October 3, 1981

SECY-81-598

POLICY ISSUE
(Notation Vote)

For: The Commissioners

From: Executive Director for Operations

Subject: INVESTIGATIVE JURISDICTION OF THE OFFICE OF INSPECTION AND ENFORCEMENT

Purpose: To clarify the authority of the Office of Inspection and Enforcement to conduct external investigations within the jurisdiction of the NRC.

Discussion: Two NRC offices have been delegated the authority to conduct investigations: the Office of Inspection and Enforcement (IE) and the Office of Inspector and Auditor (OIA). There has been a continuing lack of clarity regarding the investigative jurisdiction of IE as compared to that of OIA. This has resulted in problems affecting the effective functioning of both offices. The purpose of this paper is to (1) advise the Commission of this problem because of its impact on both IE and OIA operations and (2) to seek Commission clarification of its desires in this area.

It is my view that the distinction between the investigative responsibilities and authority of the two offices should be determined by whether the matter to be investigated is internal or external, rather than on the basis of whether potential criminality is involved. By internal I mean that the focus of the investigation involves the NRC and its employees or contractors; by external I mean that the focus of the investigation involves the licensed nuclear industry or a matter of NRC regulatory interest.

I believe that IE has and should have exclusive authority and responsibility for the conduct of all external investigations and that OIA has and should have similar exclusive authority for the conduct of internal investigations. In this regard the official Delegations of Authority embodied in the NRC Manual Chapters as well as Chapter 1 of 10 CFR pertaining to the two offices are instructive. Manual Chapter 0113 (as well as 10 CFR 1.30) pertains to OIA.

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This Chapter and 10 CFR 1.30 establish OIA as an internal investigative and auditing organization.

In contrast, Manual Chapter 0127 (as well as 10 CFR 1.64), gives IE a broad external investigative mandate. Among other things, it confers on IE the responsibility to investigate licensees, their contractors or suppliers, applicants, individuals, and any organization subject to NRC jurisdiction. MC 0127 describes the purpose of these investigations as being "to ascertain the status of compliance with NRC requirements" and to "identify conditions...that may adversely affect the public health and safety, the common defense and security, the environment, or the safeguarding of nuclear materials and facilities." In addition, MC 0127 specifically charges IE to "investigate incidents, accidents, allegations, and other unusual circumstances involving matters in the nuclear industry which may be subject to NRC jurisdiction..." Neither the Manual Chapter nor the regulation limit IE's investigative role in matters that may involve potential criminality.

The issue of authority as specified in the NRC Manual and Regulations notwithstanding, there are several other compelling reasons that lead me to conclude that IE requires a clear external investigative mandate. For instance, it appears to me that it is inconsistent to have OIA perform external investigations, thus involving a Commission staff office in an operational activity. Commission policy has been to place operational activities under the cognizance of the Executive Director for Operations. Assigning external investigative authority to OIA represents a departure from this practice.

Even more important, however, is the impact of OIA involvement in external investigations on the inspection and enforcement program in general and on enforcement coordination in particular. Indeed, the problems already encountered in such investigations as South Texas, Nuclear

Pharmacy Incorporated, Stepan Chemical, Zimmer, and the various TMI investigations have demonstrated the need to have this conflict corrected. In these cases, all of which involved potential criminality as well as major health and safety issues, it is not clear that all developed information has been provided to IE or the Department of Justice, enforcement actions have been delayed, and licensees have been confused by having to deal with two sets of NRC investigators. The Department of Justice has been brought into some of these matters with only limited IE consultation regarding the program implication of such an action. The latter has caused elevated enforcement actions to be held in abeyance pending DOJ resolution of relatively minor criminality. There have also been occasions where DOJ has declined prosecution in cases where IE believed prosecution to be warranted for reasons of program impact.

Relatedly, there have been instances where IE Enforcement meetings with licensees have led to NRC/Licensee Agreements which were later challenged by DOJ. The Niagara Mohawk, Stepan Chemical, & Nuclear Pharmacy cases are examples where this has occurred.

These examples point out the need for IE's authority to deal directly with DOJ regarding those external matters that IE investigates. This would afford IE an opportunity to ensure that all relevant information is made available to DOJ in a manner sufficient for DOJ to understand the relationship of the data to the public health and safety. Such direct contact would also enhance mutual understanding of the respective roles of DOJ and NRC, and could be expected to shorten the length of time that it now requires to obtain a prosecutive determination. I believe these factors demonstrate that the present procedures that require IE to deal with DOJ via a third party are not satisfactory, and provide no discernable benefit to the NRC.

In the above-cited investigations, OIA involvement was predicated on evidence of apparent criminality.[1] It is my view that investigations of actual or potential criminality are only a subset of each of the larger categories of internal versus external investigations. Hence, it is instructive to examine the topic of criminality in light of our experience to date.

