

June 26, 1978

SECY-78-350

## COMMISSIONER ACTION

For: The Commissioners

From: Clifford V. Smith, Jr., Director  
Office of Nuclear Material Safety  
and Safeguards

Thru: *6* Executive Director for Operations *C. J. Smith*

Subject: ROLE OF USE OF DEADLY FORCE IN SAFEGUARDING STRATEGIC  
SPECIAL NUCLEAR MATERIAL AT NUCLEAR FUEL CYCLE FACILITIES

Purpose: To obtain Commission approval for Chairman to send attached  
letters to Senator Ribicoff and Congressman Brooks.

Category: This paper covers a major policy question.

Issue: Whether NRC should seek legislative authority for the use of  
deadly force in the protection of strategic special nuclear  
material at nuclear fuel cycle facilities.

Decision  
Criteria:

1. Must provide adequate protection to the public  
from unauthorized use of licensed nuclear materials.
2. Must not accomplish safeguards objectives at the  
expense of violation of human rights or other  
valid public concerns.

Alternatives:

1. Retain the current regulatory posture. The regulations  
now require responding guards to interpose themselves  
between material access areas and vital areas and any  
adversary attempting entry for the purpose of theft of  
special nuclear material or industrial sabotage and to  
intercept any person exiting with special nuclear  
material. They are also instructed to prevent or im-  
pede attempted acts of theft or industrial sabotage by  
using force sufficient to counter the force directed  
at a guard including deadly force when the guard has a  
reasonable belief it is necessary in self-defense or  
in the defense of others.

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- II. Request Congress to pass legislation specifically authorizing licensee guards or response personnel to use deadly force, whether or not its use was necessary in self-defense or in the defense of others, to prevent the theft of strategic special nuclear material provided that such force is the minimum needed to prevent the theft.

Discussion: On May 2, 1977, the General Accounting Office issued a report (EMD-77-40) that contained, inter alia, the following recommendation:

"Seek, as appropriate, Federal and/or State legislative authority to allow guards at NRC licensed facilities to use firearms to prevent thefts of SNM if such action is the minimum amount of force necessary to prevent the theft."

In a letter to Senator Abraham Ribicoff, Chairman of the Committee on Governmental Affairs, dated June 30, 1977, Chairman Rowden responded to this recommendation as follows:

"The Commission published for comment (42 FR 8382) a proposed amendment to 10 CFR Part 73 that would require guards to interpose themselves between material and any adversary attempting entry for purposes of radiological sabotage or theft of SNM and that would require guards to be instructed to apply a sufficient degree of force to counter that degree of force directed at them, including the use of deadly force when there is a reasonable belief it is necessary in self-defense or in the defense of others.

"The question of use of deadly force by licensee guards--or by policemen for that matter--is a complex one. Legislative action to override State common law, which has developed slowly and with attention to cultural attitudes, is not to be taken offhand. For this reason, we have asked our staff to determine precisely what role a use-of-deadly force instruction plays in the defense of SSNM.

"Once we have the staff's view we will then want to consult with ERDA and other interested agencies on possible courses of action. This process should be complete by the fall."

Staff has studied this subject at length in connection with the effective rule on "Guard Force Response To An Alarm" (42 FR 64103). At issue is the first of three principles enunciated in the Statement of Considerations published with that rule. The principle is that "the guard has no duty to retreat from a show of force, or from a situation that could lead to use of force." The recommendation of this paper is predicated on the validity of that principle. Based on deliberations on the "Guard Force Response To An Alarm" rule (assuming the validity of the aforementioned principle) and other factors, staff has concluded that current regulatory requirements address the issue of use of deadly force in a satisfactory way and that additional authorizing legislation is not needed. In all realistic situations the staff believes that guard force use of weapons under the guidelines of the current rule would be justifiable, as long as there was no duty to retreat. That is why the duty to retreat concept becomes the threshold and controlling issue of the adequacy of present law on use of deadly force for protection of facilities and special nuclear material. No licensee authorized to possess strategic special nuclear material has taken issue with the staff position that a guard has no duty to retreat.\*

In reaching this conclusion, staff examined the marginal gain in protection over that now in force that would be achieved by use of unprivileged deadly force and found that only a small increment in protection would be achieved (see Enclosure 1). Collaterally, staff examined the desirability of deputizing licensee guards and concluded that such a move would be unwarranted (see Enclosure 2).

