

STAFF TECHNICAL EVALUATION

Submission for Section 161A Preemption Authority
Pacific Gas and Electric Company
Diablo Canyon Power Plant, Units 1 and 2, and
Diablo Canyon Independent Spent Fuel Storage Installation
Docket Nos. 50-275, 50-323, and 72-26

1.0 INTRODUCTION

By submittal dated September 24, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13268A398), as supplemented by letter dated May 15, 2014 (ADAMS Accession No. ML14135A379), Pacific Gas and Electric Company (PG&E or licensee) submitted a request to the U.S. Nuclear Regulatory Commission (NRC) for Commission authorization to use the authority granted to the Commission under Section 161A of the Atomic Energy Act of 1954, as amended (42 United States Code (U.S.C.) 2201a), on behalf of Diablo Canyon Power Plant, Units 1 and 2 (DCPP), and the Diablo Canyon Power Plant specific-license independent Spent Fuel Storage Installation (DCPP-ISFSI) (hereafter referred to jointly as DCPP or facility). Use of Section 161A authority would permit security personnel at DCPP to transfer, receive, possess, transport, import, and use certain weapons, ammunition and other devices not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations that prohibit such actions.

In the September 24, 2013, submittal, the licensee indicated that this request is for preemption authority only and is applicable to the firearms and devices presently in use at DCPP in accordance with the NRC-approved DCPP security plan, namely handguns, semiautomatic assault rifles, and large-capacity magazines. The licensee also indicated that the firearms and devices identified in the submittal do not include enhanced weapons. The licensee stated that the types of firearms, ammunition, and other devices identified in the submittal are necessary in the discharge of official duties by security personnel to implement the NRC-approved DCPP security plan.

2.0 APPLICABLE REQUIREMENTS

Section 653 of the Energy Policy Act of 2005, Public Law 109-58 (119 Stat. 811), added Section 161A (42 U.S.C. § 2201a) to the Atomic Energy Act of 1954, as amended. Section 161A confers upon the Commission the authority to permit the security personnel of designated NRC-licensed facilities or certificate holders to transfer, receive, possess, transport, import, and use certain firearms and devices that were not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations, that prohibit such actions. The categories and types of firearms, ammunition, and devices that are subject to Section 161A are identified in Section 161A.b, which states that:

Notwithstanding subsections (a)(4), (a)(5), (b)(2), (b)(4), and (o) of section 922 of Title 18, section 925(d)(3) of Title 18, section 5844 of Title 26, and any law

(including regulations) of a State or a political subdivision of a State that prohibits the transfer, receipt, possession, transportation, importation, or use of a handgun, a rifle, a shotgun, a short-barreled shotgun, a short-barreled rifle, a machinegun, a semiautomatic assault weapon, ammunition for any such gun or weapon, or a large capacity ammunition feeding device, in carrying out the duties of the Commission, the Commission may authorize the security personnel of any licensee or certificate holder of the Commission (including an employee of a contractor of such a licensee or certificate holder) to transfer, receive, possess, transport, import, and use 1 or more such guns, weapons, ammunition, or devices . . .

Section 161A became effective on September 11, 2009, when the Commission, with the approval of the Attorney General, published the "Guidelines on the Use of Firearms by Security Personnel in Protecting U.S. NRC-Regulated Facilities, Radioactive Material, and Other Property" in the *Federal Register* (74 FR 46800), hereafter referred to as the "firearms guidelines." These firearms guidelines were subsequently revised on June 25, 2014 (79 FR 36100).

On June 5, 2013, the NRC issued Enforcement Action (EA) 13-092 "Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161A of the Atomic Energy Act of 1954, as Amended" (ADAMS Accession No. ML13121A459), hereafter referred to as "the designation order." The designation order accomplishes the following: (1) designates an interim class of NRC-licensed facilities as eligible to apply for Section 161A preemption authority; (2) provides a process through which the licensee of each designated facility may apply for Section 161A preemption authority; (3) outlines the type of information that must be addressed in an application for Section 161A preemption authority; and (4) requires the licensee of each designated facility to subject all personnel who have, or will have, access to covered firearms and devices in the performance of official duties, to a firearms background check as specified in Section 161A.c.

The designation order requires, in part, that submittals must be submitted to the NRC for review and approval under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.90, "Application for Amendment of License, Construction Permit, or Early Site Permit" and that the licensee of each designated facility must notify the NRC in writing when a sufficient number of firearms background checks have been completed to staff the facility security organization.

3.0 TECHNICAL EVALUATION

In the submittal, the licensee stated that the request is for preemption authority at DCPD. The NRC staff reviewed Attachment 1 to the designation order and confirmed that DCPD and DCPD-ISFSI are two facilities that are within the limited class of facilities designated by the Commission as eligible to apply for Section 161A preemption authority.

