

The Committee unanimously recommended these changes at various public meetings and interested parties had an opportunity to provide input. Also, Florida avocado producers and handlers are aware of these changes. All written comments timely received will be considered before a final determination is made on this matter.

#### List of Subjects in 7 CFR Part 915

Avocados, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 915 is proposed to be amended as follows:

#### PART 915—AVOCADOS GROWN IN SOUTH FLORIDA

1. The authority citation for 7 CFR part 915 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Two new paragraphs (d) and (e) are added to § 915.305 to read as follows:

##### § 915.305 Florida Avocado Container Regulation 5.

\* \* \* \* \*

(d) Avocados handled for the fresh market in containers other than those authorized under § 915.305(a) and shipped to destinations within the production area must be packed in 1-bushel containers.

(e) All containers in which the avocados are packed must be new, and clean in appearance, without marks, stains, or other evidence of previous use.

2. In § 915.306, paragraphs (a)(1), (a)(6) and (a)(7) are revised to read as follows:

##### § 915.306 Florida avocado grade, pack, and container marking regulation.

(a) \* \* \*

(1) Such avocados grade at least U.S. No. 2, except that avocados handled to destinations within the production area may be placed in containers with avocados of dissimilar varietal characteristics.

\* \* \* \* \*

(6) Such avocados when handled in containers authorized under § 915.305, except for those to export destinations, are marked once with the grade of fruit in letters and numbers at least 1 inch in height on the top or one side of the container, not to include the bottom.

(7) Such avocados when handled in containers other than those authorized under § 915.305(a) for shipment to destinations within the production area are marked once with the grade of fruit in letters and numbers at least 3 inches in height on the top or one side of the container, not to include the bottom.

Each such container is also to be marked at least once with either the registered handler number assigned to the handler at the time of certification as a registered handler or with the name and address of the handler.

\* \* \* \* \*

Dated: September 17, 2008.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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#### 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 September 23, 2008.

**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 e-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 Documents 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](mailto:PDR.resource@nrc.gov).

##### FOR FURTHER INFORMATION CONTACT:

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##### 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. 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. \* \* \*" While licensees must make a good faith effort to secure the participation in emergency preparedness demonstrations of 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 such entities are at liberty to refuse to participate. This recognition is based on the fact that the NRC does not have the authority to require offsite authorities 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.

#### Commissioner Gregory B. Jaczko's Dissenting View on the Commission's Decision To Deny the Petition for Rulemaking Concerning Integrated Response

I respectfully disagree with the decision to deny the petition for rulemaking as included in this **Federal Register** notice. The petitioners are asking for a more formal approach to ensuring licensees, local, State, and federal officials are closely coordinated to respond to a range of potential security events. The requested approach is modeled on the emergency preparedness exercises which currently take place, and I believe this proposal warrants further consideration.

While it is certainly true that the NRC does not have the authority to require offsite federal agencies to participate in nuclear power reactor exercises, it is also true that our emergency preparedness regulations clearly read as if we do—for example: "Offsite plans for each site *shall be exercised* biennially *with full participation by each offsite authority having a role* under the radiological response plan" (10 CFR Part 50 Appendix E Section IV.F.2.c., emphasis added), and "A *full participation exercise* which tests as much of the licensee, State, and local emergency plans as is reasonably achievable without mandatory public participation *shall be conducted* \* \* \*" (10 CFR Part 50 Appendix E Section IV.F.2.a., emphasis added). As footnote 4 of that section makes clear, these exercises are for the purpose of "testing major observable portions of the onsite and offsite emergency plans and *mobilization of State, local and licensee personnel* and other resources in sufficient numbers to verify the capability to respond to the accident scenario." (Id., emphasis added)

10 CFR 50.47(c) does include provisions for determining that reasonable assurance exists even if States and local officials refuse to

participate in exercises. Thus it is implicit that we can not require their participation, but at the least we can certainly fully encourage it. Clearly, the regulations could be modified to require licensees to participate in Federal and State integrated response exercises that Federal, State and local agencies decide to pursue. They could also be drafted in such a way as to encourage interagency participation in these types of exercises, if a policy decision was reached concluding that was a good approach.

The NRC is currently participating in integrated response initiatives with the Homeland Security Department and the Federal Bureau of Investigation to strengthen the ability of emergency response organizations and law enforcement around nuclear power plants to respond to events including potential beyond-DBT threats. The challenge to further pursuing integrated response exercises is not in securing the participation of government agencies which are eager to make additional progress, but rather with the willingness of the NRC's licensees to volunteer support for those efforts. That is a challenge that can be addressed by exercising the agency's authorities to compel such participation on the part of licensees. The NRC should pursue such a requirement if a substantive analysis by agency staff and the results of a public rulemaking determine it would provide additional protection to the common defense and security.

Rather than searching for a legalistic reason to dismiss the petition, the agency would be much better served by analyzing the substance of the proposal and basing its decision on the petition for rulemaking on the merits. It is especially awkward to hang our hats on a lack of authority to pursue the petition when the legal basis for our authority over integrated response so closely parallels our authority in the emergency preparedness arena. Such an approach risks creating challenges to the important radiological emergency preparedness program we now have in place.

**The Majority View of the Commission Regarding the Denial of a Petition for Rulemaking Submitted by David Lochbaum on Behalf of Project on Government Oversight and the Union of Concerned Scientists (PRM-50-83)**

The Commission majority does not share Commissioner Jaczko's dissenting view on the denial of PRM-50-83. The petitioner requested that the NRC add an appendix (or comparable regulation) similar to Appendix E of 10 CFR Part 50 which, the petitioner asserts, requires offsite entities having a role under the

radiological response plan, to participate in biennial exercises designed to verify the capability of these entities to respond to the accident scenario. The petitioner has misconstrued Appendix E which, in fact, recognizes the NRC's lack of authority to require offsite entities to participate in biennial exercises. While Appendix E states in part that it requires nuclear power plant licensees to involve offsite authorities having a role in the emergency preparedness plan in biennial emergency preparedness demonstrations, it further states that "[t]he participation of State and local governments in an emergency exercise is not required to the extent that the applicant has identified those governments as refusing to participate further in emergency planning activities. \* \* \*" (10 CFR Part 50, Appendix E Section IV.F.2.h.).

The Commission majority points out that the NRC does not have the statutory authority to require the participation of offsite authorities and that the NRC cannot confer such authority upon itself through rulemaking. We have reviewed the substance of the petition and are satisfied that adequate protection is, indeed, provided by the current integrated response framework. Therefore, we find no basis for granting PRM-50-83 or for initiating a rulemaking that would purport to require offsite authorities to participate in nuclear power plant licensees' exercises or to "encourage" such participation.

The lead role for coordinating offsite security responses was assigned to the Department of Homeland Security (DHS) (Homeland Security Presidential Directive-7, "Critical Infrastructure Identification, Prioritization, and Protection"). To that end, the NRC has worked with DHS and other agencies 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 which has resulted in the identification of 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 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," which include nuclear power plants. In addition, the NRC has helped to 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. The NRC continues to maintain regulatory attention on the effectiveness of emergency preparedness as extended to security-related scenarios. The NRC 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. 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.

As stated in our votes on this matter, we do not question the important role that offsite federal, state and local authorities play in a nuclear power plant's ability to successfully respond to attempted radiological sabotage greater than the design basis threat. The Commission majority believes that the current framework provides reasonable assurance that adequate protective measures can and will be taken in the event of radiological sabotage.

Dated at Rockville, Maryland, this 17th day of September 2008.

For the Nuclear Regulatory Commission.

**Annette L. Vietti-Cook,**

*Secretary of the Commission.*

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