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

9/11/79

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: Leonard Bickwit, Jr., General Counsel

SUBJECT: DISCUSSION PAPER TO ASSIST COMMISSION IN THE MATTER OF CLEARANCE RULE FOR SNM (SECY-79-319)

The purpose of this paper is to contribute to the Commission's decision process on the access clearance rule by (1) reviewing the setting for the decision, especially events preceding the hearing and subsequent to issuance of the Board's report; (2) presenting some observations on the state of the record and legal issues that we believe merit consideration, and (3) outlining the principal options available to the Commission highlighting any further steps needed before a decision on those options. This paper does not intend to substitute itself for the Board's Report and Recommendations. In particular, the Board's Report and Recommendations should be consulted for a summary of the record of the hearings.

I. SETTING FOR THE DECISION

History

On October 7, 1976, Robert Minogue, Director OSD, by SECY-76-508, sought Commission approval to publish for public comment proposed amendments to the Commission's rules to establish a clearance program to be applied to individuals in the licensed nuclear industry where access is required to special nuclear material.1/ The decision issues were described as whether or not national

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1/ While we begin our discussion at this point, it is clear from the information and analysis within SECY-76-508, as well as from the reflection of differing views in the attachments to that paper, that the matter at issue already had at this date some history in the agency and its predecessor AEC.

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security requires NRC to establish such a program and, if required, what is the proper scope of an effective program.2/ The Commission's decision at this point must still confront these very issues. Further, the issues are difficult to resolve in view of the essentially intangible nature of the competing considerations. Indeed, the recommendation in SECY-76-508 was not unanimous. In the coordination section of the paper the following information appears: "ELD and PLA do not believe that the necessity of a special nuclear material access authorization program for light water reactor plants has been sufficiently demonstrated" 3/ and "OGC recommends that clearance at LWR's not be considered, that the statement of consideration be expanded and that emergency implementation of the clearance program be considered" (SECY-76-508 p. 11).

On March 7, 1977 the Commission by a vote of 3-0 approved publication for 60 day public comment of a Commission proposal to establish an access authorization program for access to or control over SNM that would be graded in scope of background investigation (National Agency Check (NAC) or full field investigation) and would employ the criteria of 10 CFR Part 10 as a basis to grant or deny clearances. The proposal included people involved in the operation

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2/ The paper has enclosures addressing alternatives and the need for and efficiency of psychological assessments. Although nearly three years old, SECY-76-508 is still a useful document, and for that reason we attach it. It is already a part of the record of the proceeding as an attachment to Staff's testimony.

3/ On January 18, 1977, Howard Shapar, ELD, replied to a question from Commissioner Gilinsky as follows:

> I have no problem, on either legal or policy grounds, to a Government clearance program for licensed reactors. Indeed I think more needs to be done in addressing the "employee trustworthiness" factor in the context of providing effective safeguards against sabotage at licensed reactors.
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> My problem stems from the fact that, in my opinion no convincing justification has thus far been developed to demonstrate that a Government-run clearance program is necessarily the best approach toward that objective. To my knowledge, no systematic analysis of industry efforts to assure "employee trustworthiness" has been performed ... The industrial experiences gained ... might suggest the outlines of a program that could be adapted to nuclear reactors without the necessity of imposing a Government-run clearance program ....

of both fuel cycle facilities and nuclear power reactors, and employees of some non-licensees. In taking this action, Chairman Rowden and Commissioner Kennedy favored publication of the proposed program in the form of a proposed rule. Commissioner Gilinsky approved soliciting of comments on the proposed access authorization program; however, the Secretary noted that Commissioner Gilinsky was not persuaded that the need for such a program for individuals at reactor sites had been sufficiently established to warrant its inclusion in a proposed rule. (Memorandum from Chilk to Gossick, Subject: Staff Requirements, March 7, 1977.)

