

September 9, 2004

The Honorable Edward J. Markey
United States House of Representatives
Washington, D.C. 20515-2107

Dear Congressman Markey:

I am responding to the questions included in your letter dated August 24, 2004, regarding the upcoming shipment of 140 kilograms of weapons-grade plutonium from the United States to France.

Please contact me if you need further information.

Sincerely,

/RA/

Nils J. Diaz

Enclosure:
Responses to Questions

RESPONSES TO QUESTIONS FOR CONGRESSMAN MARKEY, AUGUST 24, 2004

Question 1: Was DHS consulted by the Commission prior to the approval of this export on June 15, 2004? If so, please fully describe all such contacts, and provide copies of all correspondence related to these consultations. If not, why not?

Answer:

The Commission did not engage in consultations with DHS prior to approving this export because the Atomic Energy Act, as amended, requires the Department of State to coordinate Executive Branch agencies' reviews and to provide the results of such reviews to the NRC. NRC understands that the proposed export was discussed at senior levels among interested Executive Branch agencies, including DHS, and that Executive Branch views provided to us by the State Department fully reflect the results of these consultations.

NRC is not authorized to issue certain export licenses unless and until notified by the Department of State that in the judgment of the Executive Branch approval of a proposed export will not be inimical to the common defense and security of the United States. Moreover, NRC is required to deny any export license for which the Executive Branch does not recommend approval. If, after receiving favorable Executive Branch views regarding a proposed export, NRC is unable to make the statutory determinations required under the Atomic Energy Act, NRC is required to publicly issue a decision to that effect and to submit the license application to the President.

Question 2: Was DHS consulted by the Commission regarding this shipment after it issued its most recent terror warning? If so, please fully describe all such contacts, and provide copies of all correspondence related to these consultations. If not, why not?

Answer:

The Commission routinely consults with DHS and other agencies in the intelligence community on current threat information regarding NRC-licensed facilities and activities. The NRC did not consult with DHS on this shipment after the most recent change in threat level because the threat level change was limited to financial institutions in certain cities, and was not related to nuclear facilities or to the transportation of nuclear materials.

Question 3: What role, if any, has the Commission played in the development of the security plan for this shipment?

Answer:

The shipment of plutonium dioxide (PuO₂) under export license XSNM03327 is to involve three phases, and the responsibility for providing security rests with the entity responsible for each phase. The U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA), Office of Secure Transportation (OST), is responsible for the portion of the shipment involving land transport between Los Alamos, New Mexico, and Charleston Naval Weapons Station (NWS), South Carolina. Pacific Nuclear Transport Ltd. (PNTL) vessels are responsible for the portion of the shipment involving water transport between Charleston, and Cherbourg, France. The French Government is responsible for the portion of the shipment involving land transport between Cherbourg and Cadarache.

NNSA's OST has extensive experience in transporting nuclear weapons, weapons components, nuclear material, and other sensitive materials within the U.S. Furthermore, under NRC regulations in 10 CFR 73.6(d), a licensee transporting special nuclear material (SNM) by DOE's secure transport systems (i.e., NNSA's OST) is exempt from the NRC's requirements for transporting Category I quantities of SNM under 10 CFR 73.20, 73.25, 73.26, 73.27, and 73.72, including the development of a security plan. While the International Atomic Energy Standard for "The Physical Protection of Nuclear Material and Nuclear Facilities," INFCIRC/225/Rev. 4, (corrected), June 1999, does not specifically require development of a security plan, it does require emergency response plans and written instructions for transport personnel to provide security for Category I SNM shipments. The NRC has received assurances that the protective measures for both the sea-borne and French-land portions of the shipment meet the standards of INFCIRC/225/Rev. 4. In addition, security in international transportation is governed by the Convention on the Physical Protection of Nuclear Materials (IAEA INFCIRC/274/Rev. 1), to which the U.S., the United Kingdom, and France are signatories.

Accordingly, the NRC staff has not played any role in the development of the security plans for the various phases of this shipment.

Question 4: Has a threat assessment been prepared for this shipment? If so, has the Commission reviewed it? If not, why not?

Answer:

The NRC has been informed that DOE/NNSA and the Joint Terrorism Analysis Center in the United Kingdom have prepared specific threat assessments for the U.S.-land and high-sea portions of this shipment, respectively. The NRC does not have any information on whether the French Government has prepared a specific threat assessment for the French-land portion of this shipment. The NRC has not been requested to review threat assessments for this shipment.

Question 5: Does the Commission believe that the physical security measures that will be used for the shipment once it reaches France are up to the same standards employed in the U.S.? Has the Commission performed an independent review of the French measures, or is it merely accepting without any independent inquiry or investigation assurances provided by the French Government or other parties?

Answer:

As part of its required review of this export license application, the Executive Branch obtained assurances from the European Atomic Energy Community (EURATOM) that, when received, the PuO₂ will be maintained in accordance with the terms and conditions of the U.S. - EURATOM Agreement on the Peaceful Uses of Nuclear Energy (Agreement for Cooperation). The Executive Branch determined that the physical security measures applicable to the proposed export will be adequate based on its review and on consultations with Department of Defense as required under Section 133 of the Atomic Energy Act of 1954, as amended (AEA).

According to 10 CFR 110.44, recipients of U.S. nuclear materials are required to provide protection at least comparable to the recommendations contained in INFCIRC/225/Rev. 4. In addition, 10 CFR 110.44(b) requires that Commission determinations on the adequacy of physical security are based on: (1) written assurances from recipient countries that physical security measures provide protection at least comparable to INFCIRC/225/Rev. 4; (2) information obtained through country visits, information exchanges, or other sources. Such determinations are made on a country-wide basis and are subject to continuing review.

