

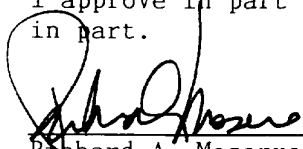


UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

11/2/00
COMSECY-00-0036

October 18, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

I approve in part and disapprove
in part.

Richard A. Meserve 1/03/01

FROM: William D. Travers
Executive Director for Operations

SUBJECT: SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED
WITH THE REVISED OVERSIGHT PROCESS

The staff began initial implementation of the revised reactor oversight process on April 2, 2000. It has been recognized that the staff will continue to develop lessons learned during initial implementation. The Staff Requirements Memorandum dated May 17, 2000, associated with SECY 00-0049, states that during the initial implementation phase, the staff should inform the Commission whenever it determines that a deviation from the Action Matrix is warranted. The purpose of this memorandum is to inform the Commission of the staff's near-term corrective actions involving the Physical Protection Significance Determination Process and to inform the Commission of interim measures the staff will use for dealing with findings in reactor safeguards.

BACKGROUND:

In SECYs 99-007A, "Recommendations for Reactor Oversight Process Improvements," and 00-0049, "Results of the Revised Reactor Oversight Process Pilot Program," respectively, the staff presented the Commission with results from its feasibility reviews which involved applying the significance determination process as part of the revised reactor oversight process (RROP). Although bench marking and feasibility reviews were completed for the significance determination processes (SDPs), including the physical protection (PP)SDP, the bench marking and feasibility reviews for the PPSDP did not include detailed consideration of Operational Safeguards Response Evaluations (OSREs) or other force-on-force exercises.

January 3, 2001

COMMENTS OF CHAIRMAN MESERVE ON COMSECY-00-0036

The Commission is responding to the staff's request for votes on certain issues relating to the conduct of Operational Safeguards Response Evaluations (OSREs). For the reasons more fully explained below,

- I approve the utilization of interim guidance for the Physical Protection Significance Determination Process (PPSDP) until the revision of the PPSDP can be accomplished;
- I approve the issuance of the Quad Cities inspection report, subject to certain comments below; and
- I approve proceeding with appropriate actions in accordance with the Revised Reactor Oversight Process, but disapprove of enforcement in this case.

This vote should be seen to constitute approval of interim steps that will be subject to a more thorough examination in the context of a broad review of NRC policies relating to safeguards and security matters over the coming year.

1. When the Commission approved the initial implementation of the Revised Reactor Oversight Process, it fully expected issues would arise that would require the further refinement of the process. Because the bench-marking and feasibility reviews for the PPSDP did not include detailed consideration of OSREs or other force-on-force exercises, it is not surprising that the application of the PPSDP should require further modification. The staff's interim guidance appears to provide a reasonable approach for assessing inspection findings and determining the appropriate regulatory response.

2. I approve the issuance of the inspection report, but would remove any reference to enforcement. I would remove any such reference because of the incoherence that surrounded the NRC's policies in this area when the Quad Cities OSRE was conducted. Although the design basis threat defined in our regulations has been fairly stable, the adversary characteristics that define the details have been revealed to licensees in the past only in the context of an OSRE and have varied from time to time and from site to site. Thus, until the adversary characteristics document was issued on August 29, 2000, the exact nature of the challenge to which our licensees were expected to respond was somewhat ambiguous. Moreover, there apparently were not clear understandings of what weaknesses revealed during the conduct of an OSRE might constitute a violation of 10 CFR 73.55(a) and perhaps of whether an OSRE could result in a notice of violation. Because at the time of the Quad Cities OSRE the NRC had not clearly and consistently communicated its expectations to licensees, the imposition of a notice of violation could appropriately be seen as retroactive and unfair.

I am also mindful that the licensee conducted the force-on-force drills with fewer responders than specified in its Security Plan. The OSRE thus did not reflect the application of the forces that the licensee is required to have in place and in fact has in place. There is therefore some question whether the OSRE in fact served to test the adequacy of the existing onsite physical protection systems and security organization in meeting regulatory requirements.