On March 17, 1977 the proposed regulations were published under the authority of 161i(2) of the Atomic Energy Act and public comment was invited (42 Fed. Reg. 14880). Responding to the magnitude of comments as well as specific requests for a hearing, the Commission issued a notice of public hearing (42 Fed. Reg. 64703, Dec. 28, 1977). The purpose of the hearing was to afford greater opportunity for public comment and for the expansion and substantiation of claims that the rule would have significant impact on industry operations.4/

The Hearing

The Commission requested that the hearing address seven issues. Briefly stated they are:

Issue 1 need for rule in each of licensed activities covered,

Issue 2 advantages and disadvantages of alternative programs and alternative safeguards,

Issue 3 impact of rule on manpower required and costs during planned outages at reactors,

Issue 4 suitability and relevance of 10 CFR Part 10 derogatory information categories,

Issue 5 relationship to 10 CFR 73.55 requirements -- extent rule meets threat of internal conspiracy,

Issue 6 desirability of rule at university research reactors,

Issue 7 impact on transportation of SNM.

4/ See SECY-77-486, Sept. 12, 1977, recommending holding a modified legislative type hearing.

The Commission requested that the Board conduct the hearing and prepare a record for its consideration. The Board's Report (pp. 1-28) describes the hearing. Pages 36-88 discuss issue by issue the positions taken in the hearing by the participants. (Also included in that section, pursuant to an August 31, 1978 request from the Commission, 5/ are the Board's recommendations on those issues.)

The Board's Report

The Board submitted its report on April 2, 1979 including its recommendations (pp. 32-35, and 36-88) based, as provided by the Commission, on the standard that a clear preponderance of information favor any rule recommended. A summary of those recommendations follows:

Issue 1 need for rule in each of licensed activities covered.

-- Need for proposed rule at nuclear power plants has not been established. Alternatives discussed in Issue 2 are feasible based on a lesser showing of need since they involve less significant social and economic costs.

-- No recommendation regarding need at fuel cycle facilities.

-- Recommendations regarding transportation included with Issue 7.

Issue 2 advantages and disadvantages of alternative programs and alternative safeguards.

-- A legal determination should be made whether NRC is required by law to follow DOE's standards, and this determination should be included in the record.

-- Assuming Commission determines that employee screening is necessary and alternative programs that differ from DOE's program are legally feasible, Board favors an industry-conducted program under

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5/ In recommending to the Commission that it seek recommendations from the Board, OGC stated: "The Board has a thorough familiarity with the record, and can offer a unique perspective on the major issues in the proceeding. The record is sufficiently complex to require a substantial investment of resources on the part of the Commission staff offices in order for them to develop detailed knowledge of the issues. The Hearing Board possesses that kind of knowledge now." Memorandum to Commissioners from James L. Kelley, Aug. 17, 1978.

NRC-issued standards that would include a background investigation, psychological screening and continued observation by supervisors. Also included in the rule should be a required appeal procedure, and requirements for protecting information and personnel privacy.

Issue 3 impact of rule on manpower required and costs during planned outages at reactors.

If the Commission adopts access authorization requirements for unescorted workers during outages the requirement should be held to lower level clearances.

Issue 4 suitability and relevance of 10 CFR Part 10 derogatory information categories.

The Commission should not adopt the recommended §§ 10.11 derogatory information criteria. While aware that a Government-wide program is under way to re-evaluate and revise the derogatory information criteria, the Board believes there is no justification for extending these admittedly unsatisfactory criteria to still another security program even as an interim measure. If criteria relating to refusal to serve in the armed forces, § 10.11(b)(6), having engaged in infamous, immoral or notoriously disgraceful conduct (8), being a homosexual or other sexual pervert (9) "are revised to account for the problems raised in the proceedings," 6/ the Board does not oppose their use as interim criteria in subsequent security clearance programs.

Issue 5 relationship to 10 CFR 73.55 requirements -- extent rule meets threat of internal conspiracy.

Record insufficient to enable Board to recommend.

Issue 6 desirability of rule at university research reactors.

Supports Staff's assertion that no access authorization program would be required at non-power reactors possessing less than formula quantities of SNM.

Issue 7 impact on transportation of SNM.

The Staff should further explore practical problems of enforcing compliance. Board agrees with general approach in Staff's final

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6/ Board's Report, p. 79. Although the matter is not entirely clear, the Board appears to be suggesting that these three criteria should be deleted.

revision, i.e., that access authorization should be required for pilots.