Authority for use of deadly force by guards of DOE contractors is not demonstrably different from that of private guards at nuclear fuel cycle facilities, i.e., it is privileged only when the user has a reasonable belief that it is necessary in self-defense or in defense of others. Instructions by DOE on use of deadly force leave much to the guard's discretion.

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\*The concern expressed in the GAO report addressed only the use of deadly force in safeguarding strategic special nuclear material against theft, and this paper is limited to that subject. Staff investigation of use of deadly force in protecting nuclear power reactors and nonpower reactors against sabotage is not complete; results of that investigation will be reported to the Commission within a few months.

In that regard, DOE has stated, "Each case calls for the exercise of sound judgment by the guard on the application of general guidance to all the facts and circumstances which confront him at the time such a decision must be made." (Report from Robert J. Ghetty to H. E. Lyon, ERDA, dated September 30, 1975.) The new "Guard Force Response To An Alarm" rule gives more clear-cut guidance to licensee guards.

A Federal law authorizing use of deadly force apart from any justification based on self-defense or defense of others could exceed current police authority (see Milton, Halleck, Lardner, and Albrecht, Police Use of Deadly Force, Police Foundation 1977, pp. 38-43). Staff believes such an action would place too great a responsibility on a private guard system and believes, if the Congress or the public concluded that the risks associated with special nuclear material justified the use of deadly force to prevent its nonviolent theft, that the question of the need for a Federal guard force should then be reopened.

The cases of Mattis v. Schnarr (547 F.2d 1007 (1976)) vacated as moot, 52 L.Ed 219 (1977), and Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir.), cert. denied, 46 U.S.L.W. 3215 (1977) have raised a serious constitutional issue on the use of deadly force in law enforcement. Typically, the cases factually involve a fleeing felon who had used no violent force in committing a felony and had not threatened the lives of the police officers. The Courts have come to varying conclusions about the constitutionality of using deadly force in this situation.

The question is a complex one, and if the decision were made (contrary to the staff's recommendation) that the use of deadly force should be authorized in the protection of strategic special nuclear material apart from any justification based on self-defense or the defense of others, then at least the following factors must be addressed:

Would the person using the deadly force be required to have--

(a) personal knowledge,

- (b) second-hand information,
- (c) a "reasonable belief", or
- (d) a presumption

that the fleeing suspect--

- (a) has more than a "formula quantity" of high-enriched uranium or plutonium in his possession, or
- (b) has any amount (even less than a "formula quantity") of high-enriched uranium or plutonium in his possession, or
- (c) has used violence in effecting entry or obtaining the high-enriched uranium or plutonium, if any, in his possession.

Two alternative courses of action have been analyzed as follows:

ALTERNATIVE I. Retain the current regulatory posture. The regulations now require responding guards to interpose themselves between material access areas and vital areas and any adversary attempting entry for the purpose of theft of special nuclear material or industrial sabotage and to intercept any person exiting with special nuclear material. They are also instructed to prevent or impede attempted acts of theft or industrial sabotage by using force sufficient to counter the force directed at a guard including deadly force when the guard has a reasonable belief it is necessary in self-defense or in the defense of others.

PRO:

- o Would provide for protection of strategic special nuclear material in instances of armed attack on nuclear facilities, in which guards are privileged to use deadly force in self-defense.

- Would be least disruptive to NRC's present safeguards posture.
- Would avoid the possibility of prolonged and possibly inconclusive public debate concerning the justification for using deadly force in the protection of strategic special nuclear material.
- The staff believes the current rule to be adequate.

CON:

- Would not be supportive to the recommendation of the General Accounting Office.
- Would retain in the regulations a rule on the use of force by guards whose total adequacy for securing special nuclear material from theft has from time to time been questioned by individual members of the Congress.

ALTERNATIVE II. Request Congress to pass legislation specifically authorizing licensee guards or response personnel to use deadly force, whether or not its use was necessary in self-defense or in the defense of others, to prevent the theft of strategic special nuclear material provided that such force is the minimum needed to prevent the theft.

- Would overcome the uncertainty associated with specific state laws or the common law in general about the right to use deadly force for the protection of potentially hazardous materials such as strategic special nuclear material.