My approval on the deletion of the reference to enforcement does not reflect my conclusion that safeguards and security issues are unimportant. On the contrary, I am confident that the entirety of the Commission shares the common view that a strong safeguards and security program is a central and important obligation of our licensees. Rather, the Commission's action should be seen to reflect the conclusion that our requirements should be sharply and precisely defined before enforcement action is appropriate.

Approval of the issuance of the inspection report (without the references to enforcement) also does not reflect a determination as to the validity of the various assertions in the report. The staff should engage the licensee as it normally would on such a matter without any restraints arising from the fact that the draft inspection report was submitted to the Commission for review.

3. Although enforcement is not appropriate in this case, the staff should proceed with other actions consistent with the RROP. The safeguards and security obligations of our licensees are important and the staff should continue to provide oversight using the interim guidance.

* * *

The staff should be commended for the effort that has been undertaken to bring openness and order to our practices relating to safeguards and security over the past six months. It is apparent, however, that many legal and policy issues remain to be addressed. In their votes on this matter my fellow Commissioners have raised a number of legitimate issues for Commission consideration. The staff should understand that a fundamental reanalysis of NRC policy in this area is required.



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

11/2/00
COMSECY-00-0036

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October 18, 2000

Approve in part and disapprove in part. See attached comments.

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

Greta Joy Dicus
Greta Joy Dicus 12/22/00

FROM: William D. Travers
Executive Director for Operations

SUBJECT: SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED WITH THE REVISED OVERSIGHT PROCESS

The staff began initial implementation of the revised reactor oversight process on April 2, 2000. It has been recognized that the staff will continue to develop lessons learned during initial implementation. The Staff Requirements Memorandum dated May 17, 2000, associated with SECY 00-0049, states that during the initial implementation phase, the staff should inform the Commission whenever it determines that a deviation from the Action Matrix is warranted. The purpose of this memorandum is to inform the Commission of the staff's near-term corrective actions involving the Physical Protection Significance Determination Process and to inform the Commission of interim measures the staff will use for dealing with findings in reactor safeguards.

BACKGROUND:

In SECYs 99-007A, "Recommendations for Reactor Oversight Process Improvements," and 00-0049, "Results of the Revised Reactor Oversight Process Pilot Program," respectively, the staff presented the Commission with results from its feasibility reviews which involved applying the significance determination process as part of the revised reactor oversight process (RROP). Although bench marking and feasibility reviews were completed for the significance determination processes (SDPs), including the physical protection (PP)SDP, the bench marking and feasibility reviews for the PPSDP did not include detailed consideration of Operational Safeguards Response Evaluations (OSREs) or other force-on-force exercises.

COMMISSIONER DICUS' COMMENTS ON COMSECY-00-0036, "SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED WITH THE REVISED OVERSIGHT PROCESS"

I join with Commissioners McGaffigan, Merrifield, and Diaz and:

- 1) Approve use of the staff's interim guidance for the Physical Protection Significance Determination Process (PPSDP) when evaluating findings during force-on-force exercises until a more formal effort to revise the PPSDP can be accomplished,
- 2) Approve issuing the draft Quad Cities inspection report, except for references to an apparent violation, and
- 3) Approve proceeding with appropriate actions in accordance with the revised reactor oversight process, but disapprove the staff's plan to proceed with enforcement of the provisions of 10 CFR 73.55(a).

I share many of the same concerns of my colleagues with regard to consistency, fairness and the framework for effectively regulating physical protection requirements. Establishing an accepted and consistent interpretation of 10 CFR 73.55(a) is essential before we can implement a well reasoned and fair enforcement policy. In addition, I support Commissioner Merrifield's request that the staff provide the Commission with a detailed account of how it distinguishes between "enemies of the United States" as discussed in 10 CFR 50.13 and those adversaries that licensees are required to protect against in 10 CFR 73.1

Although we have made significant strides recently, it is clear, to the extent practical, more communication, discussion and exchange of information between NRC and it's stakeholders is warranted. While some specifics must remain appropriately safeguarded, we must all have a common understanding of the requirements and expectations in this area. There should be no surprises with regard to NRC and licensee performance expectations.