In addition to the assurances mentioned above, in response to an NRC request, the Executive Branch provided classified national security information at a May 28, 2004 meeting on the physical security measures to be employed in France for that portion of this export shipment. In the May 28 meeting, Executive Branch staff discussed with NRC physical security experts certain details, as well as additional assurances provided by the French Government, which establish that the physical security measures to be employed for protecting the plutonium meet or exceed the requirements of INFCIRC/225/Rev. 4.

The Commission concluded that a reasonable basis existed to find that physical security for this export shipment is adequate and satisfied the applicable export licensing criteria.

The Executive Branch also pointed out that physical protection in France, as well as in the United States, is a matter of national sovereignty. There is no legal basis for the U.S. to inspect French facilities for the adequacy of physical protection, nor is there any U.S. law requiring the right of inspection as a condition for the transfer of U.S. nuclear material to EURATOM.

Question 6: Has the Commission reviewed any testing of the FS-47 containers that will be used to ship the plutonium? If so, what were the results? If not, why not?

Answer:

Response: With respect to complying with the transport packaging safety requirements, NRC review and evaluation of the design and tests of the French-approved FS-47 package was documented in an NRC Safety Evaluation Report (ADAMS accession number ML041810006) that was transmitted to the Department of Transportation (DOT) on June 28, 2004. NRC's technical review of this foreign-certified package design found the package design to be in compliance with applicable requirements, and the NRC recommended U.S. revalidation of the French approval of the FS-47 to the DOT.

Question 7: The Atomic Energy Act requires the Commission to find that adequate physical security measures exist for any export of special nuclear material before approving an export license for such exports. A videotape obtained by my office as well as photos on the Greenpeace website indicate that not only are the trucks used to transport the plutonium easily identified and followed and only lightly guarded, but they are also easily approached (see [Http://greenpeace.datapps.com/stop-plutonium/en/transport_en.php3](http://greenpeace.datapps.com/stop-plutonium/en/transport_en.php3)). How could the Commission have made the finding that the security measures were adequate in light of this?

Answer:

With respect to the portion of the export shipment occurring in France, the NRC received written assurances from the Executive Branch provided by EURATOM as well as by the French Government that physical security measures for protecting nuclear material meet the recommendations of INFCIRC/225/Rev. 4. In addition to these assurances, the NRC was provided classified national security information at a meeting with Executive Branch staff on May 28, 2004 on the physical security measures to be employed in France for that portion of this export. In that meeting, Executive Branch staff reiterated the assurances that France's physical security measures for protecting special nuclear material meet or exceed the requirements of INFCIRC/225/Rev. 4 and provided the bases for this position.

Based upon the assurances, the information provided in letters from the Executive Branch, the information provided at the May 28 meeting, and a previous country visit, the Commission concluded that a reasonable basis existed to find that physical security for this portion of the export shipment is adequate and satisfied applicable export licensing criteria.

Question 8: Will any U.S. Government officials or security personnel accompany the plutonium shipment until it reaches its destination in France? If so, who? If not, then does that mean that the British Government will be in control until the shipment reaches France, with the French Government taking over from there?

Answer:

From prior discussions with NNSA/OST, the NRC understands that Federal Agents from OST will perform their normal escort function and accompany this shipment from Los Alamos, New Mexico, to Charleston NWS, South Carolina. The NRC also understands that U.S. Coast Guard personnel will accompany the PNTL ships until they depart U.S. territorial waters. The NRC has not been informed of any U.S. Government officials or security personnel accompanying the shipment after it leaves U.S. territorial waters.

Since the PNTL ships are registered in the United Kingdom, they are under the authority of the United Kingdom while they are on the high seas. Similarly, land transportation in France is under the authority of the French Government.

Question 9: As you know, the Commission voted on June 15, 2004 to allow the export of this shipment. Commission regulations state the following.

“5USC552(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting.”

Evidently, the Commission posted notice of this meeting on its website on June 15, 2004 (the day it voted to approve the export), and didn't post it to the Federal Register until 3 days after the vote occurred. Please explain why the Commission failed to follow its regulations regarding this matter. What steps are you taking to ensure that this does not happen again?

Answer:

At the outset it is relevant and important to note that the above-quoted sentence of the Sunshine Act and the corresponding provision in the NRC's regulations at 10 CFR 9.107(a) is followed immediately by the following exception:

Such an announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date [than one announced a week in advance], in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

In this instance, the Commissioners were aware on June 15, 2004 that the Secretary of the Commission had received each Commissioner's written position on the draft order in question, and all three Commissioner's were prepared to allow the export. The Office of the Secretary had reserved time on this date for an affirmation session in the event the Commission had completed voting. In an affirmation session, the Commission meets in open session to affirm in person the votes of the Commissioners. A quorum of the Commission determined that the efficient conduct of agency business required that they vote to hold the affirmation session for the export approval without the seven days notice, and they did so immediately before affirming their vote on the export order.

Also on the day of the affirmation session, the Commission made the most practical and earliest practicable public announcement, which was to post the affirmation transcript and Staff Requirements Memorandum on the web site. The affirmed order itself (CLI-04-17) was served electronically on the participants in the proceeding promptly after its affirmance. Thus, those participants had notice available to them more rapidly than would have been the case had notice simply been dispatched to the Federal Register on June 15. Nonetheless, we agree that it was unfortunate that the formal Federal Register notice was grouped with others in preparation and delayed a few days, thus not appearing in the Federal Register until the following week. The Secretary of the Commission is giving close attention to the notice requirements, and has already alerted her staff to the need to expedite the complete notice process on the occasion of short notice meetings, including sending notice to the Federal Register as soon as possible, putting notice on the NRC website, and e-mailing interested parties.