

SECURITY ACT FOR NUCLEAR POWER PLANTS

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House Bill 5282 (Substitute H-1)

Sponsor: Rep. Al Pscholka

Committee: Energy and Technology

First Analysis (3-10-14)

BRIEF SUMMARY: The bill would:

- Authorize security officers at nuclear power plants to use physical force, and in some circumstances deadly force, to deter intruders, thieves, or saboteurs.
- Require power plants to post notices at entrances and around the perimeter warning that security officers have authority to use physical or deadly force.
- Provide immunity from lawsuits to security officers, their employers, and the owner and operator of a nuclear power plant for an officer's conduct in providing security that is lawful under the bill.
- Define terms.

According to the United States Nuclear Regulatory Commission (NRC), its licensees (which include owners and operators of nuclear power plants) are required to use armed responders to defend nuclear facilities against an attack. The bill would enable security personnel at nuclear facilities to comply with their duties under NRC regulations.

FISCAL IMPACT: House Bill 5282 would not have a significant fiscal impact on the Department of Licensing and Regulatory Affairs as it pertains to civil liability or to the licensure of private security guards. The bill would have no fiscal impact on the Michigan State Police.

THE APPARENT PROBLEM:

The level of force that may be used in Michigan in stopping trespassers or for self-defense is established in both common law and statute. Basically, the level of force that a person may use against a trespasser or someone engaging in criminal behavior must be proportionate to that other individual's actions. In 2006, legislation was enacted that expanded protection from civil and criminal penalties for a person using physical force, including deadly force, when acting in self-defense or the defense of others under certain circumstances.

In general, persons do not have to retreat from a place they have a legal right to be and can use physical or deadly force if they reasonably believe there is an imminent danger of death, serious bodily harm, or sexual assault to themselves or to another. A person may also use physical or deadly force against an intruder who is breaking and entering into a dwelling or building premises, or who has broken into the premises and is still present. Under those circumstances, a rebuttable presumption is created that the person

was acting in self-defense. Unless a prosecutor or a plaintiff in a civil action can overcome the appropriate level of proof showing otherwise, a person is not likely to face criminal prosecution or be able to be sued.

Recently, a question has arisen as to how the protections under common law and the Self-Defense Act pertain to security officers who guard the state's three nuclear power plants. On one hand, a power plant is a privately-owned business and so would appear to have the same protections under the law as any other business defending its premises against intruders. On the other hand, a nuclear power plant is different in that it is regulated by the U.S. Nuclear Regulatory Commission and is required to secure its perimeter by a variety of means to deter intruders. The NRC also requires a nuclear facility to have an approved security plan that includes having an armed response at the ready around the clock sufficient to repel a heavily armed terrorist attack that comes by land, air, or water (plants are situated by a body of water such as a large lake, river, or ocean).

So, what if an unarmed trespasser did get past the extensive fencing and other barriers used to secure the perimeter of nuclear facilities and is on the grounds and approaching sensitive areas? How much force could the heavily armed security officers lawfully use to deter the intruder, and when could the force be used without inadvertently triggering criminal or civil penalties?

It seems clear that once an intruder breeched a physical wall of a structure, the provisions under the Self-Defense act would apply since the protections under the act do extend to other buildings or structures within the yard surrounding the main premises. But would the extensive grounds of a nuclear facility be considered a "yard?" Further, not every sensitive installation at a nuclear facility has walls to be "breached." Thus, at what point could force be used to repel any further advancement toward a sensitive area?

And what if the trespasser/intruder is in more danger of self-harm because the person is about to encroach into or onto something that could cause death or injury? Would the security guard, who is armed, come under the protection of the Self-Defense Act or common law if the guard stopped and then physically restrained the person until the police arrived? Or would the guard be exposed to either criminal or civil liability since the guard was armed and the trespasser wasn't? In a recent incident, a Michigan man was charged with felonious assault for detaining an unarmed trespasser on his rural property while holding an unloaded, open shotgun until law enforcement arrived.

Simply put, it appears that the NRC regulations require a higher level of response on the part of security guards at a nuclear power plant than the protections against criminal or civil liability may afford under the Self-Defense Act or common law. Legislation has been offered in both the Senate and House to address this issue.

THE CONTENT OF THE BILL:

House Bill 5282 creates a new act to clarify the rights and duties of officers who provide security at the state's nuclear power plants. The bill would define "an officer providing

security at a nuclear generating facility" to mean a security officer employed by or under contract with a nuclear facility who is employed as part of an NRC-approved security plan and who is performing duties under that plan. The bill would take effect 90 days after enactment.

