

TECHNICAL EVALUATION
RELATED TO FACILITY LICENSE NO. SNM-42
BABCOCK AND WILCOX NUCLEAR OPERATIONS GROUP, INC.
BABCOCK AND WILCOX NUCLEAR OPERATIONS GROUP-LYNCHBURG
DOCKET NO. 70-27

1.0 INTRODUCTION

By application dated April 24, 2014, as supplemented by letters dated December 16, 2013, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14008A198), and July 25, 2014 (ADAMS Accession No. ML14209A993), Babcock and Wilcox Nuclear Operations Group, Inc. (B&W NOG or licensee) submitted an application to the U.S. Nuclear Regulatory Commission (NRC) requesting authorization to use the preemption authority granted to the Commission under Section 161A of the Atomic Energy Act of 1954 (AEA), as amended at the Babcock and Wilcox-Lynchburg (B&W NOG-L) facility. Use of Section 161A authority would permit the security personnel at B&W NOG-L, to transfer, receive, possess, transport, import, and use certain firearms and large capacity ammunition feeding 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 its application, the licensee indicated that it is requesting preemption authority as a precursor to requesting enhanced weapons authority. If approved by the Commission, the granting of preemption authority would be applicable to the firearms and devices presently in use at B&W NOG-L in accordance with the B&W NOG-L NRC-approved security plans. The licensee indicated that the 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 security plans for B&W NOG-L. In the submittal, the licensee identifies the existing Federal firearms laws for which preemption authority is requested.

The armed security officers at B&W NOG-L are deputized law enforcement officers and are, therefore, authorized to possess and use enhanced weapons at the B&W NOG-L facility. However, the ownership of the weapons stays with the Sheriff's department, not the licensee. This arrangement is in writing, and was approved by the Bureau of Alcohol, Tobacco, Firearms and Explosives' General Counsel. This arrangement allows the security personnel to utilize their existing weapons as part of the licensee's protective strategy at the B&W NOG-L facility. However, because of the nature of this arrangement, there is uncertainty about what may happen in the future. For example, if the Sheriff's Department decided not to deputize the B&W NOG-L security officers, Federal law (Title 18, United States Code (U.S.C) 922(o)(1)(A)) would prohibit the transfer, possession, and use of enhanced weapons at B&W NOG-L. Therefore, the licensee would not be able to rely upon the weapons needed to implement its protective strategy as required by applicable NRC regulations. B&W NOG has indicated to staff that it is requesting preemption authority to address this regulatory uncertainty.

2.0 APPLICABLE REQUIREMENTS

Section 653 of the Energy Policy Act of 2005, Public Law 109-58 (119 Stat 811), amended the AEA, by adding Section 161A [42 U.S.C. § 2201a]. 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 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 applications must be submitted to the NRC for review and approval under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) 70.34, “Application for Amendment of License, Construction 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

By letter dated April 24, 2014, as supplemented by letters dated December 16, 2013, and July 25, 2014, the licensee applied for authorization to use the preemption authority granted to the Commission under Section 161A of the AEA. In its review of the licensee's application, the NRC staff reviewed Attachment 1 of the Designation Order and confirmed that B&W NOG-L is one of the limited class of facilities designated by the Commission as eligible to apply for Section 161A preemption authority.

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 16, 2013, the licensee stated that a sufficient number of security personnel have completed the required firearms background checks to meet the minimum required staffing level of the B&W NOG-L security organization as stated in the B&W NOG-L NRC-approved security plans. The NRC staff reviewed the B&W NOG-L NRC-approved security plans, and found that the licensee has subjected the required security personnel to a firearms background check. The NRC staff further found that the minimum number of armed responder and armed security officer positions required to effectively implement the licensee's protective strategy have successfully completed the firearms background check. The NRC staff confirmed that the licensee submitted this notification under oath and affirmation.

3.2 Training and Qualifications

The Designation Order requires the licensee of each designated facility to revise its training and qualification program to ensure that applicable security personnel receive instruction regarding firearms background check disqualifying events that would prevent them from possessing or using firearms. The Designation Order further 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. In a letter dated July 25, 2014, the licensee responded to an NRC request for additional information and confirmed that site procedures were revised to address the requirement to instruct all affected personnel on disqualifying events and their ongoing responsibility to notify the licensee of a change in their status.

The NRC staff reviewed the B&W NOG-L NRC-approved training and qualification plan to assess whether the licensee adequately addressed how affected personnel are trained on the types of events that would disqualify them from possession and use of firearms. Based on this review, the NRC staff found that the licensee has revised the B&W NOG-L training and qualification program, including site procedures, to ensure that affected personnel receive instruction regarding the types of events that would disqualify the individual from continued access to firearms and devices and their continuing responsibility to report such events and status 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 list of the types of firearms and devices that are currently in use at B&W NOG-L and confirmed that these firearms and devices are used to implement its protective strategy at the facility. The licensee also addressed the types of duties and responsibilities that are required of personnel who are assigned armed duties. The NRC staff reviewed the B&W NOG-L application and the licensee's NRC-approved security plans to determine if the use of the firearms and devices identified by the licensee are necessary in the performance of official duties by personnel assigned to the armed responder and armed security officer positions at B&W NOG-L.

