



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 3, 2019

The Honorable Thomas R. Carper
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Senator Carper:

On behalf of the U.S. Nuclear Regulatory Commission, I am responding to your letter dated April 1, 2019, requesting information regarding the Mitigation of Beyond-Design-Basis Events (MBDBE) rulemaking. In light of the issues raised regarding the final form of the rule, this letter reflects the views of the majority of the Commission supporting that outcome; Commissioner Baran will reply separately. I am particularly interested in addressing the concerns you expressed that the final rule unnecessarily backtracks from critical safety requirements to protect U.S. nuclear reactors against the flooding and seismic hazards that they face today and in the future. Rather than eliminate existing requirements, the final MBDBE rule incorporates all of the requirements the Commission previously imposed on licensees through orders regarding mitigating strategies for beyond-design-basis events following the Fukushima Dai-ichi accident. The Commission previously found these requirements necessary to ensure adequate protection of public health and safety, and they are all included in the final rule.

The proposed MBDBE rule did contain a number of additional requirements, some of which related to protecting equipment needed to implement mitigating strategies from reevaluated external hazards. The final rule did not contain these requirements because the Commission determined that ongoing staff efforts to reevaluate external hazards at every facility and take appropriate site-specific action, if warranted by the reevaluation, sufficiently addressed this issue. These site-specific efforts include the consideration of increased flooding risks from climate change or other causes. Should the site-specific reevaluations of external hazards uncover a need to take further regulatory action to maintain a reasonable assurance of adequate protection or to achieve a substantial and cost-justified increase in safety, in light of new information regarding climate change or other information, the Commission will do so.

I would like to emphasize that the Commission's actions were not taken lightly and did not ignore the staff recommendations provided in the proposed and draft final MBDBE rules. Instead, the Commission executed its duties as a collegial, deliberative body to consider carefully each potential requirement that had been recommended by the staff in order to determine whether the imposition of the requirements was appropriate under the authorities granted to the Commission in its role as the accountable policy and decisionmaking body holding the authority and discretion in this area of regulation. My deliberations on this matter were informed by discussions, including communications under the NRC's Open Door Policy, with several senior career staff members who expressed concerns that the proposed additional requirements were neither necessary nor warranted.

While no comments in the public comment record specifically raised the concern that it was inappropriate to include the omitted requirements in the MBDBE rule, the Commission independently reached this conclusion by applying the agency's Backfit Rule to the proposed new requirements. The Backfit Rule, a long-standing rule established to ensure a high level of rigor in the NRC's regulatory process, generally requires that all new requirements either be necessary for adequate protection of public health and safety or result in a cost-justified substantial increase in safety. In this case, the Commission found that for the components of the proposed MBDBE rule that it did not include in the final MBDBE rule, the rulemaking record did not contain sufficient information to conclude that either standard had been met. Indeed, the technical staff drafted the proposed MBDBE rule to facilitate this result, as they committed to do in a notation vote paper, SECY-14-0046, "Fifth 6-Month Status Update on Response to Lessons Learned from Japan's March 11, 2011, Great Tōhoku Earthquake and Subsequent Tsunami," as follows:

The staff understands that different portions of the consolidated rulemaking will have different backfitting justifications under 10 CFR 50.109, and accordingly portions of the consolidated rulemaking may not be supportable in accordance with the provisions of 10 CFR 50.109.... As such, the staff intends to construct the consolidated rulemaking with this in mind, and enable any requirements that do not meet the backfitting or issue finality requirements to be bifurcated from the consolidated rulemaking at the final rule stage.

Thus, as with any rule, the agency contemplated the possibility that not all of the requirements in the proposed MBDBE rule would remain in the final version because those requirements could not meet the terms of the Backfit Rule. Therefore, the absence of those provisions in the final rule is not unusual, rather it is a result the agency clearly anticipated in preparing the rule. The Supreme Court has explicitly recognized that agency determinations to remove some provisions of a proposed rule in a final rule is a regular feature of the administrative law process.

The Commission did so following its well-established processes. For items the staff suggested could be found to be necessary for adequate protection of public health and safety, such as the actions to address beyond-design-basis flooding and seismic hazards, the Commission followed its statutory mandate to consider and determine independently the set of requirements needed to ensure adequate protection. As noted above, informed in part by the ongoing staff activities to reevaluate seismic and flooding hazards at all sites, the Commission found that the provisions of the MBDBE rule that went beyond the requirements of the orders imposed in the aftermath of Fukushima were, in its expert judgment, not needed to provide reasonable assurance of adequate protection of public health and safety. Moreover, the Commission considered the rulemaking record provided by the staff and also determined that it did not support a finding that those measures would nevertheless provide a cost-justified, substantial increase to health and safety. Thus, because those requirements did not meet the terms of the Backfit Rule, the Commission removed them from the final MBDBE rule. Moreover, the Commission's finding is further buttressed by the extensive, systematic, and disciplined process the agency took to evaluate the Fukushima accident and make any necessary regulatory changes as a result of that evaluation. A description of this process is provided in Enclosure 1.

Responses to your specific inquiries, including non-public documents, are provided as Enclosure 2. We respectfully request that these non-public documents be held in confidence with access limited to you and your staff.

Please feel free to contact me or have your staff contact Eugene Dacus, Director of the Office of Congressional Affairs, at (301) 415-1776, if you have any questions or need additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Svinicki', with a stylized, flowing script.

Kristine L. Svinicki

Enclosures:
As stated

cc: Senator John Barrasso

Identical letter sent to:

The Honorable Thomas R. Carper
Committee on Environment and Public Works
United States Senate
Washington, DC 20510
cc: Senator John Barrasso

The Honorable Sheldon Whitehouse
Subcommittee on Clean Air and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510
cc: Senator Mike Braun