Finally, in order to continue to promote communication and progress on the viability of a revised approach for assessing safeguards performance, the staff should consider efforts to mitigate regulatory uncertainty and burden for licensees that volunteer to pilot a safeguards performance assessment process. For any licensee that volunteers to pilot a revised safeguards approach, the staff should consider:

- 1) Accepting the pilot implementation and staff review of a revised safeguards performance assessment program in lieu of an NRC conducted operational safeguards response evaluation.
- 2) Establishing an enforcement discretion policy that continues to ensure safety but provides appropriate consideration for findings that result from pilot implementation activities.
- 3) Removing the Part 170 NRC review costs from the licensee-specific fee-base, consistent with current provisions, for those NRC pilot review activities that have generic applicability.

gpd
12-22-00



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

11/10/00
COMSECY-00-0036

October 18, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

Approved in part, Disapproved
in part. See attached
comments.

FROM: William D. Travers
Executive Director for Operations

Nils J. Diaz
Nils J. Diaz 12/20/00

SUBJECT: SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED
WITH THE REVISED OVERSIGHT PROCESS

The staff began initial implementation of the revised reactor oversight process on April 2, 2000. It has been recognized that the staff will continue to develop lessons learned during initial implementation. The Staff Requirements Memorandum dated May 17, 2000, associated with SECY 00-0049, states that during the initial implementation phase, the staff should inform the Commission whenever it determines that a deviation from the Action Matrix is warranted. The purpose of this memorandum is to inform the Commission of the staff's near-term corrective actions involving the Physical Protection Significance Determination Process and to inform the Commission of interim measures the staff will use for dealing with findings in reactor safeguards.

BACKGROUND:

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10/18/00

ORIGINAL

COMMISSIONER DIAZ' COMMENTS ON COMSECY-00-0036

An indispensable attribute of an efficient and effective safety regulatory agency is predictability. Predictability is an attribute that embodies clarity, specificity and objectivity. Predictability is not static but bounds requirements and responses in a comprehensive manner; it is expected by licensees, stakeholders and the American people. Predictability is not event driven but is responsive to events; it changes for safety reasons but is unchangeable to the unreasonable. Predictability is bound by law and by assurance of public health and safety. It provides roadmaps for what is to come. Predictability should be used to shore up enforcement and also to provide exemptions to enforcement. Predictability was the underlying force behind the changes to 10 CFR 50.59, the elimination of the Senior Management Meeting and the SALP, the Revised Reactor Oversight Process, the risk-informed Regulatory Guide 1.174, the 50.65(a)(4) addition to the Maintenance Rule, and many of the other changes made at the NRC in the last three years. Predictability is consistent with the elimination of the "zero factor" in regulation, and predictability is what is now needed for steam generators' performance requirements.

Predictability is also what is needed for the nuclear power plants' safeguards and physical protection arena---sooner rather than later. I recognize the extent of and commend the many staff efforts in this area, as well as the recent improvements in addressing these issues, but I believe we need to do better and provide a finality that truly serves the needs of the American people.

I believe that U.S. nuclear power plants are security hardened and will continue to be so. They would even be better if our requirements are predictable, as discussed above. Therefore, I strongly recommend that an early determination of the joint role of licensees and the U.S. Government, as delineated by 10 CFR 50.13, be established to bound the plant's security requirements.