Post Report Developments

The Commission met on June 5, 1979 to discuss SECY-79-319, OGC's May 7, 1979 memorandum to the Commission presenting alternatives for Commission consideration of the Report of the Hearing Board and recommending issuance of an order providing for an on-the-record submission of Staff's legal analysis of whether NRC was required to follow DOE, an opportunity for Staff to respond to the Board's assertions of deficiencies in Staff's support of the rule, and a subsequent opportunity for other participants to comment.

The Commission requested and has received legal analyses from ELD and OGC on the authority question. The analyses agreed in substance that the better legal view is that NRC is not bound to follow DOE in establishing standards for an access rule. ELD's legal analysis was included in a July 16, 1979 memorandum titled "Staff Comments on the Access Hearing Board's Decision" which discussed in some detail Staff's belief that the Hearing Board wrongly indicated that Staff had some burden of proving the need for an access rule[7/] and failed to recognize that the Commission had already postulated an "insider" safeguards threat that could serve as a basis for the rule.

Responding to a Commission request that Staff provide (1) an opinion of what alternative programs are available under existing authority "other than 161i(2) with an explanation of the difference

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7/ While this paper cannot accommodate such a discussion, in another forum the Commission might consider better defining the role of the Staff in NRC rulemaking proceedings. Some issues that suggest themselves are:

(1) Should Staff be a participant in informal rulemaking proceedings?

(2) If Staff is a participant, should it exclusively represent Commission positions or may it reflect dissenting views where they exist?

(3) If Staff is a participant, what Commission-Staff contacts are desirable?

(4) How may other participants be informed of Staff's role, so as to avoid feelings of unfairness?

between a reliability standard and a clearance program" and (2) a draft fuel cycle rule, Staff submitted a July 31, 1979 memorandum. Enclosure A addressed alternative programs. It stated that NRR, SD and NMSS do not believe that alternatives which do not include some form of background investigation into associations would meet the current objectives. Staff stated, and we agree, that an inquiry into associational background would need to be based on the authority of 161i(2).

The memorandum also stated that NMSS, OSD and NRR, having been advised of ELD's legal view that NRC is not legally compelled to follow basic standards and procedures promulgated by DOE, nonetheless believe that "a traditional government clearance program is the best alternative available at this date." NMSS recommended adoption of a draft rule for fuel cycle facilities and transportation involving formula quantities of SNM. NMSS was silent on the subject of power reactors. NRR recommended that the rule as originally proposed be adopted with certain refinements, and as a second choice recommended for power reactors, excluding for the present all non-power reactors, an R access authorization based on a NAC investigation and the adoption of other requirements for unescorted access. Any of the above alternatives was acceptable to OSD. (Memorandum for Commissioners from H. K. Shapar, July 31, 1979, Enclosure A pp. 6-7.) Enclosure B provided the draft rule for fuel facilities. The draft rule adopts full field investigation with 10 CFR Part 10 criteria.

Two participants in the rulemaking, KMC and Behaviordyne, have written the Chairman to complain that Staff has been permitted opportunity to comment after the record has been closed. By way of relief, one requested a similar opportunity to comment; the other requested the Commission not to consider Staff's comments.[8/]

Related Considerations

New requirements intended to meet the "insider threat" postulated for preparation and review of security plans for nuclear power reactors (e.g. pat-down searches) have been delayed in expectation of a Commission decision on the clearance rule. If a clearance rule were to be approved by the Commission, many believe some of the other measures would not be required. However, if no clearance rule were to be approved, the matter of the "insider threat" would remain to be faced. All the alternatives to some form of clearance rule will present substantial controversy. For example, labor has voiced strong objection to the indignity of pat-down searches. A two-man rule has the disadvantage of requiring more personnel than

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8/ See preceding footnote.

otherwise would be required to enter vital areas, and therefore significantly affects the worker population exposures to radiation. The pat-down search requirement is scheduled to go into effect on November 1. Industry will require time to put it into effect.

Industry is currently revising its ANSI 18.17 standard. It is possible that a new standard would issue which the Commission could accept as assurance of trustworthiness and reliability.