[1] Pursuant to section 221(b) of the Atomic Energy Act, the FBI is required to investigate all alleged or suspected criminal violations of the Atomic Energy Act.

As it pertains to the NRC, actual or potential criminality can be considered as falling into two categories. The first category is encountered during inspections or investigations (or is brought to the attention of the NRC in some other fashion) and is only peripheral to NRC's principal interest or responsibilities. Examples of this type of criminal activity range from theft of private property or embezzlement of licensee funds to violations of specific federal laws, such as smuggling, counterfeiting, or evading payment of income tax. In such cases, we make the information available to the Federal, State, or local law enforcement agency having jurisdiction over the matter. NRC has neither the authority nor the desire to investigate such matters except to the extent that they may bear upon NRC statutory responsibilities.

In the second category are those instances of potential criminality that are clearly related to matters within the jurisdiction of the NRC. The vast majority of these involve potential violations of the Atomic Energy Act or the General Fraud Against the Government Statutes (such as 18 USC 1001 or 18 USC 371). Some examples of these are willful violations of NRC regulations made criminal by statute, records falsification, lying to an inspector or investigator, unlicensed possession of nuclear material, or attempts to deceive the NRC in order to obtain a license.

It is important to note that the vast majority of investigations conducted by IE involve, at least at the outset of the investigation, the possibility of criminality. IE is dealing with, or has dealt with recently, dozens of instances where the initial information indicated either possible falsification of records relied upon by the NRC or the knowing and willful violation of NRC regulations.

In each of these examples, the elements of potential criminality and NRC's regulatory interests are inextricably intertwined. No decisions can be made regarding either health and safety actions or criminal prosecution until there is an adequate amount of information available on which to base such a decision. It is my belief that the appropriate way to acquire this information is to initiate or continue an investigation concerning the matter at issue. By following this course of action IE would be able to ensure that it promptly possesses information of sufficient quantity and quality on which to make its decisions involving the health and safety of the public. At the same time, such an approach would not foreclose a future decision to pursue criminal prosecution. In that regard it should be noted that most instances of potential criminality encountered by IE are not of the "smoking gun" type. The

existing NRC-Department of Justice agreement covering criminal referrals provides guidelines for making such referrals and for the conduct of necessary health and safety investigations and the taking of necessary enforcement actions, even after such referrals.

In those rare cases in which prompt field response by the FBI might be warranted, such as theft of Special Nuclear Material (SNM) or sabotage, IE investigators could either assist the FBI or conduct a parallel investigation in coordination with the FBI as was done in the recent Beaver Valley investigation and three other cases in the past year. Provisions for such actions are currently contained in the NRC/DOJ agreement.

Whether or not criminality is involved, IE investigators need to collect sufficient information to support successful NRC enforcement actions. To this end, they need to identify and collect copies of pertinent records, and identify and interview persons who can provide substantive information. When warranted by the nature of the case, statements must be obtained. It should be noted that statements, or admissions, or other evidence obtained by IE investigators could be used for prosecutive as well as civil enforcement purposes. Thus, these IE investigations would enhance rather than hinder any subsequent criminal investigation or prosecution.

In summation, IE and OIA have both had difficulty regarding the respective investigative jurisdictions of the two offices. Thus I feel that this matter needs to be clarified by the Commission. I believe that the following points support the IE position:

(1) The appropriate NRC Manual Chapters and Regulations presently give IE rather than OIA broad authority to conduct external investigations. This external authority is not further conditioned by whether the matter also involves potential criminality.

(2) A thorough IE investigation could provide the basis for NRC health and safety as well as referral decisions.

(3) External investigations, as an operational activity, belong under the cognizance of an EDO line office.

(4) IE has the capability to conduct such investigations.

(5) The current situation is having an adverse impact on the inspection and enforcement program and is causing confusion among licensees.

(6) It is reasonable for IE to present the issues of a case directly to DOJ rather than through an intermediary. Such direct communication would facilitate mutual understanding and promote the ultimate objective of advancing the safety of nuclear activities.

(7) The July 9, 1981 GAO report on OIA notes the need for OIA to concentrate on its legitimate internal audit role.

Recommendation: I recommend that the Commission clarify the Delegations of Authority in MC 0113 and 0127, designating IE as the NRC agent for all investigations external to the agency and OIA as the NRC agent for all internal investigations. Further, both offices should have coordination and referral responsibilities with DOJ for matters falling within their respective jurisdictions.

Coordination: The Offices of NRR, NMSS, RES, ADM and OELD concur in this recommendation. We have provided a copy of this paper to OIA for their information. OIA has indicated its desire to withhold written comment until such time at this paper is forwarded to the Commission.

William J. Dircks
Executive Director for Operations

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Monday, October 26, 1981.

Commission staff office comments, if any, should be submitted to the Commissioners NLT October 19, 1981, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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