For the reasons so clearly stated by Commissioners McGaffigan and Merrifield in their votes, I join them fully. Specifically, re: COMSECY-00-0036:

- I approve the staff's proposed interim guidance for the physical protection significance determination process (PPSDP)
- I approve issuing the draft Quad Cities Inspection Report
- I disapprove taking enforcement action against Quad Cities
- I approve proceeding with appropriate actions proposed by staff in accordance with the Revised Reactor Oversight Process (RROP)
- I disapprove proceeding with enforcement of the provisions of 10 CFR 73.55(a) until the Commission determines that the processes and the outcomes are predictable.

Furthermore, I believe the industry should be allowed to begin testing their proposed self-assessment program on plant security without being subject to enforcement actions during the first year. This, of course, does not relieve them from their responsibility to maintain their established levels of physical security.



UNITED STATES
NUCLEAR REGULATORY COMMISSION
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11/2/00
COMSECY-00-0036

October 18, 2000

*Approved in part.
Disapproved in part.
See attached comments.
E. Alie Goffey Jr.
11/2/00*

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers
Executive Director for Operations

SUBJECT: SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED
WITH THE REVISED OVERSIGHT PROCESS

The staff began initial implementation of the revised reactor oversight process on April 2, 2000. It has been recognized that the staff will continue to develop lessons learned during initial implementation. The Staff Requirements Memorandum dated May 17, 2000, associated with SECY 00-0049, states that during the initial implementation phase, the staff should inform the Commission whenever it determines that a deviation from the Action Matrix is warranted. The purpose of this memorandum is to inform the Commission of the staff's near-term corrective actions involving the Physical Protection Significance Determination Process and to inform the Commission of interim measures the staff will use for dealing with findings in reactor safeguards.

BACKGROUND:

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Commissioner McGaffigan's Comments on COMSECY-00-0036

I approve, in part, and disapprove, in part, the staff's three planned actions described in COMSECY-00-0036. Specifically, I:

approve the staff's proposed interim guidance for the physical protection significance determination process (PPSDP), as described in COMSECY-00-0036,

approve issuing the draft Quad Cities Inspection Report, except for the references to a Notice of Violation, and

approve proceeding with appropriate actions in accordance with the revised reactor oversight process (ROP), but disapprove the staff's plans to proceed with enforcement of the provisions of 10 CFR § 73.55(a).

I commend the staff for its efforts to resolve the various problems with the NRC inspection program for physical security, particularly in regard to force-on-force exercises. While some of these problems preceded implementation of the ROP, the ROP's PPSDP further exacerbates these problems -- as the staff's analysis illustrates in this COMSECY. The difficulties in applying a risk-informed approach to physical protection have been well documented in other fora.

The staff's recent efforts to ensure a common understanding of the Adversary Characteristics Document clearly were a step in the right direction. In COMSECY-00-0036, I find the staff's arguments in favor of modifying the PPSDP compelling and I encourage the staff to continue to work closely with our external stakeholders to resolve the remaining challenges. Despite the staff's laudable efforts thus far, I fear that we have too far to go in addressing these shortcomings before we will be able to devise a reasonable enforcement policy for findings arising from in reactor safeguards force-on-force exercises, if indeed it makes sense to use enforcement in this context at all.

I believe that our licensees must ensure that their facilities remain the most hardened commercial industrial targets in the United States with an extremely capable and well exercised security force to serve as a deterrent to any potential adversary. I fully support force-on-force exercises as a method for evaluating the effectiveness of our licensees' protective strategies and I also support an enforcement policy that is fair, rational, predictable, and stable. Unfortunately, when it comes to enforcement of 10 CFR § 73.55(a), it is clear to me that important stakeholders - - licensees, the public, the Commission itself, and perhaps even the staff - - do not have a common understanding of NRC's enforcement policy for deficiencies identified in force-on-force exercises.

I disagree with the staff's proposal to pursue enforcement action vis-a-vis 10 CFR § 73.55(a) for deficiencies identified in force-on-force exercises such as OSREs, because I find the wording of § 73.55(a) to be unclear and the standard to be undefined.