Responding to vulnerabilities exhibited at Surry, Staff is currently preparing a paper concerning added procedures other than personnel clearances for access control to nuclear power plant vital areas. An ongoing Staff study is also evaluating "methods or techniques for detecting or preventing insider threats, e.g., security clearance, psychological profiling."(Memorandum from S. Chilk for L. Gossick, Subject: Commission Action on SECY-78-567 "Generic Adversary Characteristics Study," October 31, 1978, p. 3).

II. OGC OBSERVATIONS

The record of this rulemaking proceeding will, as a matter of law, support a variety of options.9/ It is not our purpose to propose any particular option for adoption by the Commission. Rather, our purposes here are to describe any weaknesses in the record insofar as they may limit the Commission's options, to describe what we believe to be the major considerations in favor or against the principal options, and to describe a possible limitation in NRC's authority to adopt a clearance rule for LWRs.

The Record

Except for certain of the derogatory information criteria that have been proposed (see discussion of Issue 4 of the Board's Report above), the record will support the clearance rule proposed by the Staff, or as proposed by the Staff but limited to fuel cycle facilities involving formula quantities of SNM. The record is weak and confused regarding the derogatory information criteria. The Board, and prior to the Hearing part of the Staff, urged that the criteria be revised; part of the Staff urged that the criteria not be revised by NRC but be kept uniform with other government clearance criteria. The reasoning offered in support of the present criteria rested in substantial part on what is now conceded to be an invalid legal premise -- that NRC was legally compelled to adopt the DOE criteria. There is some indication in the record that the proposed derogatory information criteria were

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9/ While the Commission requested the Board to present its recommendations based on a standard of "clear preponderance of information" on the record, the standard for judicial review of the Commission's decision is whether there is a rational basis for the decision. Furthermore, while the Board's determination of a preponderance is entitled to great weight, the Commission is not bound by it.

reviewed and found generally suitable for a materials access program. However, the details of that review and the reasons for the general suitability conclusion are not available. Because programs that affect constitutional rights should be the least restrictive possible to achieve the necessary result, it is subject to serious question whether it would be constitutionally permissible to intrude into protected areas on the basis of a program no more narrowly drawn than "generally suitable". The failure to provide reasoning in support of even this conclusion increases its frailty. The only remaining argument in support of the present criteria is that there are substantial benefits to having all agencies of the Government using the same criteria, so that an individual is not denied access by one agency and granted access by another. The problem with this argument is that it is not related to the merits of the criteria themselves. If it is conceded for purposes of argument that the criteria are flawed, then it is not in our view a strong argument to assert that this is an acceptable state of affairs because all of the other agencies' criteria are similarly flawed. Why should NRC not take the lead here in proposing updated and more clearly relevant criteria? In our view a Court would not likely uphold the contested criteria in the face of a determined challenge based upon the present record. We believe that before any access clearance rule is promulgated by the Commission, the Commission should solicit the views of the Staff and subsequently of other participants on the suitability of revised criteria for an access clearance program.

The record will also support variations on the access clearance rule that was proposed by the Staff. 10/ The principal alternative here is the one proposed by the Board -- an industry run program, including psychological testing, subject to NRC standards.

Principal Considerations

Need for Agency Rule

A Commission decision on the basic question whether any clearance rule is needed will entail a judgment of the relative significance of competing considerations. On the one hand, any rule that entails an investigation into a person's behavior, character, associations, and loyalty will impinge on rights of privacy and on rights of association and belief protected by the First Amendment. This will be true (although to a somewhat lesser extent) even if the derogatory information criteria are carefully drafted and narrowly drawn. These represent very significant, although unquantifiable costs. There are also, of course, the

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10/ To the extent that any alternative relies on use of the derogatory criteria proposed by Staff, the record will require supplementation.

more quantifiable administrative costs to NRC and the industry of setting up and then administering a clearance program. On the other hand, we believe that the insider safeguards threat postulated in the existing Commission regulations should be taken as a given for the purposes of this proceeding. There are obvious benefits associated with any rule that will reduce the safeguards risk from insiders. However, even assuming the existence of an insider threat, the benefits of a clearance rule designed to respond to it are difficult to gauge. How successful would a clearance program be in weeding out individuals inclined toward theft or sabotage? The premise for a clearance rule -- that clearances based on an investigation into a person's character, associations, loyalty and (if psychological assessments are included) behavior will significantly reduce the safeguards risk from insiders -- cannot be conclusively demonstrated. The Board in its Report was not helpful in "proving" or "disproving" this premise. Given the unquantifiable nature of most of the important competing considerations, the case for a rule must turn on value judgments of individual Commissioners as to the relative significance of those considerations.

