparedness for a terrorist attack through Federal initiatives, such as the Comprehensive Review Program and integrated response planning efforts.

REASON FOR DENIAL:

In December 1979, the President directed FEMA to assume lead Federal responsibility for all offsite nuclear emergency planning and response. Homeland Security Presidential Directive-7, "Critical Infrastructure Identification, Prioritization and Protection," assigns the lead role for coordinating offsite security responses to DHS. The NRC's cooperation in these planning and response activities is a factor in the NRC's determination that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, whether or not the event is the result of sabotage.

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...." Appendix E requires nuclear power plant licensees to involve in emergency

preparedness demonstrations the offsite authorities having a role in the emergency preparedness plan. However, Section IV.F.2.h of Appendix E and 10 CFR 50.47(c) recognize that local and State entities are at liberty to refuse to participate. Further, the NRC does not have the authority to require offsite federal agencies 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 the request that the NRC require Federal, State, and local governments to participate in demonstrations of their capability to respond to beyond-DBT events is misplaced because the NRC cannot compel local, State, or Federal entities to take part in biennial emergency exercises if those entities do not choose to participate in emergency planning activities.

For these reasons, the staff believes that promulgating the requested requirements would exceed the NRC's authority and is recommending the denial of PRM-50-83.

RECOMMENDATION:

The staff recommends that the Commission:

- (1) Deny the PRM submitted by Mr. David Lochbaum on behalf of POGO and UCS, publish the *Federal Register* notice announcing the Commission's determination (Enclosure 1); and
- (2) Approve the enclosed letter for the Secretary's signature (Enclosure 2) to inform the petitioner of the Commission's decision.

COORDINATION:

The Office of the General Counsel has reviewed this package and has no legal objection to the denial of this petition.

/RA/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice
2. Letter to Petitioner

Enclosure 1

Federal Register Notice

ADAMS Accession No: ML073140009

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM-50-83]

[NRC-2007-0012]

David Lochbaum on Behalf of the Project on Government Oversight
and the Union of Concerned Scientists

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; denial.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by Mr. David Lochbaum on behalf of the Project on Government Oversight (POGO) and the Union of Concerned Scientists (UCS) on February 23, 2007. The petitioner requested that the NRC amend its regulations governing domestic licensing of production and utilization facilities to require periodic demonstrations by applicable local, State, and Federal entities to ensure that nuclear power plants can be adequately protected against radiological sabotage by adversaries with capabilities that exceed those posed by the design basis threat (DBT).

DATES: The docket for the petition for rulemaking PRM-50-83 is closed on [insert date of publication in the Federal Register].

ADDRESSES: You can access publicly available documents related to this petition for rulemaking using the following methods:

Federal e-Rulemaking Portal: Further NRC action on the issues raised by this petition will be accessible at the Federal rulemaking portal, <http://www.regulations.gov>, by searching on rulemaking docket ID: NRC-2007-0012. The NRC also tracks all rulemaking actions in the “NRC Regulatory Agenda: Semiannual Report (NUREG-0936).”

NRC’s Public Document Room (PDR): The public may examine, and have copied for a fee, publicly available documents at the NRC’s PDR, Public File Area O-1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC’s Agencywide Document Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC’s Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC’s public documents. If you do not have access to ADAMS or if there are any problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-800-387-4209 or 301-415-4737, or by e-mail to PDR.resource@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Harry S. Tovmassian, Office of Nuclear Reactor Regulation, NRC, Washington, DC 20555-0001, telephone 301-415-3092, e-mail Harry.Tovmassian@nrc.gov.

SUPPLEMENTARY INFORMATION:

The Petition

On February 23, 2007, the NRC received a petition for rulemaking from Mr. David Lochbaum on behalf of POGO and UCS (PRM-50-83). The petitioner requested that the NRC amend its regulations in Title 10 of the *Code of Federal Regulations*, Part 50, "Domestic Licensing of Production and Utilization Facilities" (10 CFR Part 50), to add an appendix (or comparable regulation), similar to existing Appendix E to 10 CFR Part 50, "Emergency Planning and Preparedness for Production and Utilization Facilities," which would require periodic demonstrations by local, State, and Federal entities to ensure that nuclear power plants can be adequately protected against radiological sabotage by adversaries with capabilities that exceed those in the DBT. In the *Federal Register* of March 29, 2007 (72 FR 14713), the NRC published a notice of receipt of the petition for rulemaking and requested public comment.