In the submittal, the licensee stated that certain California State-mandated training and qualification requirements would be applicable to DCPD in addition to the more stringent

Commission mandated requirements contained in 10 CFR Part 73, Appendix B, and that existing California state law would require armed personnel at DCPD to obtain and maintain guard registration cards and firearms permits. The licensee further stated that the registration and permit process could potentially result in an inability to staff the security organization should the State of California fail to process renewals in a timely manner.

3.1 Staffing

The designation order requires that all licensees within the designated class of facilities eligible to apply for Section 161A preemption authority shall subject all members of the security organization whose official duties require or will require access to any firearm to a firearms background check. In a letter dated December 18, 2013, the licensee stated that a sufficient number of personnel have completed the required firearms background checks to meet the minimum required staffing level for the DCPD security organization as stated in the NRC-approved DCPD security plan, including the minimum number of armed responder and armed security officer positions required to effectively implement the licensee's protective strategy and to meet applicable fatigue requirements of 10 CFR Part 26. The NRC staff reviewed the NRC approved DCPD security plan and determined that the licensee has identified the minimum number of armed responder and armed security officer positions that must be staffed at all times at DCPD and for which the assigned personnel must successfully complete a firearms background check. The NRC staff further finds that the number of firearms background checks completed by the licensee is consistent with the minimum number of armed responder and armed security officer positions required to implement the DCPD NRC-approved security plan and to meet applicable fatigue requirements.

3.2 Training and Qualifications

The designation order requires the licensee of each designated facility to revise their training and qualification program, as needed, to ensure that affected personnel receive instruction regarding the firearms background check's disqualifying events. Additionally, the designation order requires that licensees must provide training on the continuing responsibility of each individual to promptly notify the licensee of the occurrence of any such event or status. By letter dated May 15, 2014, the licensee responded to an NRC request for additional information and confirmed that site procedures had been revised to address the activities required to instruct all affected personnel on disqualifying events and their continuing responsibility to notify the licensee of a change in their status.

Based on the licensee's May 15, 2014, letter and descriptions contained in the NRC-approved DCPD security plan, the staff finds that the DCPD training and qualification program includes the development and implementation of supporting site procedures needed to ensure that affected personnel receive instruction regarding the types of events that would disqualify the individual from continued access to firearms and the reporting of such events to the licensee.

3.3 Firearms and Devices

Consistent with the firearms guidelines, before authorizing a licensee to use the authority granted by Section 161A, the Commission must determine that the weapons used by licensee

security personnel are necessary in the discharge of their official duties. In its submittal, the licensee provided a description of the types of firearms and devices that are currently in use at DCPD and confirmed that these firearms and devices are used to implement its protective strategy at the facility. The staff reviewed the NRC-approved DCPD security plan to determine whether the use of the firearms and devices identified by the licensee in their submittal is adequately described as being necessary to the performance of official duties by personnel assigned to the armed responder and armed security officer positions at DCPD.

The Commission's regulations require that NRC-licensed facilities develop, implement, and maintain a physical protection system that will protect the special nuclear material that each licensee is authorized by license to possess and use. The physical protection system for an NRC-licensed power reactor will have as its objective to provide high 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. In establishing the specific level of physical protection that must be provided by each licensee at a power reactor facility, the Commission has defined a Design Basis Threat (DBT) of radiological sabotage in 10 CFR 73.1. Consequently, the Commission has assigned specific attributes and capabilities to the DBT of radiological sabotage to include the types of firearms, ammunition, and other devices and equipment that an adversary could use for the purpose of causing radiological sabotage. Conversely, the Commission has determined that it is also appropriate and necessary to ensure that those personnel who are assigned official duties required for the prevention of radiological sabotage at an NRC-licensed power reactor facility, are also provided with the types of firearms, ammunition, and other devices that will provide and ensure the ability of assigned personnel to counter the capabilities that the Commission has assigned to the DBT of radiological sabotage.

The licensee's description of the weapons and their use in the approved security plan identified the types of firearms and devices that are currently in use (specifically, handguns, semiautomatic assault weapons, and large-capacity ammunition feeding devices) and stated that these firearms and devices are necessary to satisfy Commission requirements for the physical protection of the DCPD facility. The staff determined that the description contained in the DCPD security plan is consistent with Commission regulations and the licensee's protective strategy for the DCPD facility, including the types of firearms and devices needed to provide armed responders and armed security officers with the ability to counter the attributes of the DBT of radiological sabotage.

Based on its review, the NRC staff finds that the licensee has demonstrated that the firearms and other devices currently possessed at the DCPD facility are necessary in the performance of official duties required for the physical protection of a facility, radioactive material or other property it owns and operates. The staff also finds that the firearms and devices identified in the submittal are within the types of firearms and devices described in Section 161A.b and the firearms guidelines.

