

May 7, 1979

UNITED STATES
NUCLEAR REGULATORY COMMISSION

SECY-79-278A

INFORMATION REPORT

For: The Commissioners

From: William J. Dircks, Director
Office of Nuclear Material Safety
and Safeguards

Thru: Executive Director for Operations *[Signature]*

Subject: PHYSICAL PROTECTION OF IRRADIATED FUEL SHIPMENTS

Purpose: To provide the Commission with supplemental information concerning SECY-79-278.*

Discussion: In Enclosure G to SECY-79-278, OSD stated that the proposed requirements should be implemented by order or license condition rather than by the rulemaking process. A discussion of these two methods follows:

Implementation by Rulemaking

Rulemaking is the course normally followed when a proposed action has generic applicability. This method has the advantage of (i) permitting public participation to the widest extent possible in the proceeding, (ii) avoiding duplicative litigation of the same issue in several licensing proceedings, and (iii) effecting widespread dissemination of relevant information thru established channels, i.e., the Federal Register and Code of Federal Regulations. In addition, rulemaking is generally regarded as more suitable for raising and deciding questions of policy.

The action being proposed by the staff is generic in nature since it would apply across the industry to all licensees who engage in transport of irradiated reactor fuel. Implementation by rulemaking would assure that the benefits described in (i) thru (iii) above are realized.

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*SECY NOTE: SECY-79-278 is to be scheduled for a Commission briefing

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Discussion:
(continued)

In regard to public participation, even though contact has been made with carriers, licensees and their representatives, and other government agencies, the public at large has not had an opportunity to review and comment on this matter. However, publishing the rule in an effective form with a concurrent comment period may result in limited public participation.

On the other hand it can be argued that since these are interim requirements, codification should be delayed until the confirmatory research has been completed and a final determination made. This argument is based on the perception that it would be easier to rescind an order than delete requirements from a published rule if the research should show that physical protection was in fact not necessary.

Implementation by Order Modifying a License

Modifying a license in accordance with the provisions of 10 CFR 2.204 is the process normally employed when (i) the action applies to one or only a limited number of licensees and principally involves factual issues, (ii) the matter requires timely implementation to protect public health or safety (the time required to draft a rule and to obtain Commission approval of a rule may be too long), or (iii) the modification is transitory in nature. It can be argued that the proposed action meets (ii) and (iii) and that there are precedents for issuing generic amendments to licenses. (For example, generic license conditions were issued in 1976 and 1977 in regard to the physical protection of Category I nuclear materials in transit.)

In this instance a main objection to the order procedure is the absence of a clear delegation of staff authority in this area. NRR authority, as specified in NRC Manual Chapter 0123-032a, is limited to transportation activities within the site boundary. NMSS authority, as contained in the June 16, 1976, Delegation of Authority, does not appear to extend to "utilization facilities." The Director, NMSS therefore, may not have the authority to amend a Part 50 power reactor operating license under which spent fuel activities at operating reactors are currently covered. Because of the lack of clear authority in NMSS, the staff believes that an order would require the Commission either to specifically delegate authority to NMSS in regard to spent fuel outside the site boundary or to issue the order itself.

Discussion:
(continued)

Another objection to the use of orders in this case is the administrative burden that would be involved in amending approximately 160 reactor and import licenses. Inasmuch as each licensee must be given an opportunity to demand a hearing with respect to the order and with the added possibility of intervention, the probability exists that considerable staff effort may have to be expended in response to such hearings.

Coordination:

The Office of the Executive Legal Director has no legal objection to this paper.



William J. Dircks, Director
Office of Nuclear Material Safety
and Safeguards

EDO NOTE: The attached memos from IE & NRR amplify/modify their previous comments on this paper. They are attached as Enclosures 1 and 2.