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The Honorable J. Bennett Johnston  
Chairman  
Committee on Energy and Natural Resources  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for Department of Energy views on S. 1802, the "Department of Energy Nuclear Facilities Act of 1989." This bill consists of eight titles addressing environmental, health, and safety aspects of the Department's nuclear defense operations.

On almost a daily basis I am learning more and more of the extent of the Department's environmental, health, and safety problems and the difficulties in resolving them. These problems have developed over many years and will not be solved quickly. To begin the resolution process, I recently have taken several concrete actions. In June, I announced a 10-point initiative instituting measures that will ensure full accountability within the Department in the areas of environment, safety, and health. In August, I released a 5-year plan for environmental cleanup, compliance, and waste management activities. With these actions, I am beginning to make headway in restoring both the environment and a resourceful management culture at the Department's facilities.

I believe, however, that to address these problems most effectively, I will need the continued full cooperation of your committee and others in Congress. Legislative action very well may be necessary, and S. 1802 is closer to the mark than any other legislation I have seen so far. I am especially pleased that S. 1802 would establish an additional Assistant Secretary position to handle environmental restoration and waste management. Although I am not sure that is necessary to specify position and office titles in the law, the need for an additional Assistant Secretary to carry out these responsibilities is clear.

Title VIII of S. 1802 contains several innovative provisions that could be helpful in achieving significant environmental cleanup and restoration.

John Rudolph's Files  
Letter Files  
Letters - Marshall Islands 1990

One of its provisions would require that pending the completion of a compliance agreement between the Department, the Environmental Protection Agency, and a State, neither the Department nor its contractors, with some exceptions, would be subject to civil or criminal action for noncompliance. Another very helpful provision would allow the Department to pay attorney fees for a contractor or employee if the contractor or employee was 1) acting in good faith and in compliance with applicable rules of the Department, 2) had no reasonable cause to believe the conduct was unlawful, and 3) was acting within the scope of his assigned duties.

Both of these provisions would provide the Department very useful authorities as we seek to resolve our environmental, health, and safety problems. I also support another provision of title VIII that would require States to use penalties and fines imposed for environmental violations at nuclear facilities only for environmental improvement or enforcement at those facilities.

While S. 1802 has many positive elements, several provisions would complicate our problems or are not needed at this time. Detailed comments on the bill are enclosed.

I look forward to working with you to develop legislation that will be useful in addressing these serious matters.

Sincerely,

James D. Watkins  
Admiral (Retired)

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DEPARTMENT OF ENERGY

TITLE-BY TITLE

COMMENTS ON S. 1802

TITLE I -- OFFICES OF ENVIRONMENT, SAFETY, AND HEALTH AND WASTE MANAGEMENT AND ENVIRONMENTAL RESTORATION WITHIN THE DEPARTMENT OF ENERGY

Title I would require one of the present Assistant Secretaries in the Department to be designated as the head of an Office of Environment, Safety, and Health and would create a new Assistant Secretary to be the head of a new Office of Waste Management and Environmental Restoration. The Department needs an additional Assistant Secretary to assume responsibility for waste management and environmental restoration. Waste management and environmental restoration has become a very time consuming and important part of the Department's operations. These functions have expanded to such an extent that they can be most efficiently managed only if consolidated under one Assistant Secretary. If we receive an additional Assistant Secretary, we could accomplish this consolidation and the other Assistant Secretaries would have the responsibilities they should have for the Department to operate efficiently.

We are not certain, however, about statutory language assigning authorities and responsibilities for the Assistant Secretaries or for particular offices within the Department. Assigning to Assistant Secretaries and particular offices specific duties might limit the Secretary's authority to organize the Department to respond to new problems. It is clear that an additional Assistant Secretary is needed, however, and we support the establishment of this position.

TITLE II -- APPLICATION OF OSHA TO DOE NUCLEAR FACILITIES

Title II would apply the Occupational Safety and Health Act of 1970 to the Department's nuclear facilities five years after the date of enactment. We are concerned about the safety of our employees and contract workers. As part of our 10-point environmental protection and waste management plan, we will ensure that we and our contractors comply fully with OSHA worker safety standards. In this regard, the Occupational Safety and Health Administration has participated in some of the Department's inspections at our defense facilities. We believe the Department's safety and health programs can be improved with OSHA involvement in inspections, in resolving health and safety complaints of employees, and in ensuring that suitable provisions have been made for worker safety. We also have begun to prepare a similar program to emphasize OSHA compliance at non-defense facilities. We do not object to this title.

TITLE III -- RADIATION RESEARCH

Title III would require the appointment of a panel of seven experts to evaluate the Department's epidemiology programs and make recommendations concerning their management. This title also would require establishment of a repository for the Department's epidemiology data and grant access to the data to qualified researchers under reasonable conditions. We already have established a panel of independent experts to advise us on this issue, and it has issued an interim report. As a result of the report, access to this important set of data will be broadened significantly. Although its purposes already have been accomplished, we do not object to this title.

TITLE IV -- RADIATION WASTE REMEDIATION RESEARCH

Title IV would require the Department to establish a program of research, development, demonstration, and transfer to the private sector of technologies for the management of mixed waste generated at the Department's nuclear facilities. We realize that we do not know all we need to know about the best methods for treating and disposing of the radioactive and hazardous waste we generate. For several years the Department has been conducting basic research into the scientific principles that underlie new technologies in the field of waste management. This program will continue. In addition, we have recently completed a research and development plan that describes the current state of cleanup and waste technologies and establishes milestones for applied research in these technologies to reduce risk to human health and the environment.