Confinement of Rule to Fuel Cycle Facilities

This issue presents some special factors in addition to those described above. First, while the costs are minimized if the rule is confined to fuel cycle facilities involving formula quantities of SNM, there remains the question whether there are so few people affected that the costs of establishing and administering the program are justified. Second, while application of a clearance rule to nuclear power reactors would for many symbolize a kind of conversion of the nuclear power industry from a peaceful, civilian activity to a quasi-military one, this symbolic change will be avoided if the rule is confined to fuel cycle facilities. Finally, although there is a serious legal question, described below, whether the Commission can apply a clearance rule to LWRs, if the rule is confined to fuel cycle facilities this legal issue is avoided.10a/

The Board's Alternative

The Commission could, if it chose, adopt the Board's recommended alternative -- an industry run program, including psychological assessments, subject to NRC standards, although it is not at all clear that such a program would have a lesser impact on First Amendment rights or rights of privacy. In our view, the principal differences here lie in the relative effectiveness and administrative costs of the Board's and the Staff's proposed programs.

10a/ The first and final of these considerations would apply to a clearance rule for research reactors possessing formula quantities of SNM, and a rule for transportation of formula quantities of SNM. A clearance rule for such transportation also raises separate considerations of feasibility and practicality of enforcement.

NRC Authority to Adopt a Rule

As indicated above, there is a serious legal question whether the clearance rule proposed by the Staff, or any alternative rule entailing an investigation into persons' character, associations, and loyalty, can be applied to LWRs.

Under Schneider v. Smith, 390 U.S. 17 (1967), any program entailing an intrusion into individuals' rights protected by the First Amendment -- rights of association and belief -- must be based on specific statutory authority. Section 161i(2) was added to the Atomic Energy Act in 1974 by Pub. Law 93-377 to provide such specific statutory authority. At the time the AEC considered that the general grant of authority in section 161i(2) to prescribe rules or orders to guard against loss or diversion of SNM would not meet the test of specificity called for by Schneider v. Smith. Section 161i(2), as amended by Pub. Law 93-377, provides as follows:

> [In the performance of its functions the Commission is authorized to prescribe such regulations or orders as it may deem necessary] (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, including regulations or orders designating activities, involving quantities of special nuclear material which in the opinion of the Commission are important to the common defense and security, that may be conducted only by persons whose character, associations, and loyalty shall have been investigated under standards and specifications established by the Commission and as to whom the Commission shall have determined that permitting each such person to conduct the activity will not be inimical to the common defense and security.

The text quoted above makes two things clear. First, the authorized clearance program is to be part of an overall program "to guard against the loss or diversion of any special nuclear material." There is no other way to explain the use of the word "including" in the opening language of paragraph (2). Second, the clearance program is tied specifically only to the common defense and security. There is no mention here, as there is in numerous other sections of the Act, of "health and safety of the public". This failure to mention "health and safety of the public" is

easily explained. Traditionally, loss or diversion of special nuclear material had been viewed not as a public health and safety matter, but as a common defense and security matter. See Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968). Given the earlier language focusing exclusively on "loss or diversion of any special nuclear material", it is not surprising that the drafters of Pub. Law 93-377 made reference only to "common defense and security" in the later language of the paragraph.

A clearance program for LWRs thus presents two critical legal questions. First, can such a program be based on the need to protect against loss or diversion of SNM in the interest of the common defense and security? Second, if the answer to the first question is no, can section 161i(2) be construed more broadly so as to authorize a clearance program to protect against sabotage?

