UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

October 5, 2001

The Honorable W.J. "Billy" Tauzin, Chairman
House Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Nuclear Regulatory Commission (NRC) appreciates this opportunity to provide its views on amendments discussed at the Committee's October 3rd markup of antiterrorism legislation. The Commission is pleased that the Committee promptly reported favorably the three of the four legislative proposals that we had recommended in our letter to you of September 28, 2001. The Commission continues to urge your support for the fourth proposal in our September 28 letter, which would confer upon guards at NRC-designated facilities the authority to possess and use weapons comparable to those available to the Department of Energy or other Federal protective guard forces to protect against the design basis threat.

This letter will focus on certain other amendments that were considered by the Committee. Because we have concerns about two of these amendments as drafted, we are offering revised amendments for the Committee's consideration.

Before turning to the specific amendments, it is important to note that the Commission agrees that the issues raised by the Committee are important ones that must be addressed in developing new security requirements for nuclear facilities and materials. In fact, as a result of the September 11 events, the Commission began to address immediately the concerns that underlie the amendments. In a tasking memorandum of September 28, 2001, to the NRC's Executive Director for Operations, the staff was directed to do a comprehensive reassessment of our security requirements. We are prepared to work with the Committee to develop legislation that it deems necessary.

1. The amendment offered by Representative Wilson would require the Commission to conduct a study in consultation with the national laboratories to assess the vulnerability of nuclear power plants to potential terrorist attacks. That assessment would be required to include, among other matters, a reassessment of the design basis threat. An initial report to the Congress would be due within 90 days after enactment of the legislation; a final report no later than 270 days after enactment. The Commission has already directed the establishment of a high-level task force that is carefully and thoroughly reviewing security for not only nuclear power plants, but also other NRC-regulated facilities and materials. Moreover, the NRC has already initiated consultation with DOE national laboratories and will be seeking additional resources from the Office of Management and Budget to fund needed research and analyses. On the assumption that necessary funds are forthcoming, the Commission is prepared to

provide the initial and final assessments within the time periods specified in Representative Wilson's amendment. Thus, the Commission has no objection to this amendment.

2. Representative Markey offered an amendment (Amendment No. 77) that also addresses reassessment of the design basis threat (DBT). His amendment would have the NRC commence a rulemaking proceeding within 60 days of enactment to consider changes to the design basis threat for facilities licensed by the Commission. The Commission would be required to issue a final rule within one year after enactment of the legislation. The regulations would need to take into account a number of specified threat scenarios. Armed escorts would be required for all spent fuel shipments. The NRC would also be required to retain its Operational Safeguards Response Evaluation (OSRE) program.

The Commission has already initiated a review of the DBT, and intends a full consultation with a number of Executive Branch agencies on the matter. That review will not only address the nine threat scenarios set forth in the amendment, but others as well. Because we agree that the DBT needs to be reevaluated in a fashion free from any constraints, the Commission is offering a revised amendment for the Committee's consideration that addresses the underlying concerns (Enclosure 1). This amendment would allow the NRC to consider fully the evolving views of Executive Branch defense, intelligence, and law enforcement agencies on the appropriate division of security responsibilities between the Federal government and the private sector.

The Commission cannot support the amendment as drafted, however, because the NRC will not be in a position to initiate a meaningful modification of the design basis threat until the Commission has thoroughly examined the matter, and, in concert with other agencies, has achieved resolution of certain underlying policy issues. Chief among these is the development of a clear Federal policy as to the obligations of the private sector, which are defined by the DBT, and those of the government. Moreover, as the Committee is aware, any rulemaking concerning the DBT would have to be carefully shaped, as much of the pertinent information is either "safeguards information," which must be protected from public disclosure, or classified national security information. We are thus concerned about those aspects of Amendment No. 77 that require a public rulemaking.