3.4 Firearms Background Check Processes

Firearms background checks are submitted through the NRC to the Federal Bureau of Investigation (FBI's) Criminal Justice Information Services Division and include a check against

the FBI Criminal History database and the FBI National Instant Criminal Background Check System, which was established by Section 103(b) of the Brady Handgun Violence Prevention Act, Public Law 103–159, 107 Stat. 1536. All members of a licensee’s security organization whose official duties require access to firearms and where the licensee has applied for use of preemption authority under Section 161A.b shall be subject to a firearms background check to determine whether the person is prohibited from possessing or receiving a firearm under Federal or State law.

The designation order requires the licensee of each designated facility to establish a program that addresses: (1) the removal of security personnel from duties requiring access to firearms on the receipt of an adverse firearms background check or other disqualifying information; (2) instruction for resolving a delayed response and/or appealing a denied response resulting from a firearms background check; (3) provisions for a firearms background check reinvestigation not to exceed five years; (4) the conduct of a firearms background check reinvestigation for individuals who have had a break in employment from the licensee or applicable security contractor of greater than one week; and (5) self-disclosure requirements and reporting requirements concerning a disqualifying event. Attachment 3 to the designation order contains provisions for establishing processes to ensure that security personnel maintain appropriate qualification and training as well as a process to establish periodic firearms background check re-investigations.

By letter dated May 15, 2014, the licensee confirmed that appropriate processes and procedures have been established to maintain the requirements for the conduct of firearms background checks to include, periodic reinvestigations, instruction for appealing adverse results, notification/reporting requirements for disqualifying events, and the removal of individuals from armed duties when disqualifying information becomes known, as required in Attachment 3 to the designation order.

Based on its review of the NRC-approved DCPD security plan and the licensee’s letter dated May 15, 2014, the NRC staff finds that DCPD has established background check processes and procedures that are consistent with the designation order requirements. In addition, the staff finds that DCPD has established, through these processes and procedures, a method to assure that affected security personnel are not barred under Federal or State law from receiving, possessing, transporting, or using any of the subject firearms or devices used at the facility.

3.5 State Law

Section 161A of the Atomic Energy Act of 1954, as amended, confers on the Commission the authority to permit the security personnel of designated NRC-licensed facilities or certificate holders to transfer, receive, possess, transport, import, and use certain firearms and devices that were not previously permitted to be owned or possessed under Commission authority, notwithstanding local, State, or certain Federal firearms laws, including regulations, that prohibit such actions. The categories and types of firearms, ammunition, and devices that are subject to Section 161A are identified in Section 161A.b.

In its submittal, the licensee states that certain California State laws makes it illegal to possess the types of firearms and devices currently in use at DCPD unless specific exemptions are

approved by the State of California. California Penal Code Section 27535 prohibits the purchase of more than one handgun within a 30-day period. While Section 27535(b) provides for exemptions from this prohibition, DCPD does not qualify for any of these exemptions. Similarly, California Penal Code Sections 30500 through 31335, Sections 32310 through 32390, and Sections 32650 through 32670 set forth the restrictions on the possession and use of semi-automatic assault weapons and high capacity magazines. It is illegal for any person to possess assault weapons unless they fall within one of the enumerated exceptions in Sections 30600 and 30605. DCPD does not fall into any of these exceptions.

The security personnel at DCPD were previously able to possess hand guns and semi-automatic assault weapons because of an exemption granted by the California Attorney General. In a letter dated October 22, 2002, from the then Deputy Attorney General, Firearms Division, for the state of California (Attachment 6 to the submittal (ADAMS Accession No. ML13268A398)) that a determination was made that DCPD and the DCPD-ISFSI are exempt from the restrictions imposed by California. In this letter, the Deputy Attorney General for the state of California states that: "any use of weapons and ammunition authorized by Congress and approved for use by the director or head of the particular federal agency involved is authorized by the State of California." In this letter, the Deputy Attorney General for the State of California further states that:

It is my understanding that you have the requisite authority from Congress to defend nuclear power plants pursuant to the Atomic Energy Act and the Nuclear Regulatory Commission has approved the use of assault weapons and tracer ammunition in the vital defense of Diablo Canyon Nuclear Power Plant from terrorism. Consequently, the Attorney General of California has no problem with your security force using assault weapons and tracer ammunition.

In its submittal, the licensee stated that since the issuance of the 2002 letter, a new administration has taken office in California. Based on communications between the licensee and the California Department of Justice, the current California Attorney General does *not* plan to issue a new letter to DCPD stating that the determination made in the 2002 letter remains valid. As a result, the licensee has been informed by its firearms suppliers that the exemption in the 2002 letter will no longer be honored.