The answer to the first question is clearly no. Nowhere in the rulemaking record is there any indication that the proposed rule is designed to protect against loss or diversion of SNM at LWRs. There was an effort made to relate reactor sabotage to the national defense. While this arguably ties the proposed program to the common defense and security, it does not tie the proposed program to loss or diversion of SNM. Thus the answer to the second question is critical to the legality of the rule as applied to LWRs.

The only indication in the legislative history of section 161i(2) that the authorized clearance program may be used to protect against sabotage is in the testimony of Lester Rogers, AEC Director of Regulatory Standards, before the Joint Committee on Atomic Energy:

> The amendments to subsection 161i.(2) of the Atomic Energy Act would clarify and make explicit the authority of the Commission to institute a clearance program for inquiry into the associations and backgrounds of persons who have access to or control over significant quantities of special nuclear material.
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> Such a program is important because of the ever increasing amounts of high strategic value special nuclear material associated with development and expansion of commercial nuclear energy. For example, the domestic annual production of fissile plutonium by commercial power reactors is expected to grow from the present level of about 1,000 kilograms per year to over 10,000 kilograms per year by 1980. Moreover, as fissile plutonium can be used as fuel in commercial reactors, plutonium could be employed to that end, resulting in

> large amount of plutonium being processed into fuel elements each year. With the advent of high temperature gas cooled reactor technology, we can, as well, anticipate large material flows of highly enriched uranium and uranium-233. Success of the liquid metal fast breeder reactor and the light water breeder reactor programs would further add to the quantities of plutonium and uranium-233, respectively, to be utilized in the generation of electricity.
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> These materials -- plutonium, highly enriched uranium, and uranium-233 -- are all materials that could be used in making nuclear weapons. Moreover, plutonium and uranium-233 are highly radiotoxic. This means that concomitant with the growth of commercial nuclear energy there will be an increase in the amount of materials which could be used in a manner inimical to the common defense and security, either by clandestine fabrication of an illicit nuclear weapon, by dispersal of radiotoxic plutonium or uranium-233, or by sabotage to a nuclear fuel plant or a power reactor in an effort to cause widespread contamination. Thus, it is of the utmost importance that there be a high degree of confidence in the trustworthiness of persons having access to or control over significant quantities of special nuclear material.

This testimony presents three problems. First, the testimony can be read as assuming that formula quantities of SNM would be separately possessed at power reactor sites. This assumption would disqualify most present LWRs. Second, Mr. Rogers's statement is not reflected in any other legislative materials. There is no way to tell whether the Congress itself (as opposed to the AEC or the Joint Committee on Atomic Energy) had Mr. Rogers's concept of the legislation in mind when Pub. Law 93-377 was enacted. As a general rule, statements made at committee hearings are weak evidence of Congressional intent. Finally, given the expressed intent of the legislation to provide specific statutory authorization for a clearance program, it would be inconsistent with that intent to read the language broadly so as to sanction a clearance program that is not specifically authorized by the statutory language. Any such reading would also conflict with Schneider v. Smith and U.S. v. Robel, 389 U.S. 258 (1967), which may be read to hold that statutory language authorizing an intrusion into First Amendment rights must be narrowly construed.

This Office has previously advised the Commission of some of these problems of statutory construction. See Memorandum for

Commissioner Gilinsky from Peter L. Strauss dated Feb. 2, 1977 (attached).11/ The legal issues are not open and shut ones. The testimony of Mr. Rogers does offer some support for the proposition that sabotage at LWRs was intended to be covered, and if the NRC should adopt this point of view the court would pay some deference to this interpretation. Nevertheless the better legal view is that the statute cannot be read this broadly.

III. OPTIONS OUTLINE

Having described the setting for the clearance rule decision, we will outline the Commission's various options and will highlight further steps that in our view are required before the Commission may choose an option. We have categorized the options under three headings: the basic type of rule to be adopted, the scope of the rule, and the criteria to be used under it.