In support of the request for this proposed amendment to the NRC's regulations, the petitioner cites the recent DBT final rule (72 FR 12705; March 19, 2007) which states that the DBT rule reflects the Commission's determination of the most likely composite set of adversary features against which a private security force should reasonably be required to defend. The petitioner states that the final DBT rule requires plant owners to demonstrate periodically that they can meet their responsibilities to adequately protect nuclear power plants from sabotage threats up to and including the DBT but fails to include provisions requiring periodic demonstrations that applicable local, State, and Federal entities can meet their responsibilities to adequately protect nuclear power plants from sabotage threats by adversaries with capabilities exceeding those of the DBT. The petitioner urges the NRC to remedy this shortcoming by amending its regulations to require demonstrations similar to those required by Appendix E to 10 CFR Part 50, which the petitioner claims requires plant owners and external authorities to demonstrate periodically their

ability to meet their responsibilities during nuclear plant emergencies. According to the petitioner, Appendix E to 10 CFR Part 50 requires biennial exercises at each nuclear plant site and evaluation by the Federal Emergency Management Agency (FEMA) of the performance of local, State, and Federal entities.

Public Comments

The notice of receipt of the petition for rulemaking invited interested persons to submit their comments. The NRC received 16 comment letters (1 from the Nuclear Energy Institute (NEI) on behalf of the nuclear energy industry, 13 from NRC-licensed power reactor operators or their affiliates, and 2 from private citizens). In its letter, NEI recommends that the NRC deny the petition. According to NEI, the U.S. Department of Homeland Security (DHS), through the Homeland Security Presidential Directive - 7, "Critical Infrastructure Identification, Prioritization, and Protection," is responsible for the oversight and coordination of local, State, and Federal entities for all terrorist threats including those above the DBT. In addition, the commenter states that the NRC has acknowledged in the Statement of Considerations for the recent DBT final rule that the NRC and DHS are working together to develop and improve emergency preparedness for a terrorist attack through Federal initiatives such as comprehensive review programs and integrated response planning efforts. For these reasons, NEI recommends that the NRC deny this petition. All 13 comment letters from the nuclear power reactor industry endorse the NEI comments.

The Commission agrees that oversight and coordination of local, State, and Federal entities are under the purview of DHS and that the NRC and DHS continue to undertake joint comprehensive review programs and integrated response planning efforts.

One individual commenter, opposing the petition, also questions the NRC's authority to require participation in demonstrations by local, State, and Federal entities. This commenter's argument is essentially the same as that of NEI. This commenter also states that the proposed requirement is too vague in that it does not define how far beyond the DBT adequate protection should be demonstrated. With respect to the specificity of the petition, the NRC concurs that it would be difficult to construct criteria defining levels beyond the DBT for which demonstrations would be required. However, the question is moot because the NRC lacks the authority to require the demonstrations in the first place. Another individual commenter presents a discussion that generally does not address the elements of the petition. This commenter states that demonstrations of the capability of Federal authorities to "take-back-the-plant" might be needed but adds that the adversary has easier and more effective means of achieving radiological sabotage than physical takeover of a plant. While this may be true, the Commission believes that this argument has no bearing on the merits of the petition.

Reason for Denial

In December 1979, the President directed FEMA to assume lead federal responsibility for all offsite nuclear emergency planning and response. Homeland Security Presidential Directive - 7, "Critical Infrastructure Identification, Prioritization and Protection," assigns the lead role for coordinating offsite security responses to DHS. The NRC's cooperation in these planning and response activities is a factor in the NRC's determination that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, whether or not the event is the result of sabotage.

