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July 3, 2007

The Honorable Dale E. Klein, Ph.D.
Chairman
U. S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738

Dear Chairman Klein:

We are writing to you to express our concerns regarding a major nuclear safety event that occurred last year at the Nuclear Fuel Services (NFS) plant in Erwin, Tennessee, and the Nuclear Regulatory Commission's (NRC) questionable policy to shield all NRC documents regarding this event and the plant in general, from the public by designating all documents related to the NFS plant as "Official Use Only."

In its "Report to Congress on Abnormal Occurrences: Fiscal Year 2006," issued in April 2007, NRC first notified Congress and the public regarding a March 6, 2006, spill of high-enriched uranium (HEU) solution at the NFS plant. Approximately 35 liters of HEU solution leaked uncontrolled into a glovebox and subsequently spilled onto the floor. According to the report, a criticality[1] event was possible both in the glovebox and at an uncontrolled accumulation point in a nearby elevator pit. The volume of HEU solution involved was "more than enough for criticality to be possible." If criticality had occurred, "it is likely that at least one worker would have received an exposure high enough to cause acute health effects or death." The leak was discovered when a supervisor saw a yellow liquid "running into a hallway" from under a doorway.

NRC inspection reports suggest that it was merely a matter of luck that a criticality

[1] As you know, a nuclear "criticality" event or accident is the occurrence of a self-sustaining neutron chain reaction involving fissile material that is either unplanned or behaves unexpectedly. This releases neutron radiation that is highly dangerous to surrounding personnel and causes induced radioactivity in the surroundings.

accident did not occur. For example, had the uncontrolled leak of HEU solution filled the glovebox to a mere few inches, there would have been a criticality event. Luckily, the drains in the glove box were not blocked, despite cheesecloth and poly bottles found inside the glovebox that could have obstructed the flow of uranium solution out of the drains. Moreover, an elevator pit that was only four feet from the leak could have collected HEU solution and, had it filled with only a few inches of HEU solution, a criticality event would also have resulted.

Considering the serious nature of this incident, Committee staff requested a briefing from NRC staff to obtain details and an explanation as to why NRC failed to notify the public or Congress for 13 months regarding this serious incident and the enforcement proceedings that followed. At that briefing, NRC justified its decision to withhold inspection reports and other documents based on an August 24, 2004, NRC staff memorandum (SECY-04-0155) ("August 2004 OUO policy") which directed "staff to designate all future correspondence, to and from NFS and BWXT, that is related to Naval Reactors programs, as Official Use Only." We understand that the August 2004 OUO policy also required the removal of 1,740 archived documents from NRC's publicly available records system.

According to NRC staff, the August 2004 OUO policy was implemented in response to a March 2004 request from the Department of Energy's Office of Naval Reactors (NR). In its request, NR identified information contained in some public documents found on NRC's website that, when accumulated, could reduce the effectiveness of the security posture at the NFS and BWXT plant.

We agree that NRC should withhold from public view any sensitive security information of this nature. However, NRC went far beyond this narrow objective with its August 2004 OUO policy when it acceded to the Naval Reactor program's request to withhold <u>all</u> information that is neither classified nor safeguards related. As a result, NRC has removed hundreds of otherwise innocuous documents relating to the NFS plant from public view.

Inexplicably, the August 2006 OUO policy memorandum was itself marked "OUO" and restricted from public disclosure. Thus, the public and Congress have been kept in the dark regarding NRC's decision to withhold all documents regarding the NFS plant from public view.

In addition to withholding information regarding the March 2006 safety incident at the NFS plant, the August 2004 OUO policy has had other negative consequences. For example, NRC exposed itself to unnecessary litigation by denying the public its due process rights as mandated by Section 189 of the Atomic Energy Act[2] when it withheld public notice of NRC's February 21, 2007, Confirmatory Order that modified NFS's Special Nuclear Materials License.

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[2] Section 189 states, in part: "In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees...the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

Moreover, Section VI of the Confirmatory Order provides that, "any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." However, the public was never aware of the Confirmatory Order, and thus, could never avail themselves of their right to a hearing. Due to the August 2004 OUO policy, the NRC inspection reports, changes to license conditions, and the Confirmatory Order are all marked "OUO" and withheld from the public. All NRC proceedings related to the Confirmatory Order were conducted in closed session.

Based on a follow-up discussion with NRC staff on June 20, 2007, we now understand that the Commission has decided to reissue the February 21, 2007, Confirmatory Order and allow the public the opportunity to request a hearing. We urge you to follow through with this decision as soon as possible.

Based on a June 7, 2007, letter to the Committee, NRC also indicated that it has initiated a dialogue with NR to develop new guidelines for the disclosure of information related to the BWXT and NFS facilities. We call on NRC to make every effort to withhold from public view only those documents that contain security sensitive information, and restore to the public view all other documents that have been withheld as a result of the August 2004 OUO policy.

We request that you respond to the following questions regarding this matter:

1. Why is the OUO policy (SECY 04-155) referenced above designated as OUO?

2. Please provide all of the names, positions, and titles for all officials involved in developing and approving the OUO policy, as well as those involved in determining that the OUO policy, itself, be designated OUO.

3. A June 7, 2007, NRC letter to our Committee indicates that NRC is working with Naval Reactors staff to develop new guidelines for public disclosure of documents related to BWXT and NFS. What is NRC's schedule for reevaluating this policy?

4. If NRC terminates the OUO policy, will it retroactively open to public disclosure all information previously deemed OUO (excluding classified/safeguards information)?

5. NRC staff indicate that those documents regarding licensing, inspections, and enforcement of purely commercial activity at BWXT and NFS are public. What justifies publicly disclosing commercial information about these plants, but designating as OUO all information related to Naval Reactors funded activity?

6. Why is NRC treating simple inspection and enforcement information related to the March 6, 2006, near–criticality event at NFS as OUO? What is the public benefit?

7. Did NRC know that public notification of licensing activity—the public's right to participate in licensing activities pertaining to NR activities—at these two facilities would be effectively eliminated when it issued the August 2004 OUO policy? Did NRC take any steps to ensure that due process rights afforded to the public under the Atomic Energy Act were protected? Were the statutory provisions providing for public involvement in licensing reduced to meaningless paper rights under the August 2004 OUO policy?

8. Which State and local government authorities were notified of the March 6, 2006, nuclear incident? When was this notification delivered? Please provide copies of all communications notifying State and local government officials.

9. Was there any involvement of the White House or Office of Management and Budget in formulating this OUO policy? If so, please provide copies of all communications between your agency and these offices.

In addition, please provide all communications between NRC and DOE Naval Reactors pertaining to this policy.

Please provide a response to this letter by no later than July 11, 2007. If you have any questions, please contact us or have your staff contact Richard Miller with the Committee staff at (202) 226-2424.

Sincerely,

John D. Dingell
Chairman

Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations

cc: The Honorable Edward McGaffigan, Jr., Commissioner
United States Nuclear Regulatory Commission

The Honorable Jeffrey S. Merrifield, J.D., Commissioner
United States Nuclear Regulatory Commission

The Honorable Gregory B. Jaczko, Ph.D., Commissioner
United States Nuclear Regulatory Commission

The Honorable Peter B. Lyons, Ph.D., Commissioner
United States Nuclear Regulatory Commission