Amendment No. 77 would also require the retention of the current OSRE program. At the time of the September 11 attacks, the Commission was working on an alternative program to the OSRE, requiring more frequent security test exercises, that we thought would be more effective and efficient. Nonetheless, the tasking memorandum requires a thorough reevaluation of the exercise program. We are concerned about any legislation that would freeze our security exercise program and thereby hamper our ability to improve it.

The amendment's provisions also require armed guards on all spent fuel shipments. Armed guards are required today for transportation of materials of proliferation significance and for shipments of spent fuel through heavily populated areas. The NRC believes it needs to complete its ongoing physical security evaluations before a determination of whether further changes are necessary. This evaluation will include a review of threats, vulnerabilities and the risk of transportation sabotage. As the Committee is aware, the casks which are used to transport spent fuel are designed to withstand severe transportation accident conditions and, while the casks are not specifically designed against sabotage by terrorists, the designs do provide substantial protection against the effects of sabotage. A reasoned determination about

whether and what additional protection or protective procedures are necessary will benefit from the completion of our ongoing studies and evaluations

In light of these problems with Amendment No. 77 as drafted, we ask the Committee's consideration of the enclosed alternative.

3. Representative Markey's Amendment No. 79 addresses the transportation of nuclear materials more generally. The amendment provides that all shipments of byproduct materials, source materials, special nuclear materials, and any materials and wastes contaminated by those materials be accompanied by manifests describing the type and amount of materials being transported. In addition, the drivers and those traveling with such a vehicle must have been subject to a Federal security background check, and the material being transported may go to no destination other than a facility licensed by the NRC or an Agreement State.

The amendment would also require transporters to take material only to facilities licensed by the NRC or an Agreement State, or to a Federal facility. Most shipments of radioactive materials are shipments of radiopharmaceuticals. The U.S. manufactures radiopharmaceuticals that are used abroad. Because foreign recipients of U.S. manufactured radiopharmaceuticals are not licensed by the NRC or an Agreement State, the amendment would effectively halt the export of critical medical supplies. We are sure this was not intended.

Many shipments regulated by the NRC currently satisfy the proposed statutory requirements relating to manifests because NRC transportation regulations require shippers to comply with Department of Transportation regulations. 10 C.F.R. § 71.5. Those regulations require that manifests describing the type and amount of materials being transported accompany each shipment. This would apply to, for example, shipments of spent fuel, fresh reactor fuel, radiopharmaceuticals, and radioactive sealed sources, and devices. Only "limited quantity shipments," such as shipments of smoke detectors and laboratory samples of radioactive material, are exempt from the manifest requirement.

The vast preponderance of shipments of radioactive materials involve shipments of radiopharmaceuticals, ores, waste with low activity, and consumer products utilizing radionuclides (e.g., watches, smoke detectors). These are accomplished by transporters that have not been subject to government background checks. However, most of the materials being transported are not attractive targets for diversion because diversion of the materials would not have significant public health and safety or nonproliferation consequences. Background checks are, however, performed for the infrequent transportation of strategic quantities of special nuclear material because of the nonproliferation significance of such shipments. Moreover, almost all of these shipments of strategic quantities of special nuclear material occur using DOE's secure transportation system. In light of the innocuous nature of most transportation of nuclear material, we do not believe that sweeping requirements for background checks are appropriate.

We recognize that the September 11 attacks require a thorough examination of NRC policies, including those bearing on transportation. The Commission has commenced a comprehensive review of transportation requirements that will analyze those shipments presenting the greatest risks (e.g., spent fuel and irradiator components) and then analyze the benefits and costs of potential enhancements to our existing requirements. We will consider, in

partnership with the Department of Transportation, whether Federal security background checks should be expanded to a larger class of transported materials.

Although we believe there are flaws in Amendment No. 79 as drafted, we have attached for the Committee's consideration an amendment which would codify an approach to address the underlying concern that motivates the amendment (Enclosure 2). We understand it would require the Commission to prepare an initial report on transportation issues within 120 days after enactment of the legislation and a final report no later than 300 days after enactment.