Category 1 -- Type of Rule

a. No Rule

To choose the No Rule Option requires no further steps in this particular rulemaking proceeding. However, were the Commission to make this choice, it would likely wish to proceed with other safeguards measures to meet the insider threat.

b. The Proposed Rule (or any variation requiring a National Agency Check or full field background investigation)

If the Commission wishes further to consider adopting the originally proposed rule, it is OGC's view that opportunity should be provided for other participants in the rulemaking proceeding to submit their comments on Staff's July 18 and July 31 memoranda and on any other Staff submissions the Commission may request before making its decision. While the proceeding is an informal rulemaking, considerations of fairness as well as recent judicial decisions strongly suggest that where the record is in effect reopened to admit new significant materials or additional argument, all parties should have an opportunity to comment. This would be in addition to requesting the view of Staff and other participants on the derogatory information criteria.

11/ The cited memorandum reached the conclusion that while a clearance program at LWRs would have serious litigative risks, it could survive a court challenge. However, this memorandum did not focus on the issue of whether the program must be linked to loss or diversion of SNM.

Further consideration of the proposed rule might suggest further postponement of the effective date of the pat-down rule.

c. Rule Based on the Board's Suggestion (industry-run program including psychological testing)

The Commission could make a decision to move in this direction; however, a rule would have to be drafted and put out for comment before the Commission could adopt it. At the least, in our view, comment should be solicited from participants before adoption. The wiser course would be to publish a new rule for general comment.12/ While the rulemaking proceeding did address alternatives in a general sense, there has been no opportunity for the public to comment on the specifics of any alternative that represents a major departure from the proposed rule -- for example, the criteria and procedures that would be required for psychological assessments.

d. Other

Other basic options, such as a government-run program with psychological testing, would also require further rule drafting and public comment.

Category 2 -- Scope of the Rule

If an access rule is adopted,13/ a decision must be made on the extent to which it should apply to:

a. Fuel Cycle Facilities -- While there appears to be less opposition to instituting some kind of a clearance program at fuel cycle facilities, to do so would still be a significant administrative undertaking. In light of current expectations that a clearance program will be instituted for access to certain safeguards information at fuel facilities and in light of ongoing DOE clearances, OGC suggests that before approving a rule for fuel cycle facilities, the Commission ascertain that the program would cover enough personnel to be warranted. We recommend requesting Staff to provide updated figures on the number of persons who would remain uncovered without a material access rule.

12/ One deficiency noted by the Board in the proceeding it conducted was the lack of views from organized labor. Board Report, p. 62.

13/ See footnote 10.

b. Power Reactors -- The best legal argument in support of application of a clearance program to LWRs would rest on Mr. Rogers's testimony before the Joint Committee, and a factual tie-in between reactor sabotage and the common defense and security. The only such tie-in that has been proposed relates reactor sabotage to the power needs of defense installations and other vital Governmental facilities. The rulemaking record on this tie-in is weak, and the Commission's legal position would be bolstered if this matter were given more detailed consideration.

c. Research Reactors -- There appears to be general agreement to send the issue to Staff for its research reactor study (Memorandum for Commissioners from H. K. Shapar, July 31, 1979, Enclosure A, p. 7). The Commission's decision should note this disposition.

d. Transportation of SNM -- The Commission would likely wish to request Staff to provide a response to the Board's concern regarding the practical problems of enforcing compliance.

Category 3 -- Criteria

If the Commission elects to proceed with any rule requiring a background investigation, it has the following options:

a. Adopting the DOE (Government-wide) Criteria. A move to institute a new clearance program with criteria that are acknowledged as outmoded and irrelevant would, as we have indicated, be extremely vulnerable to legal challenge. As indicated supra (p. 9) the record requires supplemental information. Views of participants should be solicited. In our view a court would not likely uphold the contested criteria in the face of a determined challenge.

b. Adapting the DOE Criteria by Eliminating Criteria Criticized by the Hearing Board. This would require additional minor drafting before implementation. No further public comment would likely be required. The record would still be deficient in showing that the remaining criteria are the least restrictive criteria designed to screen out individuals likely to perpetrate a diversion, theft or sabotage. Also, the Commission would need to consider the effectiveness of a clearance program with only the remaining criteria.

c. New Criteria. This would require additional study and drafting. If the criteria represent a wholesale departure from the proposed criteria, then public comment should also be solicited. Also consideration would need to be given to awaiting the Government-wide study of criteria now under way.

Attachments:
1. SECY-76-508
2. Strauss memo 2/2/77

cc: OPE
OCA
SECY