- o Would assure uniform protection because of explicit federal legislation.
- o Would make clear to the public, plant operators, and guard personnel that guards can and should use deadly force as necessary to stop a theft of strategic special nuclear material without the guards having to first decide if their lives or the lives of others are in danger.
- o Would cover those few possibilities that might not now be covered by 10 CFR 73.50(g)(2) and (3). (See Enclosure 1.)

CON:

- o Protection of strategic special nuclear material in instances of armed attack on nuclear fuel cycle facilities is already assured by 10 CFR 73.50(g)(2) and (3).
- o Would involve an extension of Federal law that will be highly controversial and could take several years to go through the legislative process and be implemented.
- o The fact that NRC requested legislation on this subject could be misinterpreted as indicating that NRC deemed an element of safeguards to be inadequate.

- o Would call for reconsideration of need for Federal guard force.
- o Failure to secure legislation, if sought, might cast doubt on present regulatory requirements.

Recommendation: 1. That the Commission approve:

a) Alternative 1,

"Retain the current regulatory posture. The regulations now require responding guards to interpose themselves between material access areas and vital areas and any adversary attempting entry for the purpose of theft of special nuclear material or industrial sabotage and to intercept any person exiting with special nuclear material. They are also instructed to prevent or impede attempted acts of theft or industrial sabotage by using force sufficient to counter the force directed at a guard including deadly force when the guard has a reasonable belief it is necessary in self-defense or in the defense of others,"

and not seek additional authority for use of deadly force in the protection of strategic special nuclear material;

b) The letters, attached as Enclosures 3 and 4, to Senator Ribicoff and Congressman Brooks, respectively.

- 2. Note that appropriate Congressional committees will also be sent copies of the letter as in Enclosure 3.
- 3. Note that a public announcement will not be made.

Coordination:

The Offices of Inspection and Enforcement, the Executive Legal Director, Policy Evaluation, General Counsel, and Congressional Affairs concur in the recommendation of this paper and suggest similar letters be forwarded to Senator Hart, and Congressmen Udall and Dingell. Since this paper only covers fuel cycle facility



The Commissioners

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issues, the Office of Nuclear Reactor Regulation has no objection. The Office of the Executive Legal Director prepared those portions of the paper concerned with legal issues. The Office of Public Affairs concurs in the conclusion that a public announcement should not be made.

*Sheldon Meyers*

*for* Clifford V. Smith, Jr., Director  
Office of Nuclear Material Safety  
and Safeguards

Enclosures:

1. Potential Incremental Protection
2. Deputizing Licensee Guards
3. Draft letter to Senator Ribicoff
4. Draft letter to Congressman Brooks

**ENCLOSURE 1**

**Potential Incremental Protection**

ENCLOSURE 1

EVALUATING THE POTENTIAL INCREMENTAL PROTECTION  
FROM AUTHORIZING LEGISLATION

Use of deadly force has been a component of the protection of licensed SNM since November 6, 1973 (38 FR 30537), when a requirement for guards (defined at that time as a uniformed individual armed with a firearm...) was incorporated in the regulations in 10 CFR Part 73. The requirement for a deadly weapon implies the use of that weapon under certain circumstances.

The implicit requirement for use of deadly force was made explicit on December 22, 1977, with the publication (42 FR 64103) of an effective rule on "Guard Force Response To An Alarm." In adopting that rule after due deliberation, the Commission decided that it was necessary and effective in safeguarding licensed special nuclear material at fuel cycle facilities. The pertinent provisions of that rule are:

"The licensee security organization shall require responding guards to interpose themselves between material access areas and vital areas and any adversary attempting entry for the purposes of theft of special nuclear material or industrial sabotage and to intercept any material.

"The licensee shall instruct every guard to prevent or impede attempted acts of theft or industrial sabotage by using force sufficient to counter the force directed at him including deadly force when the guard has a reasonable belief it is necessary in self-defense or in the defense of others."

Use of deadly force cannot be counted on to be effective by itself; its use is only one element of an overall safeguards system. A report

prepared for NRC on this subject\* observes that "it is debatable whether authorizing or requiring use of deadly force whenever reasonably needed to protect SNM or licensed facilities would have any significant effect, either beneficial or harmful. Occasions when deadly force might be applied are likely to be emotionally charged.... The frequency with which trained soldiers have failed to fire their weapons during battle is ample warning that any prediction about the effect of a federal authorization or requirement to use deadly force should be discounted to some extent."