- 10 CFR § 73.55(a) reads in part:

The licensee shall establish and maintain an onsite physical protection system and security organization which will have as its objective to provide *high assurance* that activities involving special nuclear material are not inimical to the common defense and

security and do not constitute an *unreasonable risk to public health and safety*. The physical protection system shall be designed to protect against the design basis threat of radiological sabotage as stated in § 73.1(a). [emphasis added]

In much of the staff's discussion of this provision, this fairly convoluted language has been simplified. For example, the NRC Inspection Manual (Inspection Procedure 71130) states: "The required ability to demonstrate high assurance of protection against the DBT is the focus of this performance evaluation." Similarly, Inspection Procedure 81110 on Operational Safeguards Response Evaluation (OSRE) states: "Explain that enforcement action will be taken if a performance weakness is identified such that there is not high assurance that the licensee has the capability to protect against the DBT." But high assurance of protection against the DBT is not what § 73.55(a) requires.

We should admit that § 73.55(a) is a very difficult to interpret provision. By comparison the prescriptive provisions of 10 CFR §§ 73.55(b)-(h) are straightforward and provide an objective standard to measure against. Each licensee has an NRC-approved Security Plan that incorporates its response to those provisions. Section § 73.55(a) speaks of an objective for the onsite physical protection system and security organization of providing "high assurance" that licensee activities "do not constitute an unreasonable risk to public health and safety." Separately, it speaks of "designing" the physical protection system (but not the security organization) to protect against the design basis threat.

How is one to enforce this provision? How do we relate a security organization's response to an exercise, or series of exercises, to its success or failure to meet the objective of high assurance that these activities do not constitute an unreasonable risk? How are we to determine whether a physical protection system may no longer be designed to protect against the DBT (even though we have approved the physical security plan)?

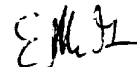
It is questions such as these which surely led the staff to refrain from trying to enforce § 73.55(a) until this year. As I understand it, a Commissioner asked a question about enforcing § 73.55(a) at a Commission briefing. This led to an OGC clarification to the staff, dated November 9, 1998, that it would be possible (emphasis added) to cite non-compliance with § 73.55(a) at a plant with an NRC approved security plan. With the advent of the revised reactor oversight process, the staff has valiantly tried to figure out how to enforce § 73.55(a). It carried out its first enforcement action against Waterford earlier this year (via a confirmatory order), although this was done under the old oversight process. The proposed notice of violation against Quad Cities would be the second such enforcement action with more to follow. The Commission was not involved in the Waterford case, but obviously the staff has now recognized that there is an important policy issue involved here and has come to the Commission for guidance.

The Commission has been supportive of clarifying and revising 10 CFR § 73.55, including adding a requirement for regular exercises, and has committed itself to rulemaking in this area over the next couple of years. I believe that we would be best served by not trying to enforce as obtuse and subjective a provision as § 73.55(a) until it is revised, particularly when the Office of Nuclear Material Safeguards and Security (NMSS) does not enforce against the equivalent § 73.20(a) as described below. In revising § 73.55(a) we will need to be clear on how the revised provision will be enforced, if it is to be enforced and what purpose the force-on-force exercises are intended to serve.

I would note that NMSS does not take enforcement action on the results of its force-on-force exercises at Category I fuel cycle facilities. Category I fuel cycle facilities have the same hard to interpret general performance objective as reactors (§ 73.20(a)). Unlike reactor licensees, such licensees have in addition a formal regulatory requirement to periodically conduct exercises, including force-on-force exercises (§ 73.46(b)(9)). But in writing this provision in 1988, the Commission stated in the Statements of Consideration that:

The exercises would demonstrate the guard force state of readiness and test the effectiveness of delay mechanisms, alarm and communication systems, response times, deployment of response forces, firing skills (simulated), and tactical maneuvers. The results would be used to determine whether additional training or security system improvements are needed. The exercises are not intended to be viewed in terms of "pass" or "fail."

