



Federal Emergency Management Agency

Washington, D.C. 20472

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MEMORANDUM FOR: Dennis Kwiatkowski
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SUBJECT: Effect of Decisions of the Nuclear Regulatory Commission,
Atomic Safety and Licensing Boards, and Atomic Safety
and Licensing Appeal Boards on FEMA's Radiological
Emergency Preparedness Program

You recently requested that the Office of General Counsel provide an opinion on the effect on FEMA's REP program on a nation-wide basis of decisions rendered on off-site emergency planning issues, in particular licensing proceedings by the Nuclear Regulatory Commission or its Atomic Safety and Licensing Boards or Atomic Safety and Licensing Appeal Boards. Specifically, the question is whether FEMA is legally required to alter its REP planning standards and guidance on a nationwide basis to conform with the decision on an offsite emergency planning issue rendered by the NRC, or its licensing and appeal boards, in a licensing proceedings regarding a particular site.

After researching the applicable regulations and consulting with the Office of General Counsel of the NRC, I am able to say that a decision of an individual Atomic and Safety Licensing Board applies only to the particular site that was the subject of the ASLB proceedings and has no precedential or binding effect on FEMA on a nationwide basis nor, for that matter, on other ASLBs conducting proceedings regarding other sites. On the other hand, decisions regarding emergency planning of the full Commission and decisions of Atomic Safety and Licensing Appeal Boards that are not reversed by the Commission are binding upon FEMA on a nationwide basis.

The basis for this opinion is set forth below, as well as recommendations for ensuring to the maximum extent possible that FEMA's policy judgments on off-site emergency planning issues will be legally sustained.

The Relationship of FEMA and the NRC in Off-Site Emergency Planning

Congress has required that the NRC consult with FEMA in establishing standards for State or local radiological emergency response plans. Publ. L. No. 96-295, Sec. 109(a) (1980). Under the Memoranda of Understanding between FEMA and the NRC regarding off-site emergency preparedness for commercial nuclear power plants (50 FR 15485, April 18, 1985, and 45 FR 82713, December 18, 1980), FEMA provides to the NRC for use in the NRC licensing process FEMA's findings and determinations regarding the adequacy of off-site emergency planning. However, in the licensing process NRC, and not FEMA, has the final decision-making authority with respect to the adequacy of offsite emergency planning. See, Massachusetts v. Nuclear Regulatory Commission, 878 F.2d 1516 (1st Cir. 1989) (regarding Pilgrim Nuclear Power Plant).

FEMA has independent authority in its process under 44 C.F.R. 350 to determine the adequacy of off-site emergency planning of state and local governments. Arguably, FEMA could adopt different standards for its 350 review of the adequacy of off-site emergency planning than the standards NRC uses in the licensing process. However, in light of NRC's ultimate authority over offsite emergency planning in making licensing determinations, it would make no sense for FEMA to adhere to policies contrary to those adopted by the Commission in regard to standards for emergency planning and preparedness and FEMA has never done so. The issue for FEMA, in regard both to 350 findings and interim findings submitted to NRC pursuant to the MOU, thus is which of the various NRC adjudicatory bodies have the authority to issue decisions that have nation-wide applicability and are binding upon all of the Commission's adjudicatory boards and upon the NRC staff.

The Nuclear Regulatory Commission and the Atomic Safety and Licensing Appeal Board Panel

The Nuclear Regulatory Commission, composed of five members appointed by the President and confirmed by the Senate, has authority over all aspects of the regulation of commercial nuclear power, including rulemaking and adjudication of licensing proceedings. Atomic Energy Act, 42 U.S.C. Sec. 5841 et seq. In making rulings in individual adjudicatory proceedings, the Commission often provides case-by-case guidance on its evolving regulatory policies and these ruling are binding upon all the entities of the Commission, including the NRC Staff, the Atomic Safety and Licensing Boards, and the Atomic Safety and Licensing Appeal Boards. See 10 C.F.R. Sec. 2.764.

The Atomic Safety and Licensing Appeal Board Panel has been delegated much of the adjudicatory functions of the full Commission, and the Atomic Licensing Appeal Boards (ASLABs) essentially act in place of the Commission. The Commission has authorized the Atomic Safety and Licensing Appeal Boards "to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission," 10 C.F.R. Sec. 2.785, including appeals to the Commission of initial decisions of Atomic Safety and Licensing Boards. Decisions of an ASLAB are final and have the same effect as a ruling of the Commission itself, unless the Commission on its own decides to review an ASLAB decision or, upon request of a party, agrees to grant review. Thus, ASLAB decisions that are not reviewed by the full Commission have binding effect upon the NRC staff and the Atomic Safety and Licensing Boards, and likewise should be considered to have binding effect upon FEMA's REP program.

The Atomic Safety and Licensing Board Panel

Under Commission rules, Atomic Safety and Licensing Boards, chosen from the Atomic Safety and Licensing Board Panel, are authorized to conduct hearings and receive evidence and to render initial decisions in licensing proceedings. 10 C.F.R. Sec. 2.759-2.761. If not appealed or reviewed by the Commission on its own initiative, an initial decision of an ASLB becomes the final decision of the Commission on the matter within 45 days after its date of issuance. 10 C.F.R. Sec. 2.760. However, unlike decisions of ALABs, "unappealed licensing board conclusions on legal issues do not have precedential effect." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423 (1988); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978). Consultation with the Office of General Counsel of the NRC has confirmed that the NRC Staff considers that decisions of individual licensing boards have no binding effect on the Staff or upon other licensing boards. We can thus conclude that an individual licensing board decision has no nationwide effect on FEMA's REP program, and affects only the particular site that was the subject of the decision.