Another study\*\* prepared for NRC by the United States Marshals Service discusses "...the question of whether a guard of SNM should be willing to put his life on the line if necessary. In point of fact, it is a moot question--unanswerable until the actual situation should arise for the individual guard.... The matter of a guard's risking his life ... is probably more closely tied to training, anyway."

Because of the new rule on "Guard Force Response To An Alarm" that has just been promulgated and the limited effectiveness of deadly force in the total protection effort (see preceding two paragraphs), any additional authority by statute, such as recommended by GAO, can be seen as providing only an increment of protection, the significance of which

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\* Alan V. Washburn, "Use of Deadly Force To Protect Special Nuclear Material and Licensed Facilities," Appendix C, pp. 24-25.

\*\*"Security of Special Nuclear Materials," October 1975. (Not for public dissemination.)

cannot be justified. Indeed, the enactment of specific authorizing legislation has been seen as affecting only "a margin of an increment of an edge."\*\*\* Furthermore, such a law could exceed current police authority (see Milton, Halleck, Lardner, and Albrecht, Police Use of Deadly Force, Police Foundation 1977, pp. 38-43.)

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\*\*\*Washburn, op. cit., p. 18.

**ENCLOSURE 2**

**Deputizing Licensee Guards**

## ENCLOSURE 2

### DESIRABILITY OF DEPUTIZING LICENSEE GUARDS

Staff has considered the desirability of deputizing licensee guards.

It is generally held that a law enforcement officer may use deadly force, if he reasonably believes it necessary, to prevent the escape of a person fleeing from arrest for a felony (in some states, only for a "violent" felony). A private citizen (including a private guard) is more limited in arrest authority and is not privileged if it turns out that the person against whom deadly force was actually used did not commit a felony for which a private citizen can arrest. The Model Penal Code allows the use of deadly force by a private person in making arrests only when that person believes he is assisting a law enforcement officer.

On balance, staff believes that deputizing licensee guards to gain a debatable arrest advantage is not desirable because (a) it is not available in all jurisdictions; (b)<sup>1</sup> it makes the guards subject to all restrictions placed on state police officers under the Fourteenth Amendment (such as warning on arrest and before questioning), and (c)<sup>1</sup> makes the guard

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<sup>1</sup>Although this is a legitimate concern from the standpoint of safeguards effectiveness, OELD notes that these factors may be regarded by others as an advantage to deputization since it would afford some measure of public protection against unreasonable actions by private guards.

clearly subject<sup>2</sup> to suit for unreasonable detention, or to criminal and civil penalties for violation of civil rights under color of state law (see, e.g., 18 U.S.C. 242, 42 U.S.C. 1983; Williams v. United States, 341 U.S. 97 (1951), Griffin v. Maryland, 378 U.S. 130 (1964), United States v. Hoffman, 498 F.2d. 879 (1974).)

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<sup>2</sup>An argument could be made that such guards act under "color of law" even without being deputized - but the argument is much weaker than in the case of deputization.



**ENCLOSURE 3**

**Draft Letter to Senator Ribicoff**

ENCLOSURE 3

(Draft letter)

The Honorable Abraham Ribicoff  
Chairman, Committee on Governmental Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

As promised in Chairman Rowden's letter to you dated June 30, 1977, the NRC has given consideration to the need for legislation concerning the role of a "use of deadly force" instruction in the defense of strategic special nuclear material at nuclear fuel cycle facilities. This letter is to inform you of our conclusion.

Use of deadly force has been one element of the protection required by NRC since November 6, 1973. In order to clarify the requirements of this safeguards system element, we published a rule in the Federal Register on December 22, 1977, entitled "Guard Force Response to an Alarm." We believe this rule effectively addresses the issue. Our analysis has shown that a request for additional legislative authority for the use of deadly force would provide no significant benefit to the present system of protecting special nuclear material from malevolent acts.