It strikes me that the NMSS approach has much to recommend it, and should certainly be considered in revising § 73.55. The NRC does not get caught up in citing violations against obtuse language or giving pass-fail exercise results. Instead NRC and licensee staff use exercises to identify weaknesses and to correct them. The NMSS approach would obviously even raise questions about the revised reactor oversight process's revised SDP for physical protection (PPSDP) with its color coding of OSRE results. But I am personally somewhat more comfortable with this because I believe it mirrors how the Army might grade a unit's performance in force-on-force exercises at the National Training Center at Fort Irwin, California. Receiving other than a green (or no color) inspection finding, as Quad Cities will do, will certainly focus licensee attention on taking necessary corrective actions without, in my view, the need for the additional citing of a violation against § 73.55(a).





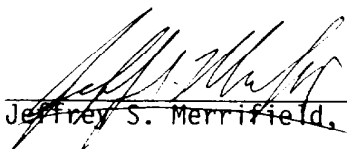
UNITED STATES
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11/2/00
COMSECY-00-0036

October 18, 2000

Approved in part.
Disapproved in part.
See attached comments.

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield


Jeffrey S. Merrifield, 11/28

FROM: William D. Travers
Executive Director for Operations

SUBJECT: SAFEGUARDS PERFORMANCE ASSESSMENT ISSUES ASSOCIATED
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Commissioner Merrifield's Comments on COMSECY-00-0036

I commend the staff for their diligent efforts associated with this very difficult matter. I am particularly pleased with the staff's efforts on the OSRE Adversary Characteristics Document that was issued in August. I believe this document should serve to bring greater discipline, predictability, credibility, and stability to the OSRE process. The public and our licensees deserve nothing less. I am also pleased that the staff has opened up better lines of communication with our stakeholders and our licensees regarding plant security issues. For too long, inadequate communication, unclear requirements and expectations, and regulatory unpredictability have plagued our OSRE process, and thus, it is refreshing to see the staff tackling these problems so thoroughly and aggressively. I have a great deal of confidence in the staff and the management team responsible for these efforts.

Regarding the staff's three planned actions outlined in COMSECY-00-0036, I:

1. Approve the staff's interim guidance for the Physical Protection Significance Determination Process (PPSDP) for use when evaluating findings during force-on-force exercises until a more formal effort to revise the PPSDP can be accomplished,
2. Approve issuing the draft Quad Cities Inspection Report, except for the references to an apparent violation.
3. Approve proceeding with appropriate actions in accordance with the revised reactor oversight process (ROP), but disapprove the staff's plan to proceed with enforcement of the provisions of 10 CFR § 73.55(a).

Like Commissioner McGaffigan, I strongly believe that our licensees must ensure that their plants remain some of the most secure commercial industrial targets in the United States with an extremely capable and well-exercised security force to serve as a deterrent to any potential adversary. I support force-on-force exercises as a method for evaluating the effectiveness of our licensees' protective strategies. Finally, I support an enforcement policy that is fair, rational, predictable, and stable. Based on my review of COMSECY-00-0036, I believe that the staff, despite their hard work, has fallen short in their efforts to achieve some of these attributes.

Narrowly, I do not believe enforcement should be taken against Quad Cities. I strongly believe that the instability and lack of clarity associated with the OSRE process make taking enforcement against a licensee at this time unreasonable and unfair. Taking enforcement against a licensee in such a regulatory environment would simply be inconsistent with the NRC's Principles of Good Regulation. I'll briefly touch on some of my specific concerns. First, the Quad Cities OSRE was conducted from May 1st through May 4th, 2000. Yet, the OSRE Adversary Characteristics Document, which brought much needed clarity to the OSRE process, was not issued until August 29, 2000. More importantly, the staff's detailed guidance clarifying the conduct, agenda, and rules of engagement for OSREs was not developed at the time of the Quad Cities OSRE and was not finalized until November 17, 2000. Second, the agency has a long history of refraining from enforcement of § 73.55(a). In fact, it wasn't until August 4, 2000 that the staff carried out its first significant enforcement action related to § 73.55(a) when it issued a confirmatory order to the Waterford plant. I believe that this long history has only served to reinforce among our licensees the reasonable expectation that enforcement would not be pursued for OSRE findings. In a note from John Craig to the Commissioner Assistants