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....” Appendix E requires nuclear power reactor licensees to involve in emergency preparedness demonstrations the offsite authorities having a role in the emergency preparedness plan. Section IV.F.2.h of Appendix E and 10 CFR 50.47(c) recognize that local and State entities are at liberty to refuse to participate. Further, the NRC does not have the authority to require offsite federal agencies 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 the request that the NRC require local, State, and Federal governments to participate in demonstrations of their capability to respond to beyond-DBT events is misplaced because the NRC cannot compel local, State, or Federal entities to take part in biennial emergency exercises if those entities do not choose to participate in emergency planning activities.

For these reasons, the Commission finds that promulgating the petitioner’s proposed requirements would exceed the NRC’s authority and is denying PRM-50-83.

Dated at Rockville, Maryland, this _____ day of _____, 2008.

For the Nuclear Regulatory Commission

Annette L. Vietti-Cook,
Secretary of the Commission.

Enclosure 2

Letter to David Lochbaum

ADAMS Accession No: ML073140010

Mr. David Lochbaum
Union of Concerned Scientists
1707 H Street, NW, Suite 600
Washington, D.C. 20006-3919

Dear Mr. Lochbaum:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter of February 23, 2007, by which you submitted a petition for rulemaking on behalf of the Union of Concerned Scientists and the Project on Government Oversight. The petition, docketed as PRM-50-83, requests that the NRC amend its regulations in Title 10, Part 50, "Domestic Licensing of Production and Utilization Facilities," of the *Code of Federal Regulations* (10 CFR Part 50) to add an appendix (or comparable regulation) similar to the existing Appendix E to 10 CFR Part 50, "Emergency Planning and Preparedness for Production and Utilization Facilities," which would require periodic demonstrations of adequate protection by local, State, and Federal entities against radiological sabotage of U.S. nuclear power plants by adversaries who have capabilities that exceed the design basis threat (DBT). A notice of receipt of your petition appeared in the *Federal Register* on March 29, 2007 (72 FR 14713).

In December 1979, the President directed the Federal Emergency Management Agency to assume lead federal responsibility for all offsite nuclear emergency planning and response. Homeland Security Presidential Directive - 7, "Critical Infrastructure Identification, Prioritization, and Protection," assigns the lead role for coordinating offsite security responses to the U.S. Department of Homeland Security. The granting of your petition for rulemaking to require offsite entities to participate in demonstrations of their capability to respond to beyond-DBT events would exceed the NRC's authority in these matters. The NRC cooperates in these planning and response activities, and its participation is a factor in the NRC's determination that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, whether or not the event is the result of sabotage. A summary of the NRC's involvement in the planning and response activities is enclosed.

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...." Appendix E requires nuclear power reactor licensees to involve in emergency preparedness demonstrations the offsite authorities having a role in the emergency preparedness plan. However, Section IV.F.2.h of Appendix E and 10 CFR 50.47(c) recognize that local and State entities are at liberty to refuse to participate. Further, the NRC does not have the authority to require offsite federal agencies to participate in a nuclear power reactor licensee's exercises. Thus, the Commission has determined that your reliance on Appendix E to 10 CFR Part 50 to support your request that the NRC require Federal, State and local governments to participate in demonstrations of their capability to respond to beyond-DBT events is misplaced because the NRC cannot compel local, State, or Federal entities to take part in biennial emergency exercises if those entities do not choose to participate in emergency planning activities.

D. Lochbaum

-2-

The Commission has considered the merits of your petition and the public comments received and finds that granting the petition would exceed the Commission's authority. Thus, the Commission is denying your petition for rulemaking.

Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:

1. Summary of NRC's Efforts to Enhance
Federal, State and Local Response
2. *Federal Register* Notice

D. Lochbaum

-2-

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Sincerely,

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:

1. Summary of NRC's Efforts to Enhance Federal, State and Local Response
2. *Federal Register* Notice

ADAMS Accession No.: ML073140010/EDATS: NRR-2008-0010 *via e-mail **via memo

OFFICE	DPR/PRAB	Tech Editor	DPR/PRAB	ADM**	SECY
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DATE	4/14/08	12/7/07	4/14/08	12/27/2007	/ /08

OFFICIAL RECORD COPY

SUMMARY OF THE NRC'S EFFORTS TO ENHANCE FEDERAL, STATE AND LOCAL RESPONSE

Since the September 11, 2001, attacks, the Nuclear Regulatory Commission (NRC) has supported and worked with licensees, the U.S. Department of Homeland Security (DHS), and various State and local governments to improve the capabilities of first responders as part of the National Infrastructure Protection Plan. Part of this effort included the conduct of Comprehensive Reviews (CRs) at all commercial nuclear power plants. These CRs were led by DHS, with support from the NRC, United States Coast Guard, Federal Bureau of Investigation (FBI), and nuclear power industry representatives as part of a government and private sector initiative to determine facilities' exposure to potential terrorist attacks, the consequences of such attacks, and the integrated response (prevention and response capabilities) of facility owners/operators and Federal, State, local law enforcement, and emergency response organizations. The results of the CRs are being used to enhance the security posture of the facilities and first responders by funding improvements in equipment, training, and processes in the short-term, and informing risk-based investments and science and technology decisions in the long-term. In less than one year, the CR program resulted in identifying numerous readily-adaptable protective measures for increased first responder readiness and preparedness in the event of a terrorist attack or natural disaster.

The NRC also assisted DHS in the Buffer Zone Protection Program (BZPP) designed to support State, local and tribal law enforcement and other first responders to enhance the security of a range of Critical Infrastructures and Key Resources (CI/KR), which includes nuclear power plants. Specifically, the BZPP was created to:

- Develop an appropriate buffer zone extending outward from a CI/KR facility in which protective measures can be employed to make it more difficult for terrorists to conduct site surveillance or launch attacks;
- Identify all applicable law enforcement jurisdictions and other Federal, State, and local agencies with a role in the prevention of, protection against, and response to terrorist threats or attacks specific to the site and appropriate points of contact within these organizations; and
- Evaluate the capabilities of the responsible law enforcement jurisdictions with respect to terrorism prevention and response and to identify specific planning, equipment, training and/or exercise capabilities to assist the response jurisdictions in mitigating the threats to the site and its buffer zone.

The BZPP supports requests by responsible jurisdictions for Federal grants to eligible States.

The NRC has also helped advance offsite response capabilities by meeting with a range of Federal stakeholders to ascertain their support and concurrence on a path forward for integrated response planning. Key outcomes of this effort to date include (1) FBI funding of comprehensive site models of certain nuclear facilities to aid law enforcement in planning effective tactical response including site "take back" strategies and (2) interagency planning for an FBI-led "integrated protection comprehensive exercise" at a commercial power reactor scheduled for late 2008.

The NRC has also completed multiple rounds of imminent aircraft attack “walk-throughs” with commercial reactor licensees to practice implementation of event response protocols. Lessons learned from these walk-throughs have been incorporated into Supplement 1 to Regulatory Issue Summary 2004-15: "Emergency Preparedness Issues: Post 9/11/2001," which was issued on May 25, 2006.

Finally, the NRC staff has been working with the Federal Emergency Management Agency as part of the ongoing Emergency Preparedness (EP) rulemaking to incorporate hostile action initiated scenarios into periodic biennial exercises under Appendix E to Part 50 of Title 10 of the *Code of Federal Regulations*. These exercises are intended to test the ability of licensee personnel to coordinate with State and local responders under the National Incident Management System/Incident Command Structure to take appropriate actions to mitigate the impact of a terrorist attack on a commercial nuclear power plant. The NRC staff is also working with the power reactor industry, as part of a voluntary initiative response to NRC Bulletin 2005-02, where each reactor site is conducting a hostile action-based drill within a 3-year period. The NRC staff will be incorporating the lessons-learned from these drills into its proposed EP rulemaking. To date, 10 of these “off-year” drills have been conducted with involvement and support from State, county and local officials.