Although state laws vary somewhat on the question of justifiable homicide, in the narrow context of private guards doing their job on private property, three major aspects of use of deadly force appear to be generally acceptable in this country and can, accordingly, be embodied in a rule of general

application. The first is that the guard in performing his duty is under no obligation to retreat from a show of force, or from a situation that could lead to use of force. This principle is embodied in the "Guard Force Response to an Alarm", rule referred to above in the requirement that the guard interpose himself between the adversary and the material access areas or vital areas subject to attack. A second principle is that guards may generally meet force or a threat of force with force. Finally, there is general acceptance of the use of deadly force when there is a reasonable belief it is necessary in self-defense or in defense of others.

In order to ensure that licensee guards act consistently with these principles, it is made clear in the rule that licensees' guards are expected to stand and use their right of self-defense against adversaries. The Commission believes that these three principles, taken together, constitute an adequate, practical, and publicly acceptable basis for the response regulation.

A further discussion of the factors considered is enclosed.

Sincerely,

Joseph M. Hendrie  
Chairman

Enclosure:  
Discussion on Role of Deadly Force  
in the Protection of Special  
Nuclear Material and Licensed  
Facilities

Enclosure

ROLE OF USE OF DEADLY FORCE IN SAFEGUARDING  
STRATEGIC SPECIAL NUCLEAR MATERIAL

On May 2, 1977, the General Accounting Office issued a report (EMD-77-40) that contained, inter alia, the following recommendation:

"Seek, as appropriate, Federal and/or State legislative authority to allow guards at NRC licensed facilities to use firearms to prevent thefts of SNM if such action is the minimum amount of force necessary to prevent the theft."

Chairman Rowden responded to this recommendation as follows:

"The Commission published for comment (42 FR 8382) a proposed amendment to 10 CFR Part 73 that would require guards to interpose themselves between material and any adversary attempting entry for purposes of radiological sabotage or theft of SNM and that would require guards to be instructed to apply a sufficient degree of force to counter that degree of force directed at them including the use of deadly force when there is a reasonable belief it is necessary in self-defense or in the defense of others.

"The question of use of deadly force by licensee guards --or by policemen for that matter--is a complex one. Legislative action to override State common law, which has developed slowly and with attention to cultural attitudes, is not to be taken offhand. For this reason, we have asked our staff to determine precisely what role a use-of-deadly force instruction plays in the defense of SSNM.

"Once we have the staff's view we will then want to consult with ERDA and other interested agencies on possible courses of action. This process should be complete by the fall."

The staff has studied this issue at length in connection with the effective rule on "Guard Force Response To an Alarm." Based on those

deliberations and other factors, the staff has concluded that current regulatory requirements address the issue of use of deadly force in a satisfactory way and that additional authorizing legislation is not needed. In this connection, the following points are noted.

1. On December 22, 1977 (42 FR 64103), the Commission promulgated the "Guard Force Response To an Alarm" rule after due deliberation, presuming that the new rule was necessary and effective in safeguarding licensed special nuclear material and facilities. The pertinent provisions of that rule are:

"The licensee security organization shall require responding guards to interpose themselves between material access areas and vital areas and any adversary attempting entry for the purpose of theft of special nuclear material or industrial sabotage and to intercept any material.

"The licensee shall instruct every guard to prevent or impede attempted acts of theft or industrial sabotage by using force sufficient to counter the force directed at him including deadly force when the guard has reasonable belief it is necessary in self-defense or in the defense of others."

2. Use of deadly force has been a component of the protection of licensed special nuclear material since November 6, 1973 (38 FR 30537), when a requirement for guards (defined at that time as a uniformed individual armed with a firearm ...) was incorporated in the regulations in 10 CFR Part 73. The requirement for a deadly weapon implies the use of that weapon under certain circumstances.

3. Use of deadly force cannot be counted on to be effective by itself; its use is only one element of an overall safeguards system. A report prepared for NRC on this subject\* observes that "it is debatable whether authorizing or requiring use of deadly force whenever reasonably needed to protect SNM or licensed facilities would have any significant effect, either beneficial or harmful. Occasions when deadly force might be applied are likely to be emotionally charged.... The frequency with which trained soldiers have failed to fire their weapons during battle is ample warning that any prediction about the effect of a federal authorization or requirement to use deadly force should be discounted to some extent."