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 fuel cycle facility 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 fuel cycle facility, the Commission has defined a Design Basis Threat (DBT) of radiological sabotage and a DBT of theft or diversion in 10 CFR 73.1. Consequently, the Commission has assigned specific attributes and capabilities to the DBT of radiological sabotage and DBT of theft or diversion to include the types of firearms, ammunition, and other devices and equipment that could be used for the purpose of causing radiological sabotage or theft or diversion. 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 physical protection of special nuclear materials and the prevention of radiological sabotage and theft or diversion at an NRC-licensed 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 both DBTs.

The description of the weapons and their use in the approved security plan was reviewed by the staff and was determined to be consistent with Commission regulations and the licensee's approved protective strategy for the B&W NOG-L 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 both DBTs.

Based on its review, the NRC staff finds that the licensee has demonstrated that its use of the firearms and other devices that it currently possess 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 NRC 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) 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. A person that receives, possesses, transports, imports, or uses a firearm, ammunition, or a device under Section 161A.b shall be subject to a 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 upon the receipt of disqualifying information or an adverse firearms background check; (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 re-investigation not to exceed five years; (4) the conduct of a firearms background check re-investigation for individuals who have had a break in employment from the licensee or applicable security contractor of greater than 1 week; and (5) self-disclosure requirements and notifications concerning a disqualifying event. In a letter dated July 25, 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, the removal of personnel from armed duties, notification/reporting requirements, and periodic reinvestigation, as required in Attachment 3 to the Designation Order. Attachment 3 to the Designation Order contains provisions from the Firearms Guidelines 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.

Based on the licensee having confirmed the development and implementation of processes and/or procedures governing the requirements for the conduct of firearms background checks, including instruction specific to appealing adverse results, notification/reporting requirements for disqualifying events, removal of individuals from armed duties when disqualifying information becomes known, and the conduct of periodic reinvestigations, in their letter dated July 25, 2014, the NRC staff finds that B&W NOG-L has established the processes and procedures needed to provide assurance that affected security personnel are not barred under Federal or State law from receiving, possessing, transporting, or using any covered weapon.

3.5 Federal Law

Section 161A of the AEA 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 certain local, State, or 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.

B&W-NOG owns the B&W NOG-L Category I fuel cycle facility located in Lynchburg, Virginia. In its April 24, 2014, submittal, B&W NOG states that the application is for preemption authority. The licensee stated that the firearms and devices it currently possesses and uses are necessary in the discharge of official duties of the security personnel while engaged in protecting the NRC-licensed B&W NOG-L Category I fuel cycle facility. The licensee further stated that preemption authority is requested to permit the transfer, possession, and use of enhanced weapons. As required in the Firearms Guidelines, B&W NOG-L must receive preemption authority from the Commission before it is eligible to have enhanced weapons authority. Accordingly, the NRC staff, after discussions with the licensee, is treating this application as a request for preemption authority.

The NRC requires that all Category I fuel cycle facility licensees provide a security organization that is staffed, trained and equipped to counter the capabilities of the DBT for radiological sabotage and the DBT for theft or diversion. Consistent with applicable Federal and State laws, licensees choose the types of firearms and devices utilized at their facility that will enable the licensee's security force to defend against both DBTs and provide defense in depth.

Based on its review of the licensee's application, the NRC staff has determined that the firearms and devices utilized by the licensee are consistent with the types of firearms and devices described in Section 161A.b. of the AEA. Further, based on the review of the B&W NOG application, the NRC staff finds that: the firearms and devices identified by the licensee in the submittal are currently in use at B&W NOG-L in accordance with the B&W NOG-L NRC-approved security plans that implement the licensee's site protective strategy; 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 stated in the B&W NOG-L NRC-approved security plans; and that the firearms and devices identified in the submittal are subject to current Federal law that would restrict the use of such firearms, weapons, and devices at B&W NOG-L absent the circumstances currently present at B&W NOG-L.

4.0 CONCLUSION

The staff has reviewed the application that was submitted by B&W NOG, and has determined that it was submitted in accordance with the requirements of the Designation Order, Section 161A and applicable Commission regulations. The staff has determined that granting B&W NOG preemption authority will not endanger health and safety of the public nor will it be inimical to common defense and security. In addition, the staff has determined that any authorized activities would be conducted in compliance with applicable requirements. The staff recommends that B&W NOG be approved for preemption authority.

5.0 REFERENCES

1. Babcock and Wilcox Nuclear Operations Group application dated April 24, 2014 (C-RD)
2. Babcock and Wilcox Nuclear Operations Group letter dated December 16, 2013, ADAMS Accession No. ML14008A198
3. Babcock and Wilcox Nuclear Operations Group letter dated July 25, 2014, ADAMS Accession No. ML14209A993

4. Commission Order EA-13-092, ADAMS Accession No. ML13121A459
5. Section 653 of the Energy Policy Act of 2005, Pub. L. 109-58, (119 Stat 811)
6. The Atomic Energy Act of 1954, as amended, Section 161A [42 United States Code (U.S.C.) § 2201a]
7. The Firearms Guidelines (74 Fed. Reg. at 46805) ADAMS Accession No. ML12124A377
8. Part 73, Title 10 of the *Code of Federal Regulations*
9. Part 71, Title 10 of the *Code of Federal Regulations*

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