dated November 16, 2000, the staff appears to share my view by confirming that “Based upon precedent, the licensee also may have believed that enforcement would not be taken during OSREs.” Notwithstanding that case law may support carrying out enforcement in this manner (see Advanced Medical Systems, Inc., CLI-94-6, 39 NRC 285, 319, 320 (1994)), I believe that when the staff intends to deviate from such a long-standing enforcement practice, it should take prudent measures to ensure that the basis for the deviation is clearly articulated to our stakeholders, that clear guidance is provided to our staff, and that our intentions and expectations are clearly conveyed to our licensees and the public. Such clarity was not present in this case. Finally, as discussed in COMSECY-00-0036, there are significant problems associated with the current Significance Determination Process (SDP) and thus it remains in a state of flux even today. These SDP deficiencies served as the impetus for the staff’s interim guidance proposed in COMSECY-00-0036. In sum, I believe that we, and our stakeholders, would be best served by not trying to enforce against § 73.55(a) until the staff instills greater clarity and stability into our OSRE process. My position on enforcement in no way diminishes my strong belief that comprehensive and prompt corrective actions should be taken by licensees when significant deficiencies are identified during OSREs. As responsible regulators, however, we must bring consistency and stability into this process in order for enforcement activities to be effectively utilized to achieve the goals of the NRC Enforcement Policy. I believe the staff is making progress in resolving these concerns and I commend them for their diligence.

More broadly, I agree with Commissioner McGaffigan that the staff should not pursue enforcement action vis-a-vis 10 CFR § 73.55(a) for deficiencies identified in force-on-force exercises such as OSREs because I find the wording of § 73.55(a) to be unclear and the standard to be undefined. Specifically, § 73.55(a) states in part:

The licensee shall establish and maintain an onsite physical protection system and security organization which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety. The physical protection system shall be designed to protect against the design basis threat of radiological sabotage as stated in § 73.1(a).

Clearly, § 73.55(a) is not well-written and thus difficult to interpret and enforce. As discussed by Commissioner McGaffigan in his vote on COMSECY-00-0036, § 73.55(a) speaks of an objective for the onsite physical protection system and security organization of providing “high assurance” that licensee activities “do not constitute an unreasonable risk to public health and safety.” **Separately**, it speaks of **designing** the physical protection system (but not the security organization) to protect against the design basis threat (DBT). While the staff has clearly made a good faith effort to interpret the difficult and fairly convoluted language of § 73.55(a), I believe they may have unwittingly blurred that separation in their interpretation. For example, NRC Inspection Procedure 81110, Operational Safeguards Response Evaluation (OSRE), states: “Explain that enforcement action will be taken if a performance weakness is identified such that there is not high assurance that the licensee has the capability to protect against the DBT.” While the staff’s interpretation may have merit, § 73.55(a) does not specifically require a high assurance of protection against the DBT. Thus, after very careful consideration of § 73.55(a), and the staff’s interpretation of § 73.55(a) as presented in Inspection Procedure 81110, I believe there are legitimate questions that must be answered regarding the intent of § 73.55(a), the enforcement of § 73.55(a), and the basis behind the staff’s interpretation of

§ 73.55(a). Until these questions are thoroughly addressed by OGC and NRR, and answered to the satisfaction of the Commission, I believe it would be prudent to **not** enforce against § 73.55(a) for deficiencies identified in force-on-force exercises such as OSREs.