Another study\*\* prepared for NRC by the United States Marshals Service discusses "... the question of whether a guard of SNM should be willing to put his life on the line if necessary. In point of fact, it is a moot question--unanswerable until the actual situation should arise for the individual guard... The matter of a guard's risking his life ... is probably more closely tied to training, anyway."

4. Because of the new rule on "Guard Force response To an Alarm" (Item 1) and the limited effectiveness of deadly force in the total

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\* Alan V. Washburn, "Use of Deadly Force to Protect Special Nuclear Material and Licensed Facilities," Appendix C, pp. 24-25.

\*\* "Security of Special Nuclear Materials," October 1975. (Not for public dissemination)

protection effort (Item 3), any additional authority by statute, such as recommended by GAO, can be seen as providing, at best, only a marginal increment of protection, the significance of which cannot be justified. Such a law could exceed current police authority (see Milton, Halleck, Lardner, and Albrecht, Police Use of Deadly Force, Police Foundation 1977, pp. 38-43).

5. Staff has also considered the desirability of deputizing licensee guards. It is generally held that a peace officer may use deadly force, if he reasonably believes it necessary, to prevent the escape of a person fleeing from arrest for a felony (in some states, only for a "violent" felony). A private citizen (including a private guard) is more limited in arrest authority and is not privileged if it turns out that the person against whom deadly force was actually used did not commit a felony for which a private citizen can arrest. The Model Penal Code allows the use of deadly force by a private person in making arrests only when that person believes he is assisting a peace officer. On balance, staff believes that deputization of licensee guards to gain a debatable arrest advantage is not desirable because (a) it is not available in all jurisdictions; (b) it makes the guards subject to all restrictions placed on State police officers under the Fourteenth Amendment (such as warning on arrest and before questioning), and (c) makes the guard subject to suit for unreasonable detention, or to criminal and civil penalties for violation of civil rights under color of State law.

(see, e.g., 18 U.S.C. 242; 42 U.S.C. 1983; Williams v. United States, 341 U.S. 97 (1951); Griffin v. Maryland, 378 U.S. 130 (1964); United States v. Hoffman, 498 F.2d 879 (1974)).

6. DOE instructions on "use of deadly force" are equivocal. Authority to use deadly force is not demonstrably different from that of private guards at licensee facilities, i.e., privileged when the user has a reasonable belief that it is necessary in self-defense or in the defense of others. In the last analysis, DOE has stated, "Each case calls for the exercise of sound judgment by the guard on the application of general guidance to all the facts and circumstances which confront him at the time such a decision must be made." (Report from Robert J. Ghetti to H. E. Lyon, ERDA, dated September 30, 1975.) The new guard force response rule gives more clear-cut guidance to the guards.



**ENCLOSURE 4**

**Draft Letter to Congressman Brooks**

ENCLOSURE 4

(Draft letter)

The Honorable Jack Brooks  
Chairman, Committee on Government Operations  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

As promised in Chairman Rowden's letter to you dated June 30, 1977, the NRC has given consideration to the need for legislation concerning the role of a "use of deadly force" instruction in the defense of strategic special nuclear material at nuclear fuel cycle facilities. This letter is to inform you of our conclusion.

Use of deadly force has been one element of the protection required by NRC since November 6, 1973. In order to clarify the requirements of this safeguards system element, we published a rule in the Federal Register on December 22, 1977, entitled "Guard Force Response to an Alarm." We believe this rule effectively addresses the issue. Our analysis has shown that a request for additional legislative authority for the use of deadly force would provide no significant benefit to the present system of protecting special nuclear material from malevolent acts.

Although state laws vary somewhat on the question of justifiable homicide, in the narrow context of private guards doing their job on private property, three major aspects of use of deadly force appear to be generally acceptable in this country and can, accordingly, be embodied in a rule of general

application. The first is that the guard in performing his duty is under no obligation to retreat from a show of force, or from a situation that could lead to use of force. This principle is embodied in the "Guard Force Response to an Alarm" rule referred to above in the requirement that the guard interpose himself between the adversary and the material access areas or vital areas subject to attack. A second principle is that guards may generally meet force or a threat of force with force. Finally, there is general acceptance of the use of deadly force when there is a reasonable belief it is necessary in self-defense or in defense of others.

