

RULEMAKING ISSUE NOTATION VOTE

November 21, 2006

SECY-06-0228

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: DENIAL OF A PETITION FOR RULEMAKING TO CODIFY FEDERAL EMERGENCY MANAGEMENT AGENCY GM EV-2, "PROTECTIVE ACTIONS FOR SCHOOL CHILDREN," INTO THE EMERGENCY PLANNING REGULATIONS IN 10 CFR PART 50 (PRM-50-81)

PURPOSE:

To obtain Commission approval to deny a petition for rulemaking (PRM) requesting that the Nuclear Regulatory Commission (NRC) codify the Federal Emergency Management Agency's (FEMA's) Guidance Memorandum (GM) GM EV-2, "Protective Actions for School Children," into the NRC's emergency planning regulations in Title 10 of the *Code of Federal Regulations* (CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities."

BACKGROUND:

The NRC received a PRM submitted by Mr. Eric Epstein on October 19, 2005. The petition, docketed as PRM-50-81, requests that NRC codify criteria in GM EV-2 into NRC's emergency planning regulations in 10 CFR Part 50. The petitioner believes that this action is necessary to provide preplanned emergency evacuation capabilities for children in Pennsylvania. The staff requests Commission approval to deny the petition because it does not provide significant new information that was not previously considered in denying an earlier petition, PRM-50-79, submitted by Mr. Lawrence T. Christian, which requested that the Commission amend its emergency planning regulations to ensure that all day care centers and nursery schools in the

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SECY NOTE: TO BE MADE PUBLIC 5 BUSINESS DAYS AFTER LETTER IS SENT TO PETITIONER.

vicinity of nuclear power facilities are properly protected in the event of a radiological emergency. GM-EV2 is a guidance document developed by FEMA and utilized by the Department of Homeland Security (DHS), which has the primary responsibility for developing the acceptance criteria for, and the performance of, assessments of the adequacy of offsite emergency preparedness.¹ NRC bases its own findings in part on a review of DHS's findings and determinations as to whether State and local emergency plans are adequate and there is reasonable assurance that they can be implemented.

The Petitioner's Request

The petitioner requested that NRC amend its regulations to codify criteria in GM EV-2 into NRC's emergency planning regulations (10 CFR Part 50). The petitioner believes that this action is necessary to provide preplanned emergency evacuation capabilities for children in Pennsylvania. In support of his petition, Mr. Epstein cited excerpts from an enclosure to his petition, an unsigned, undated document that he represents as a differing professional opinion (DPO) submitted by a member of the NRC staff.² This DPO focused on the adequacy of preplanned evacuation resources and preplanned relocation centers for day care centers and nursery schools within the Commonwealth of Pennsylvania ("Commonwealth") and on whether the Commonwealth and DHS/FEMA complied with DHS/FEMA guidance.

Summary of Original Petition PRM-50-79 and Basis for Denial

On September 4, 2002, NRC received a petition for rulemaking submitted by Mr. Lawrence T. Christian and 3,000 co-signers. The petition was docketed on September 23, 2002, and assigned Docket No. PRM-50-79. The petition requested that NRC amend its regulations regarding offsite state and local government emergency plans for nuclear power plants to ensure that all day care centers and nursery schools in the vicinity of nuclear power facilities are properly protected during a radiological emergency.

The Commission denied the petition in a document published in the *Federal Register* on December 19, 2005 (70 FR 75085). The basis for the denial was that current NRC requirements and NRC and DHS guidance reasonably assure adequate protection of all members of the public, including children attending day care centers and nursery schools, in the event of a nuclear power plant incident. NRC stated in its denial that many of the specific requests of petition PRM-50-79 either are already covered by regulations or guidance

¹ The Security and Accountability for Every Port Act of 2006, P.L. 109-347, provides that the DHS radiological emergency preparedness program will be transferred back to FEMA as of April 1, 2007.

² The Commission acknowledges that such a DPO was submitted. This DPO was processed in accordance with NRC procedures included in Management Directive 10.159, "The NRC Differing Professional Opinions Program." On June 14, 2006, the Director, Office of Nuclear Security and Incident Response (NSIR), issued a decision that concluded that DHS has arrived at a defensible finding of reasonable assurance that children at day care facilities and nursery schools would be evacuated in the event of a radiological emergency at a power plant in the Commonwealth. The NSIR Director also concluded that the DHS finding is consistent with the relevant regulations and guidance documents as well as legal implementation of Federal, State, and local requirements. A summary of the DPO decision is available on the NRC public web site <http://www.nrc.gov>.

documents (including GM EV-2) or are inappropriate for inclusion in NRC regulations owing to their very prescriptive nature.