I request that OGC and NRR carefully review § 73.55(a) and reassess its enforcement. I encourage the staff to conduct this process in an open and transparent manner; actively seeking input from the public, our licensees, our staff, and other interested stakeholders. The results of this reassessment should be formally presented to the Commission. At the end of this process, there should be much greater clarity as to what constitutes a violation of § 73.55(a) as the result of a force-on-force exercise. Until such time, I believe the staff should not carry out enforcement of § 73.55(a). Ultimately, I believe that § 73.55(a) will have to be revised to instill greater clarity and objectivity into the regulation itself. I believe that this can be accomplished as part of the staff's comprehensive efforts associated with § 73.55 that are outlined in SECY-99-241. I support such a rulemaking initiative and, as part of it, I strongly encourage OGC and NRR to consider how NMSS approaches § 73.20(a). Based on my review of § 73.55(a) and § 73.20(a), I cannot find a clearly articulated rationale for the different approaches to enforcement of these regulations.

As stated above, I support the staff's interim guidance for use when evaluating findings during force-on-force exercises until a more formal effort to revise the PPSDP can be accomplished. I commend the staff for recognizing the serious flaws associated with the PPSDP and for promptly proposing corrective action. I agree with the staff that the current PPSDP, with its link to the reactor safety SDP (RSSDP), can over-estimate the risk-significance of certain OSRE findings, and therefore lead to a higher level of NRC response and engagement than is warranted. I also agree with the staff that it would be inappropriate to address this problem by repeatedly authorizing deviations from the Action Matrix. Such an approach would not address the root of the problem and could introduce greater subjectivity and less discipline into the Action Matrix process. Thus, I believe the staff's approach of issuing interim guidance is appropriate. I did not reach this conclusion without careful consideration of its impact on public confidence. As I noted in my vote on SECY-00-0049, I take very seriously any deviations from the Action Matrix and any deviations from the formal change process adopted for the ROP. I believe that this formal change process serves to facilitate stakeholder feedback on proposed changes to the ROP, and that as a general matter, deviating from that process could serve to erode public confidence in the ROP. Thus, I was concerned when I learned that the staff had not sought stakeholder feedback on the proposed interim guidance. However, after careful consideration of the particular facts surrounding this matter, I believe that proceeding with the staff's interim guidance, absent stakeholder input, is the most prudent course of action. Although I would have preferred having the benefit of stakeholder input, I believe the current SDP is so seriously flawed and so out of step with the NRC's Principles of Good Regulation that immediate and extraordinary corrective action (i.e., interim guidance) is warranted. I believe it is in all of our stakeholders' best interests for the staff to move forward with the interim guidance laid out in COMSECY-00-0036 to prevent inappropriate NRC response to OSRE findings and repeated deviations from the Action Matrix. I strongly encourage the staff to actively pursue stakeholder insights on the long-term fix to the SDP.

I also request that OGC, NRR, and NMSS clarify for the Commission the basis for their interpretation of § 73.1 with respect to the knowledge and attributes possessed by the adversaries. Based on my limited review of the Quad Cities OSRE results, it appears that the adversaries possessed substantial knowledge associated with plant design and layout, the

plant's physical protection system and security facilities, the licensee's security response procedures, the control room design, ECCS equipment operation, and the plant's safe shutdown facilities and procedures. During a recent briefing conducted for Commissioner McGaffigan and me, I raised concerns about whether the knowledge and attributes demonstrated by the adversaries at Quad Cities were in fact credible and realistic. In a written response to my concerns, the staff stated that they believe that the knowledge possessed by the adversaries was "within the bounds of a knowledgeable employee intending to provide available information to dedicated and well/military trained adversaries for a specific pre-planned attack." I appreciate and respect the staff's response to my concerns; however, I request that the staff formally provide the Commission with a more detailed account of how it bounds the adversary knowledge and attributes discussed in § 73.1.

Finally, I request that OGC, NMSS, and NRR provide the Commission with a detailed account of how it distinguishes between "enemies of the United States" as discussed in § 50.13, which licensees are not required to protect against, and the adversaries that licensees are required to protect against in § 73.1. I am aware that other Commissioners have raised this important issue on several occasions in the past, and I believe it warrants a thorough and timely staff response.



11/28/00