In order to ensure that licensee guards act consistently with these principles, it is made clear in the rule that licensees' guards are expected to stand and use their right of self-defense against adversaries. The Commission believes that these three principles, taken together, constitute an adequate, practical, and publicly acceptable basis for the response regulation.

A further discussion of the factors considered is enclosed.

Sincerely,

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Chairman

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deliberations and other factors, the staff has concluded that current regulatory requirements address the issue of use of deadly force in a satisfactory way and that additional authorizing legislation is not needed. In this connection, the following points are noted.

1. On December 22, 1977 (42 FR 64103), the Commission promulgated the "Guard Force Response To an Alarm" rule after due deliberation, presuming that the new rule was necessary and effective in safeguarding licensed special nuclear material and facilities. The pertinent provisions of that rule are:

"The licensee security organization shall require responding guards to interpose themselves between material access areas and vital areas and any adversary attempting entry for the purpose of theft of special nuclear material or industrial sabotage and to intercept any material.

"The licensee shall instruct every guard to prevent or impede attempted acts of theft or industrial sabotage by using force sufficient to counter the force directed at him including deadly force when the guard has reasonable belief it is necessary in self-defense or in the defense of others."

2. Use of deadly force has been a component of the protection of licensed special nuclear material since November 6, 1973 (38 FR 30537), when a requirement for guards (defined at that time as a uniformed individual armed with a firearm ...) was incorporated in the regulations in 10 CFR Part 73. The requirement for a deadly weapon implies the use of that weapon under certain circumstances.

3. Use of deadly force cannot be counted on to be effective by itself; its use is only one element of an overall safeguards system. A report prepared for NRC on this subject\* observes that "it is debatable whether authorizing or requiring use of deadly force whenever reasonably needed to protect SNM or licensed facilities would have any significant effect, either beneficial or harmful. Occasions when deadly force might be applied are likely to be emotionally charged.... The frequency with which trained soldiers have failed to fire their weapons during battle is ample warning that any prediction about the effect of a federal authorization or requirement to use deadly force should be discounted to some extent."

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4. Because of the new rule on "Guard Force response To an Alarm" (Item 1) and the limited effectiveness of deadly force in the total

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\*\* "Security of Special Nuclear Materials," October 1975. (Not for public dissemination)

protection effort (Item 3), any additional authority by statute, such as recommended by GAO, can be seen as providing, at best, only a marginal increment of protection, the significance of which cannot be justified. Such a law could exceed current police authority (see Milton, Halleck, Lardner, and Albrecht, Police Use of Deadly Force, Police Foundation 1977, pp. 38-43).

5. Staff has also considered the desirability of deputizing licensee guards. It is generally held that a peace officer may use deadly force, if he reasonably believes it necessary, to prevent the escape of a person fleeing from arrest for a felony (in some states, only for a "violent" felony). A private citizen (including a private guard) is more limited in arrest authority and is not privileged if it turns out that the person against whom deadly force was actually used did not commit a felony for which a private citizen can arrest. The Model Penal Code allows the use of deadly force by a private person in making arrests only when that person believes he is assisting a peace officer. On balance, staff believes that deputization of licensee guards to gain a debatable arrest advantage is not desirable because (a) it is not available in all jurisdictions; (b) it makes the guards subject to all restrictions placed on State police officers under the Fourteenth Amendment (such as warning on arrest and before questioning), and (c) makes the guard subject to suit for unreasonable detention, or to criminal and civil penalties for violation of civil rights under color of State law.

(see, e.g., 18 U.S.C. 242; 42 U.S.C. 1983; Williams v. United States, 341 U.S. 97 (1951); Griffin v. Maryland, 378 U.S. 130 (1964); United States v. Hoffman, 498 F.2d 879 (1974)).

6. DOE instructions on "use of deadly force" are equivocal. Authority to use deadly force is not demonstrably different from that of private guards at licensee facilities, i.e., privileged when the user has a reasonable belief that it is necessary in self-defense or in the defense of others. In the last analysis, DOE has stated, "Each case calls for the exercise of sound judgment by the guard on the application of general guidance to all the facts and circumstances which confront him at the time such a decision must be made." (Report from Robert J. Ghetti to H. E. Lyon, ERDA, dated September 30, 1975.) The new guard force response rule gives more clear-cut guidance to the guards.