The Commission also determined that the petition, and information obtained during the review of the petition, raised questions about local implementation of relevant requirements and guidelines. Accordingly, the Commission directed the staff to undertake several actions to further assess these implementation questions and to provide appropriate recommendations for improvement (staff requirements memorandum (SRM) dated October 26, 2005, available in the Agencywide Document Access and Management System (ADAMS) No. ML052990321). In response to this direction, the NRC staff met with DHS and the Pennsylvania Emergency Management Agency to obtain information relevant to local implementation. Pennsylvania officials described a comprehensive program, mandated by Pennsylvania law, for licensed day care facilities that substantially enhances the existing emergency preparedness posture that was previously found by DHS to provide reasonable assurance that adequate protective measures can and will be taken for the public, including children in day care facilities.

The staff provided the Commission the results of this assessment and other related initiatives in a Commission paper dated May 4, 2006 (SECY-06-0101; ML060760586). The staff found no sufficient basis to question the adequacy of DHS findings regarding reasonable assurance. The staff believes the DHS findings are consistent with the planning standards of 10 CFR 50.47(b) and the existing memorandum of understanding between NRC and DHS. The staff also included a recommendation to republish the December 19, 2005, *Federal Register* Notice with revisions to correct factual errors and clarify NRC's regulatory positions and bases in the petition denial. This recommendation afforded the Commission an opportunity to reconsider its earlier denial of the petition. The Commission found no basis for changing its earlier denial, and in an SRM dated June 21, 2006 (ML061720324), the Commission directed the staff to publish the amended *Federal Register* Notice. The amended notice of denial was published on August 7, 2006 (71 FR 44593).

DISCUSSION:

The staff recommends denying the petition. The petition does not provide significant new information or arguments that were not previously considered by the Commission in denying PRM-50-79. As stated above, the petition relies upon a DPO, which focused on the adequacy of preplanned evacuation resources and preplanned relocation centers for day care centers and nursery schools within the Commonwealth, and on whether the Commonwealth and DHS/FEMA have failed to comply with DHS/FEMA guidance. The proposed remedy of the petitioner is for the NRC to grant the petition for rulemaking (PRM50-79), commence a rulemaking to incorporate the criteria in GM EV-2 into the NRC's emergency planning regulations, and to implement the 120-day clock provisions of 10 CFR 50.54(s)(2) while the rulemaking is in progress. However, the nature of the issues raised in the DPO would not provide a basis for the petitioner's remedy. The DPO raised issues about local implementation of the requirements and guidance, and DHS/FEMA evaluation of local implementation, neither of which could be resolved by the petitioner's proposal that the GM EV-2 criteria be incorporated into NRC

regulations.³ GM EV-2 is a guidance document developed by FEMA and utilized by the DHS, which has primary responsibility for assessing the adequacy of offsite emergency preparedness. NRC bases its own findings in part on a review of DHS's findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented.⁴

RECOMMENDATION:

The NRC staff recommends that the Commission—

- (1) Approve the denial of the subject petition for rulemaking and publication of the notice (Enclosure 1) of the denial.
- (2) Note that a letter is attached for the Secretary's signature (Enclosure 2), informing the petitioners of the Commission's decision to deny the petition.

COORDINATION:

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

/RA William F. Kane Acting For/

Luis A. Reyes
Executive Director
for Operations

Enclosures:

1. *Federal Register* Notice (ML061420182)
2. Letter to Petitioner (ML061420229)
3. *Federal Register* Notice for PRM-50-79 (ML061420245)
4. *Federal Register* Notice for PRM-50-79 (republished August 7, 2006) (ML061740582)

³ The Commission has, in the October 26, 2005 SRM on SECY-05-0045, directed the staff to develop guidance and expectations for the NRC review of FEMA's assessment and findings of offsite emergency preparedness. This activity should address the petitioner's and the DPO's issues with respect to the adequacy of FEMA/DHS evaluation of local implementation of offsite emergency preparedness.

⁴ DHS has reviewed the draft *Federal Register* notice.

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ADAMS Package No.: ML061420139
Commission Paper No.: ML061420148

*via e-mail
**via memo, attached

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