We have started in the direction that this title would lead us. We do not object to its enactment, with the exception of section 403. That section would require the Nuclear Regulatory Commission, in consultation with the Environmental Protection Agency and with funding provided by the Department, to develop model standards and regulations for the disposal of mixed waste generated at the Department's facilities. We do not believe that the Nuclear Regulatory Commission is the proper entity to develop these standards. This provision would require the Commission to regulate activities that are related only remotely to its responsibilities for commercial activities. More importantly, as we have indicated and this legislation acknowledges, the technology in this area has not developed to the point that it is timely to develop model standards and regulations. For these reasons, we recommend that section 403 be stricken.

TITLE V -- MONITORING OF HEALTH AND RADIOLOGICAL CONDITIONS IN THE NORTHERN MARSHALL ISLANDS

Title V would require maintenance of a comprehensive program of

programs include

radiological activities in the Northern Marshall Islands, including monitoring of the health and radiological conditions in the Islands and, if requested, technical assistance in educating, rehabilitating, and resettling the people of the Islands. As the title indicates, we already have a comprehensive program, including monitoring, in the Northern Marshall Islands. ~~We now out~~ ~~are undertaking most of the actions that this title would require.~~ Others <sup>will</sup> be undertaken <sup>upon request of Government of the</sup> if the <sup>on a reimbursable basis</sup> Northern Marshall Islands, ~~requests them and pays for some of their costs under an agreement that already has been negotiated.~~ Still other actions are not necessary unless people move back to the affected islands, <sup>between the Govt of the U-S and the Govt of the M-I</sup> ~~[which is not contemplated now] We do not believe that there is a need for this title.~~ ~~is needed.~~

TITLE VI -- WHISTLEBLOWER PROTECTION

Title VI would apply the whistleblower protections that cover employees of licensees of the Nuclear Regulatory Commission to DOE contractors and subcontractors and their employees. We wholeheartedly support the extension of whistleblower protection to our contractor and subcontractor employees. This extension will help ensure that employees will come forward with environmental problems at our facilities rather than sweeping them under the rug. The Department is in the process of extending that protection by regulation. The principal difference in our approach from that in S. 1802 is that we would vest administration of the program in DOE as part of our line management accountability program rather than in the Department of Labor, which administers the earlier Nuclear Regulatory Commission statute. Aside from that, we strongly support the concept of title VI.

TITLE VII -- MIXED HAZARDOUS WASTE

Title VII would clarify that the Environmental Protection Agency does not have jurisdiction to regulate radioactive material under the Solid Waste Disposal Act even when this material is part of mixed waste. This provision simply would codify the current regulatory situation, and we have no objection to it.

TITLE VIII -- NUCLEAR FACILITIES CLEANUP COMPLIANCE AGREEMENTS

Title VIII would require the Secretary, the Environmental Protection Agency, and the appropriate State to complete negotiation of a compliance agreement within one year of enactment for any nuclear facility the Secretary determines is not in compliance with the substantive and procedural requirements of Federal and State environmental laws on the date of enactment. The title describes certain provisions that the compliance agreement must contain, what happens should agreement not be reached in a year, what activities could not be the

subject of court action pending completion of the agreement, how the agreement may be enforced, what the fines collected by a State for violation of environmental laws could be used for, and under what conditions the Secretary may pay the attorney fees for a person accused of an environmental violation.

We strongly support three provisions that would be helpful in restoring our facilities.

The first would require that pending the completion of a compliance agreement between the Department, EPA, and a State, neither the Department nor its contractors, with some exceptions, would be subject to civil or criminal action for noncompliance. Clearly it is important that those who have committed environmental offenses be punished. Because of the present unhealthy condition of our nuclear sites, however, it now is more important that these sites be made clean and safe once again, that the poisons be removed from the ground, the water, and the atmosphere. This restoration can be accomplished only if we know the extent of the problem to begin with, and we can learn that only if those who know the most about it assist us. Suspending enforcement for a short period of time, but not permanently for those who continue to violate, is a much needed step in the right direction. It should be expanded to include a ban on enforcement actions concerning any noncompliance that is the subject of a compliance agreement, unless the compliance agreement is breached.

The second would allow the Department to pay attorney fees for a contractor or employee if the contractor or employee was 1) acting in good faith and in compliance with applicable rules of the Department, 2) had no reasonable cause to believe the conduct was unlawful, and 3) was acting within the scope of his assigned duties. We need good people to operate our nuclear facilities and to make them environmentally safe. It will be difficult to keep or obtain capable people for this hazardous and complex work if they could be subject to expensive court action even when they act reasonably and in good faith compliance with instructions. Importantly, this provision would not allow payment of attorney fees for willful violations but would allow payment of attorney fees only for persons who acted reasonably. Not only is this fair, it also is necessary if we are to have the high caliber of people needed to operate and restore our facilities.

The third would require States to use penalties and fines imposed for environmental violations at our nuclear facilities only for environmental improvements or enforcement at those facilities. Federal funds to pay fines and penalties otherwise likely would be spent on environmental improvements to Federal facilities. A State should not use them for general State purposes but should use them in furtherance of the cleanup and restoration purposes.