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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

September 27, 1985

B-219816

The Honorable Nunzio J. Palladino
Chairman
Nuclear Regulatory Commission
1717 H Street, NW.
Washington, D.C. 20555

Dear Mr. Chairman:

We have received a congressional inquiry requesting our review of several of the provisions of the Nuclear Non-Proliferation Act (NNPA) of 1978. Two major issues were raised. First the legality of providing advance approvals for retransfer for reprocessing of U.S. origin, spent fuel in agreements for cooperation. Second, an interpretation of the test by which the executive branch determines that a proposed retransfer for reprocessing or return of plutonium will not significantly increase the risk of proliferation. We would appreciate receiving the Commissioner's views on these matters.

The first issue concerns the recent execution by the executive branch of three Agreements for Cooperation with Sweden, Norway, and Finland which contain advance approvals for retransfers for reprocessing of U.S. origin spent fuel as long as the reprocessing is done in Great Britain or France. Section 123 of the Atomic Energy Act (Act) as amended by the NNPA authorizes the President to enter into agreements for cooperation subject to various criteria and restrictions. 42 U.S.C. § 2153. Section 123a lists nine requirements that must be included in an agreement unless specifically waived by the President. 42 U.S.C. § 2153(a). Two of these are relevant to the issue of advance approval. Section 123a(5) of the Act provides that agreements for cooperation shall include a requirement that no material supplied under an agreement and no "material produced through the use of any * * * material transferred pursuant to the agreement, will * * * be transferred * * * beyond the jurisdiction or control of the cooperating party without the consent of the United States." Similarly, section 123a(7) provides:

> "* * * no material transferred pursuant to the agreement for cooperation and no material used in or produced through the use of any material, production facility, or utilization facility

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> transferred pursuant to the agreement for cooperation will be reprocessed, enriched or (in the case of plutonium, uranium 233, or uranium enriched to greater than 20 percent in the isotope 235, or other nuclear materials which have been irradiated) otherwise altered in form or content without the prior approval of the United States. 42 U.S.C. § 2153(a)(7) (emphasis added).

In view of these requirements, do you think that:

1. A Presidential waiver would be required prior to entering into an agreement for cooperation that contained an advance approval?

2. An agreement that specifies that spent nuclear fuel will be transferred or reprocessed only if "the parties agree" and that also incorporate Minutes that provide the advance approval meet the requirement of sections 123(a)(5) and (7)?

3. There are proliferation implications in including advance approval in an agreement?

The Atomic Energy Act as amended by the NNPA also provides specific procedures and standards for reviewing subsequent arrangements such as requests to retransfer reactor fuel for purposes of reprocessing subject to agreements for cooperation. 42 U.S.C. § 2160. Specifically section 131(a)(1) of the Act provides:

> "(1) Prior to entering into any proposed subsequent arrangement under an agreement for cooperation * * * the Secretary of Energy shall obtain the concurrence of the Secretary of State and shall consult with the Director, the Commission, and the Secretary of Defense: Provided, That the Secretary of State shall have the leading role in any negotiations of a policy nature pertaining to any proposed subsequent arrangement regarding arrangements for the storage or disposition of irradiated fuel elements or approvals for the transfer, for which prior approval is required under an agreement for cooperation, by a recipient of source or special nuclear material, production or utilization facilities, or nuclear technology. Notice of any proposed subsequent arrangement shall be published in the Federal

> Register, together with the written determination of the Secretary of Energy that such arrangement will not be inimical to the common defense and security, and such proposed subsequent arrangement shall not take effect before fifteen days after publication. Whenever the Director declares that he intends to prepare a Nuclear Proliferation Assessment Statement pursuant to paragraph (2) of this subsection, notice of the proposed subsequent arrangement which is the subject of the Director's declaration shall not be published until after the receipt by the Secretary of Energy of such Statement or the expiration of the time authorized by subsection (c) of this section for the preparation such Statement, whichever occurs first."

Since the Act provides specific procedures for subsequent arrangements, would you comment on whether:

1. An agreement that contains an advance approval circumvents the legislative design of the Act?

2. The requirements of section 131 for reviewing a subsequent arrangement are met when the approval is granted in the original agreement. Specifically address the requirements of consultation with the Secretary of Defense; publication in the Federal Register, advance report to Congress prior to entry into the agreement, and determination of the increased risk of proliferation if the subsequent agreement is entered into.

The second issue concerns the test by which the executive branch determines that a proposed retransfer for reprocessing or return of plutonium will not result in a significant increase of risk of proliferation. The Act as amended provides that in determining whether a proposed subsequent arrangement will result in such a significant increase of risk, "foremost" consideration will be given to whether the United States will receive "timely warning" of a diversion. 42 U.S.C. § 2160(2)(b)(2). There has been much debate over the interpretation of "timely warning." To aid us in our inquiry we would like your comments on:

1. What are the factors that are used in determining "timely warning?"

2. Whether the "timely warning" analysis is a technical analysis or a political determination?

3. May political factors be included in the "timely warning" analysis? If so, what is the legal basis for their inclusion and what weight are they given?

4. How does the "timely warning" analysis relate to the International Atomic Energy Agency's use of "timely detection" assessment?

5. How is Congress informed of the factors and their weight that went into the test of whether a particular retransfer will significantly increase the risk of proliferation? Is there any written record of the determination?

6. What particular factors went into the determination of "timely warning" with respect to the retransfer request of Japan and Switzerland? What weight was each factor given? Was the analysis of "timely warning" on the technical capabilities of each country involved? Did political factors impact on the determination of "timely warning?" How was the final determination that the retransfer would not significantly increase the risk of proliferation reached?

In view of the congressional interest in these issues, we would appreciate your response as soon as possible but no later than October 25, 1985. Any questions may be addressed to Mindi Weisenbloom (275-5544) of this Office. Please advise her of the name and telephone number of your point of contact on this matter.

Sincerely yours,

Robert H. Hunter
Assistant General Counsel