



NUCLEAR ENERGY INSTITUTE

April 3, 2003

Joe F. Colvin
 PRESIDENT AND
 CHIEF EXECUTIVE OFFICER

Ms. Lorraine Hunt
 Office of Information and Regulatory Affairs
 Office of Management and Budget
 New Executive Office Building, Room 10202
 725 17th Street, N.W.
 Washington, DC 20503

SUBJECT: Comments on the OMB Draft Guidelines for the Conduct of Regulatory Analysis and the Format of Accounting Statements (Appendix C) - 68 Fed. Reg. 5492, February 3, 2003

Dear Ms. Hunt:

The Nuclear Energy Institute ("NEI") is submitting these comments on behalf of the nuclear energy industry. NEI member companies are involved in the utilization of radioactive materials pursuant to the authority of the Atomic Energy Act of 1954, as amended, under licenses issued by the U.S. Nuclear Regulatory Commission ("NRC"). Because the NRC is an independent regulatory agency, as a matter of law, the NRC is not obligated to comply with Presidential Executive Orders (e.g., Executive Order 12866). However, the NRC has committed itself to follow principles of sound regulation, which includes evaluating the effectiveness and efficiency of its regulatory actions. Thus, it would be logical and appropriate for the NRC to adopt practices consistent with the experience of OMB and other federal agencies, including increasing the quality of the NRC's regulatory analyses and risk assessment in management.

The Atomic Energy Act provides statutory authority to issue regulations without consideration of cost that are necessary to provide *adequate* protection of the public. The industry fully agrees that this authority is properly vested in the agency. For regulatory actions that consider marginal improvements in safety, the agency's internal rules require analysis of the costs and benefits of the contemplated action. In most circumstances, the due process afforded by the Administrative Procedures Act governing rulemaking provides sufficient protection for the industry and interested public to comment on whether or not the proposed activity is necessary to achieve

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.



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adequate protection and to raise concerns regarding the alignment of costs and benefits.

The draft report issued for comment by OMB raises concerns and seeks specific comment on regulatory activity related to Homeland Security matters. In the case of security, the determination of what constitutes adequate protection and the determination the responsible entity to provide the protection is unclear. A considerable history exists to define the responsibility of NRC licensees as limited to protection against radiological sabotage perpetrated by entities who are not "enemies of the state." The tragic events of September 11, 2001 have raised a considerable body of new questions regarding the proper division of responsibilities between federal, state and local governments and those of private industry to respond to these new threats. Although it will likely take some time to arrive at sound answers to these questions within the overall federal framework it seems clear that there will be some activities that are defined as federal responsibilities under the Constitution that are most efficiently addressed by a cooperative effort with the private sector.

The draft report requests specific comments on methodologies that could be used specifically applicable to the challenges posed in Homeland Security. The nuclear industry believes that the proper approach is contained in the document recently issued by the President entitled, *The National Strategy For The Physical Protection of Critical Infrastructures and Key Assets*. The document calls for a systematic approach that would assess the relative risks and vulnerabilities of all critical infrastructures. The process would then determine appropriate measures, derived from candid collaboration among DHS, industry and relevant regulatory agencies, to assign responsibility to deploy measures designed to counter risks that rise above the level that the nation as a whole is willing to assume. The *National Strategy* clearly recognizes that new methods for sharing and allocating necessary costs consistent with benefits must be developed.

Of immediate importance to the nuclear energy industry are the regulatory initiatives being undertaken by the NRC related to homeland security. Operating with a sense of urgency and because the NRC does not believe that it can comply with the Administrative Procedures Act on issues that involve potentially sensitive information, the NRC has resorted to the use of industry wide orders to impose new security related requirements. By their nature, orders remove considerable due process for licensees and reserve to the agency a unilateral right to determine adequate protection, thereby avoiding consideration of costs and benefits. This practice seems inconsistent with the profound questions raised by the *National Strategy* in the determination of the risks that the nation as a whole is willing to bear and in the determination of appropriate sharing of responsibility between the government sectors and private industry.

Ms. Lorraine Hunt

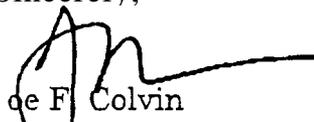
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We recommend that the draft report be modified to include provisions to modify the Administrative Procedures Act to permit the issuance of regulations dealing with sensitive security matters to only those parties who are appropriately cleared and have a need to know. The commercial nuclear power industry and the NRC possess an advanced capability to apply risk-based insights to operations and its regulations. Use of risk-based insights is fundamental to the processes described in the national strategy. Accordingly, the tools are in place to analyze new requirements contemplated by the agency and to determine the relationship between costs and benefits if due process is afforded. The analysis will be limited to the industry in isolation from a national context. Nevertheless, it will permit due process for affected parties to assure that cost-benefit considerations are made for any new requirements deemed of sufficient urgency to be proposed in advance of completion of the processes envisioned by the National Strategy.

The industry appreciates the opportunity to comment on this draft report. We believe that security provisions in place prior to September 11, and subsequently enhanced, provide adequate protection of public health and safety from possible terrorist actions. The requirements to apply cost-benefit methodologies to regulatory requirements are indicative of sound and thoughtful government. We believe that with respect to security issues, this will require a methodology that involves consideration of the relative risks of one industry sector to other sectors and to the nation as a whole. It will be exceedingly difficult for any one industry or any one regulatory body to derive independent solutions short of the comprehensive strategy issued by the President for accomplishment under the leadership of the Department of Homeland Security.

Sincerely,



Joe F. Colvin
J & F Colvin

- c: ✓ The Honorable Nils J. Diaz, Chairman, NRC
The Honorable Greta Joy Dicus, Commissioner, NRC
The Honorable Edward McGaffigan Jr., Commissioner, NRC
The Honorable Jeffrey S. Merrifield, Commissioner, NRC
Dr. William D. Travers, Executive Director for Operations, NRC
Karen D. Cyr, General Counsel, NRC