The status of the 2002 exemption letter remains unclear since it has not been formally rescinded by the current California Attorney General. However, the lack of a written exemption from the current California Attorney General prevents the licensee's security personnel from having access to firearms and devices needed to implement the licensee's protective strategy at DCPD, since firearms dealers are not willing to honor the 2002 exemption letter. Consequently, DCPD is not able to purchase handguns at a sufficient rate to meet Commission requirements in 10 CFR 73.55(k)(2), to maintain security equipment in a manner that ensures security equipment is in sufficient supply, is maintained in operable condition, and is readily available to perform its required function when needed. Similarly, DCPD is presently unable to purchase new semi-automatic assault rifles to replace or maintain the current number of weapons or to increase the number of semi-automatic assault rifles needed to accommodate changes in the DCPD defensive strategy.

In the submittal, the licensee discussed certain State-mandated training and qualification requirements that would require the armed personnel at DCPD to obtain and maintain guard registration cards and firearms permits. The licensee speculated that these requirements could prevent adequate staffing at DCPD. However, the licensee did not provide evidence that the registration and permitting processes prohibits access to weapons used by the licensee's security force at this time.

Based on the staff's review of the licensee's submittal, the NRC staff finds that: the firearms and devices identified by the licensee in the submittal are currently in use at DCPD in accordance with the licensee's NRC-approved security plans; the licensee uses the identified firearms and devices in the performance of official duties required for the protection of an NRC-designated facility and associated special nuclear materials as described in the DCPD protective strategy; and the firearms and devices identified in the submittal are subject to current State law that would restrict the possession and use of such firearms, weapons, and devices at DCPD. Given this lack of regulatory certainty, and the licensee's inability to acquire the weapons at a rate needed to implement its protective strategy, the staff has determined that the licensee has demonstrated a need for preemption authority.

4.0 CONCLUSION

Based on its review of the licensee's submittal, the NRC staff has determined that the firearms, ammunition, and devices utilized by the licensee are consistent with the types of firearms and devices described in Section 161A.b and that the request was submitted in accordance with the requirements of the designation order, Section 161A, and applicable Commission regulations. Accordingly, the staff recommends that DCPD be approved for preemption authority.

5.0 REFERENCES

1. Allen, Barry S., Pacific Gas and Electric Company, letter to U.S. Nuclear Regulatory Commission, "License Amendment Request 13-04 – Application for U.S. Nuclear Regulatory Commission Authorization to Use Preemption Authority Granted Under Provisions of Section 161A of the Atomic Energy Act of 1954, as Amended," dated September 24, 2013 (ADAMS Accession No. ML13268A398).
2. Allen, Barry S., Pacific Gas and Electric Company, letter to U.S. Nuclear Regulatory Commission, "Response to NRC Request for Additional Information Regarding Request for Preemption Authority," dated May 15, 2014 (ADAMS Accession No. ML14135A379).
3. U.S. Nuclear Regulatory Commission, "Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161a of the Atomic Energy Act of 1954, as Amended," Commission Order EA-13-092, dated June 5, 2013 (ADAMS Accession No. ML13121A459).
4. Section 653 of the Energy Policy Act of 2005, Pub. L. 109-58 (119 Stat 811).

5. Section 161A, "Use of Firearms by Security Personnel," of the Atomic Energy Act of 1954 (42 United States Code (U.S.C.) § 2201a), as added through Section 653 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 811 (August 8, 2005) and as amended. 16.
6. *U.S. Code of Federal Regulations*, "Application for Amendment of License, Construction Permit, or Early Site Permit," Section 50.90, Chapter I, Title 10, "Energy" (10 CFR 50.90).
7. *U.S. Code of Federal Regulations*, "Managing Fatigue," Subpart I of "Fitness for Duty Programs," Part 26, Chapter I, Title 10, "Energy" (10 CFR 26).
8. U.S. Nuclear Regulatory Commission, "Notice of Issuance of Guidelines on Use of Firearms by Security Personnel; Notice of Effective Date of Statute," Vol. 74, No. 175, September 11, 2009, pp. 46800–46806 (74 FR 46800).
9. Section 922, "Unlawful Acts," and Section 925, "Exceptions: Relief from Disabilities," of Title 18, "Crime and Criminal Procedures," of the United States Code (18 U.S.C. §§ 922 and 925), as added through Section 902 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90 351, 82 Stat. 226 (June 19, 1968), and as amended, particularly through the Brady Handgun Violence Prevention Act, Pub. L. 103 159, 107 Stat. 1536 (November 30, 1993).
10. *U.S. Code of Federal Regulations*, "Physical Protection of Plants and Materials," Part 73, Chapter I, Title 10, "Energy" (10 CFR 73).
11. *U.S. Code of Federal Regulations*, "Packaging and Transportation of Radioactive Material," Part 71, Chapter I, Title 10, "Energy" (10 CFR 71).