

November 28, 2001

The Honorable Harry Reid
United States Senate
Washington, D.C. 20510

Dear Senator Reid:

Thank you for the opportunity to comment on the draft legislation to be entitled "The Nuclear Security Act of 2001." Since September 11, the Nuclear Regulatory Commission has focused extensively on the security of the nuclear facilities we regulate. We and our licensees have worked around the clock to ensure security at those facilities, and we have launched a top-to-bottom review of our security requirements. We are also coordinating with both federal and State agencies to ensure good exchange of information and good coordination of efforts to prevent attacks. Moreover, we continue to press Congress to enact security legislation that we had proposed well before September 11, legislation that would increase the capabilities of security forces at nuclear facilities to respond to a terrorist attack. In light of all this, we take great interest in any proposed security legislation.

The Commission strongly opposes enactment of the legislation as drafted. Specifically, there are several fundamental difficulties with the legislation and a number of shortcomings. The latter are discussed in the enclosure to this letter. Here we concentrate on the fundamental difficulties.

First, the draft separates the strategy for the security of nuclear facilities from that for all other types of sensitive infrastructure. We believe Congress should consider allocation of society's defensive resources in accordance with relative risk, and, as a result, the separation of nuclear facilities from all other types of facilities (e.g., chemical plants, refineries, dams) will fragment the analysis inappropriately. Resources are not infinite, and disproportionate protection at one kind of facility may increase the risks at other kinds of facilities.

Second, the bill preempts the detailed efforts the Commission has underway to adapt to the new security environment. For example, until review and assessment by the NRC, DOE, the Department of Defense, the intelligence community, and law enforcement agencies have been completed, it would be premature to specify revisions to the NRC's design basis threats (DBT). Moreover, such revisions need to be coordinated with the Office of Homeland Security, the National Security Council, the Department of Defense and other federal agencies, to ensure an appropriate and integrated federal strategy.

Third, the requirement in section 3 of the bill that the NRC establish a security force for sensitive nuclear facilities addresses a non-existent problem. Current security forces at sensitive NRC nuclear facilities are well-trained, well paid, and have high retention rates. This is in sharp contrast to airport security before the recent improvements. There have been no failures in nuclear plant security of the type that has plagued the commercial airline industry and thus no need for such radical change.

Fourth, the solution to this non-problem would bring about a fundamental shift in the responsibility and mission of the NRC, diverting the agency from being an independent regulator of nuclear safety and security to being principally a provider of nuclear security. The bill would require the hiring of thousands of new federal guards to displace the well-trained and closely regulated private security forces that licensees have in place now. Also, the bill would create command and control difficulties because it would establish two classes of employees at nuclear sites, both of which would be responsible for safety in the event of a terrorist attack -- licensee personnel responsible to the licensee, and federal employees responsible to the NRC. In an emergency situation, these separate lines of authority could, in fact, lead to a diminution of the licensees' capacities to assure safety. Furthermore, the NRC's role as an independent regulator, and its freedom from fundamental conflicts of interest in carrying out that role, would be compromised by the bill's requirement that the NRC design security plans for all sensitive nuclear facilities, implement the plans with NRC employees, and then conduct safeguards evaluations of the efficacy of the implementation of those plans.

Fifth, the change would serve to increase the federal budget needlessly. Presumably, given the enhancement in the security threat against which the guard force would be required to defend in accordance with the proposed legislation, the NRC would be required to hire more guards than currently exists at sensitive nuclear facilities -- that is, more than 7,000 new federal workers, which is more than twice the number of staff now employed by the NRC. These new workers would have to undergo extensive background checks, would have to be trained and qualified, and would have to be armed and equipped. The training of this force alone would likely overload any federal law enforcement agency's training capability. Moreover, presumably the NRC would have to assume the responsibility for establishment of new security barriers and communications capabilities at the nuclear facilities (which by itself raises complicated issues associated with the interplay of security barriers and safety considerations). We estimate that the additional cost to the federal government to implement these changes may well be over \$1 billion a year -- all to address a non-existent problem.

The current system, with coordination of security and safety through a single organization subject to NRC regulatory scrutiny, is clearly preferable. This has been the agency's long-standing opinion. In 1976, NRC submitted a report to Congress on this point entitled, "Security Agency Study," a report the NRC prepared in consultation with the U.S. Marshals Service, the International Association of Chiefs of Police, the Aerospace Corporation, the Lawrence Livermore Laboratory, and the Rand Corporation. The NRC concluded that "creation of a Federal guard force for maintaining security in the nuclear industry would not result in a higher degree of guard force effectiveness than can be achieved by the use of private guards, properly qualified, trained and certified." The Commission continues to believe that licensee guard forces provide an appropriate, robust and safe mechanism for protecting licensed facilities.

These fundamental difficulties in this legislation argue against its adoption. However, NRC does believe there is appropriate legislative action that can enhance security at regulated nuclear facilities. We ask that you give the NRC the necessary time to continue working with DOE, DOD, the new Office of Homeland Security, and other security and intelligence agencies to determine, in the context of the security needs at all sensitive infrastructures, what needs to be done at NRC-regulated nuclear facilities. We also ask that you promptly enact the draft security legislation that we submitted to Congress once again this year -- a version of legislation

that the Commission has requested from Congress for many years. That legislation would strengthen security at nuclear facilities with the NRC's fundamental mission of protecting public health and safety.

