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August 10, 2007

The Honorable Carl Levin
Chairman, Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs
269 Russell Office Building
United States Senate
Washington, DC 20510-2202

SUBJECT: Permanent Subcommittee on Investigations, Staff Report
"Dirty Bomb Vulnerabilities" (July 12, 2007)

Dear Mr. Chairman:

I am writing on behalf of the Organization of Agreement States (OAS) Executive Board, regarding the subject report. The OAS Executive Board has some concerns that we would like to share with you, regarding both the Staff Report's characterization of the Agreement State program, and the recommendations made in Section V of the Staff Report.

By way of introduction, the OAS is a voluntary, scientific and professional society comprised of management and staff level representatives from those states (Agreement States) that regulate radioactive materials within their state borders under an agreement with the U.S. Nuclear Regulatory Commission (NRC). Our organization is committed to the improvement of radiation regulation and fostering cooperation and collaboration among the Agreement States and with the NRC and other Federal agencies to provide a comprehensive and coherent system of regulation of radioactive materials.

As the Staff Report correctly notes, "Radioactive materials play a vital role in American medicine, research, and industry." For nearly 50 years the Agreement States have partnered with the NRC (formerly the Atomic Energy Commission) to regulate these uses and protect the public health and safety from the misuse of these materials.

Contrary to the information in the Staff Report, however, the Atomic Energy Act (AEA), Section 274 does not authorize the NRC to "delegate" licensing, inspection, and enforcement authority to an Agreement State, as stated in Section III.B. In fact, the AEA authorizes the NRC to *discontinue* this authority, for the purposes of health and safety, in States that enter into an agreement with the NRC to regulate certain

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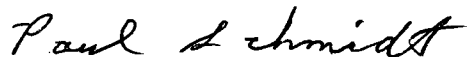
radioactive materials within their own borders. The Agreement States do not enforce the AEA. They enforce State statute and State regulation. Similarly, one cannot obtain an NRC license "through an Agreement State," as the report states in Section IV.A. One may obtain an Agreement State license from an Agreement State, or an NRC license from the NRC, but each entity acts under distinct statutory authority, and does not have the authority to issue a license or impose requirements on the others' behalf for the purposes of health and safety.

Complementing the unique distinction between the NRC and Agreement State regulatory authority, there is a well-developed system of collaboration and cooperation among these varied entities. This system includes the Integrated Materials Performance Evaluation Program (IMPEP), a variety of formally constituted Working Groups, and other collaborative efforts. As an example, IMPEP is used to evaluate the adequacy of Agreement State programs, NRC regional programs, and the NRC Headquarters' Sealed Source and Device program. The Agreement States participate in IMPEP both by serving on the teams assigned to review Agreement State or NRC programs, and by participating as a non-voting member of the Management Review Board, which approves the findings made by the IMPEP team. These various efforts serve to enhance compatibility and consistency in our collective regulatory programs nationwide.

In recognition of the close relationship between the NRC and the Agreement States, the OAS Executive Board believes it is important for the Permanent Subcommittee on Investigations to be apprised of Agreement State concerns relating to the recommendations made to the NRC in the Staff Report, as these may impact the Agreement State programs as well. In general, it does not appear that either the Staff Report, or the U.S. Government Accountability Office's testimony in the July 12, 2007 hearing on these matters support the recommendations, which could have a very serious impact on the regulation of radioactive materials nationwide. We are providing specific comments for the Subcommittee's consideration as an attachment to this letter.

I would be happy to discuss these issues with you further at your convenience.

Sincerely,



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COMMENTS ON RECOMMENDATIONS IN STAFF REPORT
"DIRTY BOMB VULNERABILITIES"

RECOMMENDATION 1: The NRC should re-evaluate the apparent good-faith presumption that pervades its licensing process.

Eliminating the good-faith presumption would have sweeping ramifications. If acted upon, this would constitute a fundamental shift in the philosophy that has guided the regulation of radioactive materials in this country since 1954. The regulators' mission has been until now to *allow* the beneficial uses of radioactive material by ensuring that the appropriate safety precautions are understood and followed.