Under the bill, an officer may:

- ❖ Use physical force *other than deadly force* if the officer honestly and reasonably believes the physical force is necessary to prevent or terminate a person's unlawful trespass under Section 552 of the Michigan Penal Code. (Section 552 makes trespassing upon the lands or premises of another a 30-day misdemeanor.)
- ❖ Use physical force, *including deadly force*, if the officer honestly and reasonably believes the use of physical or deadly force is necessary:
 - To prevent or terminate an individual from breaking and entering (or attempting to do so) into the business premises of a nuclear generating or nuclear storage building or structure with the intent to commit a crime involving the infliction or threatened infliction of serious physical harm to any individual.
 - Deter a threat of radiological sabotage.
 - Deter a threat of theft or diversion of special nuclear material.
- ❖ Threaten to use physical force, *including deadly force*, if the officer honestly and reasonably believes the use of physical or deadly force is necessary to protect himself or herself or another individual from the potential use of physical or deadly force on the part of another person, or to deter a threat of radiological sabotage or a threat of theft or diversion of special nuclear materials.

Notice. A notice of the authorization to use physical and/or deadly force must be posted conspicuously at all entrances to the business premises of a nuclear generating or nuclear storage building or structure, as well as at intervals along the perimeter in such a manner as to provide reasonable notice of the authorization to persons about to enter.

Civil immunity. An officer providing security, the officer's employer, and the owner and operator of a nuclear generating facility would be immune from civil liability for the security officer's conduct in providing security at the facility that is lawful under the bill. Except as otherwise provided in the bill, the bill would not modify Michigan common law (case law) in existence on the effective date of the bill regarding the use of deadly force.

Definitions. "Nuclear generating facility" would include currently operating nuclear power plants, power plants that no longer generate electricity but that store special nuclear material, the land surrounding those facilities, and any nuclear generating or nuclear storage building or structure located on those lands.

"Business premises of a nuclear generating or nuclear storage building or structure" would include a building or structure used to generate electricity using nuclear power, or used to store special nuclear material associated with or resulting from that generation. The term would also include appurtenant buildings or structures and any barrier or barrier system surrounding those structures designed to protect against radiological sabotage or theft or diversion of special nuclear material and which are required to be designated and posted against trespassing under federal law.

"Special nuclear material" would mean material capable of a self-sustaining fission chain reaction.

ARGUMENTS:

For:

Ever since the "9-11" attacks in 2001, the NRC has ramped up security protocol at the nation's power plants. Facilities are required to have heavily armed guards at the ready to repulse an attack or to deter any threat of sabotage or theft of radiological materials. Most of the men and women employed to provide security at the nuclear facilities are ex-military or ex-law enforcement. All receive extensive background checks and intensive training.

The security measures required by the NRC also require nuclear facilities to have redundant systems around the perimeter to prevent someone from unintentionally wandering onto the grounds and redundant systems to protect sensitive areas and equipment. Reportedly, anti-nuclear protesters generally recognize the dangers inherent to encroaching on such sensitive premises and hold the protests outside the gates where they are more likely to attract public attention to their messages.

Thus, an unauthorized person found on the grounds is most likely to be there for the purpose of engaging in some form of criminal activity. Considering the threat posed to public safety by a release of radiation or theft of radiologic material that could be used in a dirty bomb, it is understandable why a higher level of response is necessitated.

However, due to characteristics unique to nuclear power plants, it has become apparent that current common law and statutes related to defense of self and others do not comport with security-related requirements of the NRC. As a result, there are several grey areas where it is unclear as to whether a security officer responding according to an NRC-approved security plan would inadvertently face criminal charges or be open to being sued.

The bill would address these issues by clarifying the level of force that could be used in scenarios that security guards may face at the state's three nuclear power plants. The bill is not giving blanket immunity to guards to shoot anyone who didn't come in through the front gate with full security clearance. The bill is providing parameters for the level of force appropriate to a situation.

Immunity from criminal or civil actions would only be triggered if certain conditions were satisfied. For example, the security guard's actions would have to be within the NRC-approved security plan. The bill applies to nuclear security guards the same *reasonable person* threshold of believing that danger was imminent that is required for individuals defending themselves or others under common law and the Self-Defense Act.

A prosecutor would still be able to charge a security guard with assault or murder if the guard's actions were outside the authority granted by the security plan. Similarly, an injured person or, in case of a death, the person's estate, could sue a guard or the owner of the power plant. In addition to other *no trespassing* posting requirements, the bill would require that the power plants post information that security guards are authorized to use force, including deadly force, against unauthorized individuals. So far, there have not been any incidents at any of the three facilities that would warrant the use of deadly force or even physical force. However, should the need arise, the bill would clear up any uncertainty as to the appropriate level of force nuclear security guards could utilize and enable them to operate within their training and federal requirements.

POSITIONS:

A representative of DC Cook Nuclear Plant testified in support of the bill. (2-25-14)

A representative of the Berrien County Prosecutor's Office testified in support of the bill. (2-25-14)

A representative of the Berrien County Sheriff's Office testified in support. (2-25-14)

A representative of the Office of Governor testified in support of the bill. (2-25-14)

Michigan Electric & Gas Association indicated support for the bill. (2-25-14)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.