Sincerely,

/RA/

Richard A. Meserve

Enclosure: As stated

In addition to the fundamental difficulties we discuss in the letter, the draft legislation has certain more specific shortcomings. In making the comments below, the Commission intends no suggestion that removing these specific shortcomings would make the bill acceptable to the Commission.

Design basis threat (sec. 3). We have already noted that a new DBT cannot be established without the necessary coordination among federal agencies, and, that the coordination is underway, as is our top-to-bottom look at our security requirements. Statutorily imposing requirements for the design basis threat (DBT) is therefore unnecessary.

Even assuming that legislation should dictate certain features of a DBT, section 3 takes too narrow a view. For example, if the new DBT is to include the events of September 11, then the bill should direct the NRC to take into consideration protection provided by other legislation against such an attack. For example, a great deal of the new Aviation Security Act (ASA) is directed against such an attack and thus provides increased protection to every sensitive infrastructure, nuclear or non-nuclear.

New guard force (sec. 3). The draft bill overlooks a simple matter. The bill contains no express provision that would give authority to the new federal guards. This is in contrast to our own proposed legislation, or the ASA, which expressly gives law enforcement officers employed by the new DOT security agency the authority they need to carry out their assignments (ASA sec. 101(a), to be codified at 49 USC 114(q)).

Also, if new legislation is going to require that the NRC assemble a guard force of more than 7000 persons in an abbreviated period of time, the NRC must be given the flexibility to hire and manage the new employees under more flexible personnel rules.

Nuclear security fund (sec. 3). The provisions concerning this fund pose a number of difficulties. First, how much should the fee that section 3(a) establishes be? The NRC is unable to determine the full cost of implementing this legislation (although it would likely exceed \$1 billion per year) and, therefore, is doubtful that a charge not to exceed one mill per kilowatt-hour of electricity generated by a sensitive nuclear facility would cover the NRC's costs.

Second, there is a question of fairness. The funding mechanism appears to be modeled on the Nuclear Waste Fund. That fund rightly proportions fee payment to energy output, since the amount of waste depends on the amount of production; but the cost of security is not necessarily proportional to output.

Third, even assuming that the basis for the fee may be reasonable for commercial power reactors, it would have no application to other sensitive nuclear facilities listed in section 2 of the bill, including decommissioned nuclear power plants, Category I fuel cycle facilities, gaseous diffusion plants, and other facilities licensed by the NRC, because these facilities do not produce electricity.

Fourth, the fund does not ensure that the costs of additional security will be adequately covered. It is unclear from the legislation whether the NRC could draw money from this fund as necessary, or whether distributions would be subject to prior Congressional appropriations. Also, for Budget Enforcement Act purposes, is the fund to be scored as mandatory or as

discretionary spending? More specifically, the legislation does not expressly provide money from the fund for the possibly significant cost for the training and hardware that might be used by the guard forces, for the significant cost of the new Operation Safeguards and Response Unit established by section 4, or for the requirement that the NRC reimburse States for deployment of the National Guard. At the very least the NRC would need budget flexibility analogous to that provided to the Federal Emergency Management Agency for unforeseen obligations incurred in response to emergencies. Because the NRC recovers nearly all of its operating budget through fees imposed on licensees, it would be more fitting for reimbursements for the costs of war or national emergency to come from the General Fund.

Operation Safeguards and Response Unit (sec. 4). Section 4 of the bill establishes a new organizational unit within the NRC called the Operation Safeguards and Response Unit and requires that this unit conduct periodic security and emergency response exercises at sensitive nuclear facilities. The bill is extremely prescriptive concerning the organizational structure, type and number of employees, and other details. Such detail not only may detract from the effective and efficient operation of the unit and accomplishment of its assigned objectives, it may also provide useful information to terrorists. The Commission has underway an evaluation of the means to assess licensee security capabilities and, at this juncture, believes that the approach to exercises that is specified in the legislation is inappropriate and unworkable. Indeed, the legislation in Section 4 seems to preempt and prejudice certain aspects of the DBT and introduces substantial alterations to the relationships among State and federal agencies that have responsibilities for emergency response.

Potassium iodide (sec. 5). Section 5 would require the Commission to establish stockpiles of potassium iodide (KI) in the vicinity of sensitive nuclear facilities. Before September 11 the NRC had established a program to require States, which bear the primary responsibility for emergency response, to consider the distribution of KI. The NRC has also offered to provide funds for the initial acquisition of KI. The implementation has been delayed because of the need to await FDA guidance on dosages; that guidance is now expected shortly. The legislation is unnecessary because the underlying concern is being addressed in a fashion that does not disrupt the existing relationships among governmental and private entities with responsibilities for emergency response. In any event, the section is inappropriate for at least some sensitive nuclear facilities, for example gaseous diffusion plants, because these facilities do not have inventories of radioactive iodine.

Defense of facilities (sec. 6). Section 6 would require the NRC to request National Guard and Coast Guard deployments and restriction of air space during any national emergency or state of war. The section would give the NRC no discretion in the matter. Use of these forces and measures might be entirely inappropriate in many circumstances and could divert national security resources from more vulnerable facilities. Such authority should reside with authorities responsible for overall national security who are best able to determine appropriate deployment of such resources. Moreover, in the context of the rest of this bill, sensitive nuclear facilities will have defensive capabilities beyond all other facilities in the nation, including nuclear weapons facilities.