The good-faith presumption underlies all radiation protection regulation, not just the license review process. The proposed shift would mean the assumption of a new primary mission – the prevention of malevolent uses of radioactive material. This is a law-enforcement model and is fundamentally incompatible with our current regulatory framework, geared as it is toward public health rather than crime prevention.

The discussion of this recommendation in the Staff Report also implies that the extensive guidance to the applicants for a license is an impediment to security, without acknowledging the countervailing argument that it is critical for safety. The guidance that has been developed over the last 50 years, by the NRC in partnership with the Agreement States, serves to provide a robust framework for the *safe* use of radioactive materials in an extensive array of applications. Diminishing the availability, scope or depth of this guidance will have a direct negative impact on safety.

RECOMMENDATION 2: The NRC should regulate Category 3 sources more stringently.

The recommendation to regulate Category 3 sources more stringently, including the requirement for pre-licensing inspections, is not supported by the facts presented in the Staff Report or the U.S. Government Accountability Office's (GAO's) testimony. In particular, it should be noted that the gauges that were the subject of the investigation do not contain Category 3 sources. The cesium 137 and americium-beryllium sources combined in the typical moisture-density gauge still represent a Category 4 source.

In addition, although the GAO investigators were deterred by the request for a physical visit to the proposed facility, it is completely unclear that a determined terrorist would be so easily dissuaded. It would take only a very little effort to rent a small industrial storefront to pose as a legitimate business, keeping in mind that many of these types of licensees are small, independent subcontractors, with little need for extensive office space. Indeed, it was completely unnecessary for the GAO to go to the trouble of incorporating their "business," since there is no requirement for incorporation in order to obtain a radioactive materials license.

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The discussion of this recommendation in the Staff Report includes a comment regarding the potential aggregation of low-risk sources to create a high-risk quantity. The potential for aggregation is real for every harmful agent known to humankind. It is not peculiar to radioactive material. There should be reasonable controls to prevent and detect malevolent aggregation of any harmful agent, but the key word is "reasonable." The NRC and the Agreement States have worked closely since September 11, 2001 to assess the appropriate level of control of all radioactive sources, Category 1 through Category 5, and implemented a number of changes to the licensing and inspection programs to enhance the security of radioactive material, while not compromising safety, or unnecessarily limiting the beneficial uses of these materials. While it may be appropriate to periodically re-evaluate the controls of Category 3 sources, neither the Staff Report nor the GAO's July 12, 2007 testimony supports any immediate action in this regard.

RECOMMENDATION 3: The NRC should act quickly to establish a web-based licensing system to ensure that source materials can be obtained only in authorized amounts by legitimate users.

The recommendation that NRC quickly establish a web-based licensing system appears to ignore the reality that NRC regulates less than 20% of the radioactive material licensees nationwide, while the Agreement States regulate more than 80%, and that percentage stands to rise quickly when Pennsylvania joins the Agreement States in the very near future.

While the OAS Executive Board does not fundamentally oppose the idea of a truly national web-based licensing system (and, aside from the threshold question of whether the individual Agreement States would agree to participate), there are a number of practical considerations that would require close coordination with the Agreement States for the system to be effective. In addition, there are potential legal impediments (e.g., State permitting or licensing laws requiring State-specific formatting, data control or public access) that could prevent the establishment of an effective and secure system.

Furthermore, this recommendation would do little to enhance the programs already in place. Currently, radioactive material manufacturers and distributors, as well as law enforcement officials, are able to verify proffered licenses by simply calling the radiation control agency having jurisdiction. Any questions about the legitimacy of a license document or authorized possession limits in a license can be answered quickly by the appropriate NRC or Agreement State personnel.

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CLOSING COMMENTS:

These comments are intended to give the members of the Subcommittee a snapshot of the Agreement State perspective on the issues raised by the Staff Report and the GAO testimony. The OAS Executive Board urges the Subcommittee to avail themselves of the wealth of information that Agreement State regulators could bring to its deliberations on this subject.

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