Our concerns with proposed Amendment No. 79 largely emanate from its breadth, not from its purpose. As drafted, the amendment would capture all Atomic Energy Act materials including materials that pose trivial risks to the public's health and safety (e.g., slightly contaminated concrete that would be less radioactive than the granite in the Capitol), and could significantly impede medical use of radioisotopes. We think the proposed alternative would meet the Committee's objectives.

4. Representative Markey's Amendment No. 80 would authorize the President to deploy the Armed Forces of the United States or the National Guard to defend facilities licensed by the NRC, and to restrict air space in the vicinity of such facilities. This is an issue which involves the authority of the President and other federal officials. We are in contact with these officials to ensure that an effective protocol is in place should extraordinary measures be necessary. The amendment appears to restate existing Presidential authority.

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The Commission again emphasizes that it is prepared to work with the Committee to develop legislation that addresses the Committee's concerns. We hope that the enclosures serve that end.

Please feel free to contact me if you have any questions.

Sincerely,

Richard A. Meserve

Enclosures:
Draft Amendments

cc: Representative John D. Dingell
Representative Edward J. Markey
Representative Heather Wilson

Enclosure 1

Proposed Substitute for Representative Markey's Amendment No. 77

(a) The Nuclear Regulatory Commission shall consult with the Secretary of Defense, the Director of Central Intelligence, the Director of the FBI, and any other appropriate agencies responsible for homeland security, on what should be included in the NRC design basis threat (DBT) for sensitive nuclear facilities and what should be the responsibilities of homeland security agencies for attacks beyond the DBT. As part of the consultation, the Commission should give consideration to including in the DBT the potential for a larger number of attackers, greater insider assistance, suicide attacks, water-based and air-based threats, larger truck bombs, and fires of long duration.

(b) Concurrent with consultation in subsection (a), the Commission shall study the costs and benefits of federalizing the physical protection of sensitive nuclear facilities and report the results to Congress within 180 days of the date of enactment of this act.

(c) Following the consultation pursuant to subsection (b), the Commission shall make appropriate changes to the design basis threat for various sensitive facilities. These actions shall be completed within 18 months of the date of enactment of this Act.

(d) The Commission shall establish a program that ensures that the physical protection capability of each sensitive nuclear facility shall be tested periodically through Commission evaluated force-on-force exercises to determine whether the ability to defeat the design basis threat is being maintained.

(e) Definition—"Sensitive nuclear facilities" as used in this section shall include at a minimum commercial nuclear power plants, including associated spent fuel storage facilities, spent fuel storage pools and dry cask storage at closed reactors, independent spent fuel storage facilities and geologic repository operations areas, category I fuel cycle facilities, and gaseous diffusion plants.

Enclosure 2

Proposed Substitute for Representative Markey's Amendment No. 79

(a) AMENDMENT.—Chapter 14 of the Atomic Energy Act of 1954 (42 U.S.C. 2201-2210b) is amended by adding at the end the following new section:

SEC. 170C. TRANSPORTATION OF NUCLEAR MATERIALS.—

"a. The Nuclear Regulatory Commission will carry out, in consultation with the Department of Transportation, a comprehensive study of the vulnerabilities in the current security framework for transportation of source, byproduct and special nuclear materials. The study shall consider the need for a security background check by appropriate Federal entities of individuals driving or traveling with a vehicle transporting material which the study identifies as high risk from a security perspective. An initial report identifying any immediate concerns and proposed additional protection measures shall be transmitted to the Congress not later than 120 days after the date of enactment. A final report on the study shall be transmitted to the Congress not later than 300 days after the date of enactment.

b. TABLE OF SECTIONS AMENDMENT.—The table of sections for chapter 14 of the Atomic Energy Act of 1954 is amended by adding at the end the following new item:

"Sec. 170C. Transportation of nuclear materials.".