

Views of the Commission

Following the Fukushima Dai-ichi accident in Japan, the NRC embarked on a program of work that has taken eight years and involved a wide variety of people from the agency, from the regulated industry and from our interested stakeholders. The Commission's action on this final rule provides a holistic conclusion to a large portion of this work, which has already resulted in undeniable safety improvements throughout the operating power reactor fleet in the United States. Other work continues outside of the rulemaking context; there is some analysis to determine whether additional safety improvements are appropriate and further evaluation is ongoing of the actual risk posed by external hazards needed to make such determinations. This work is being performed and will continue in the disciplined, site-specific processes that are in use and are appropriate for resolving these issues. The Commission's action on the final rule does not undermine, stop, or modify these risk-informed, site-specific activities.

As our colleagues note, the final rule omits many provisions of the draft final rule; we did not arrive at this result lightly. Rather, as discussed in our votes and fully explained over the course of the lengthy revisions to this document, after carefully considering whether imposition of the underlying requirements would comply with our existing regulations, specifically the Backfit Rule in 10 CFR 50.109, we supported only those provisions for which such compliance was substantiated by the staff's analysis in the decision record. In that consideration, we primarily analyzed whether the new requirements were necessary for adequate protection or provided a cost-justified, substantial safety benefit. In general, we concluded that the requirements already imposed by the Commission by the Mitigation Strategies Order following the Fukushima Dai-ichi accident are sufficient and no new information in the record before us, including information developed by the staff or submitted by the public, indicates otherwise.

Our colleagues also claim that the Staff Requirements Memorandum (SRM) on COMSECY-14-0037, "Integration of Mitigating Strategies for Beyond-Design-Basis External Events and the Reevaluation of Flooding Hazards," established that it is necessary that the mitigation strategies under this final rule address the reevaluated seismic and flooding hazards to ensure adequate protection of public health and safety. To the extent our colleagues suggest that SRM-COMSECY-14-0037 redefined the requirements needed for adequate protection stated in the March 2012 Mitigation Strategies Order, that suggestion is inconsistent with the agency's long standing practice and with applicable procedural and safety requirements.

Staff Requirements Memoranda provide direction to the agency staff from the Commission and are not appropriate vehicles for imposing requirements on licensees and applicants. Under the Administrative Procedure Act, such vehicles are generally regulations and orders. Subsequent to COMSECY-14-0037, neither the Commission nor the staff undertook any additional action to modify and re-issue the March 2012 Mitigation Strategies Order or to issue a new order as was done for the hardened containment venting system orders when the NRC concluded venting systems should be capable of use in a severe accident. It would be inappropriate and without precedent for the agency to establish with finality what is

required of our licensees in a process lacking either the hearing rights of our process for issuing orders or the public notice and comment of our deliberative rulemaking process.

Moreover, our colleagues' suggestion regarding adequate protection finds no support within the four corners of the SRM. As noted in our underlying votes, seeking clear direction within the plain text of that document is difficult. The SRM did not approve the entirety of the staff's planned approach and in our view should not be read to approve the staff's bases for their plan. Indeed, COMSECY-14-0037 itself did not address the issue of the reevaluation of seismic hazards.

Most importantly, the assertion that the Commission made an adequate protection determination in its action on COMSECY-14-0037 is inconsistent with the Commission's conduct in the wake of the issuance of the SRM. Under long-standing agency policy, when the NRC identifies a need to impose a new or revised requirement to maintain a reasonable assurance of adequate protection, the agency must next determine whether an "imminent threat" to public health and safety exists. If so, the agency must implement the requirement immediately. In this case, the record surrounding SRM-COMSECY-14-0037 does not contain any evidence that the Commission or staff conducted such an imminent threat assessment. The lack of such an assessment severely undercuts any suggestion that the SRM somehow expanded the requirements in our March 2012 Mitigation Strategies Order to maintain a reasonable assurance of adequate protection.

Moreover, to the extent our colleagues observe that SRM-COMSECY-14-0037 directed the staff to include certain provisions in a draft rule, the absence of those provisions in the final rule is not surprising or problematic. Rather, this absence is a normal part of the rulemaking process. As the Supreme Court has observed, "Since [a] proposed rule [is] simply a proposal, its presence mean[s] that the [regulator is] *considering* the matter; after that consideration the [regulator] might choose to adopt the proposal or to withdraw it" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (emphasis in the original). We certainly have the option, as we have exercised here, to adopt certain aspects of a proposal and to reject others.

Our colleagues appear to suggest that we are ignoring the actual flooding and earthquake hazards that our licensees have determined could occur at our nation's nuclear power plants. This is not the case; we are simply choosing to complete the Commission-directed site-specific process already underway rather than to enact additional requirements on a generic basis. The hazard reevaluations conducted by licensees at the Commission's request under 10 CFR 50.54(f) have been developed using the best available methods for siting nuclear power plants and include conservative assumptions and margin sufficient to show that the reevaluated hazards will not affect the plants. Work continues on the assessment of the results of these reevaluations to determine just what the actual hazards to the plants are on a site-specific basis. To facilitate these assessments, the Commission specifically directed the staff, in the course of determining what regulatory actions are appropriate, to "introduce more realism for the purpose of identifying potential safety enhancements for operating reactors" (SRM-COMSECY-14-0037) and "continue to look for additional opportunities to address any over

conservatism in the flood hazard evaluations and to streamline the process as additional lessons are learned” (SRM-COMSECY-15-0019). The staff continues to make good progress in this area as it completes its work under § 50.54(f) to determine whether individual licenses “should be modified, suspended, or revoked.” These efforts are, in our view, sufficient to provide reasonable assurance of adequate protection at each facility.

Finally, our colleagues note the lack of specific requirements in this final rule for items that have already been resolved in the nuclear industry’s response to the Mitigation Strategies Order. This is, however, in keeping with our regulatory processes. Our Backfit Rule itself provides that “[i]f there are two or more ways to achieve compliance with a license or the rules or orders of the Commission, or with written licensee commitments, or there are two or more ways to reach a level of protection which is adequate, then ordinarily the applicant or licensee is free to choose the way which best suits its purposes” (10 CFR 50.109(a)(7)). Although we may certainly constrain the manner in which applicants or licensees develop their mitigation strategies to comply with this final rule, we will not do so absent a sufficiently documented basis. We have not been provided in the record before us – or anywhere else – a basis for artificially constraining the means and methods of future compliance as our colleagues would have us do. We have confidence that all of the nation’s currently operating power reactors are capable of complying with the requirements of this final rule using industry-developed and NRC-approved guidance because they have been able to achieve compliance with the Mitigation Strategies Order, which is made generically applicable by this Commission action.

Chairman Kristine L. Svinicki, Commissioners Annie Caputo and David A. Wright