UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

August 4, 1992

The Honorable Dale Bumpers
United States Senate
Washington, D.C. 20510

Dear Senator Bumpers:

The Nuclear Regulatory Commission appreciates the opportunity to present its views on S. 2166 and H.R. 776, the two bills passed by Congress that would establish a national energy strategy. We are, overall, quite pleased with provisions in these bills that involve the NRC and the extent to which they reflect your leadership. Nevertheless, we have substantial concerns about several provisions of the bills, particularly those relating to uranium enrichment, regulation of nuclear materials containing very low levels of radioactivity, and whistleblower protection. Our detailed comments on these and other issues before the Conference Committee that affect this agency are enclosed.

With respect to the Department of Energy's two operating gaseous diffusion plants, both bills would assign to the NRC a regulatory responsibility to ensure protection of the public health and safety from continued operations. The two bills differ markedly in their approach and the procedures the NRC would have to employ. While the House bill is less problematic than the Senate version, we believe enactment of either one would very likely lead to substantial difficulties in licensing or certifying these old facilities for long term operation, resulting in substantial costs to the United States Enrichment Corporation.

Our views on State regulation, and Federal preemption, of very low levels of radioactivity have previously been submitted to the Congress. We continue to oppose legislation that would permit States to set standards in this area independent of the existing comprehensive system of Federal nuclear regulation. Such independent regulation could have the unintended impact of decreasing protection of the public health and safety and impeding interstate commerce in consumer products by establishing conflicting regulatory requirements. We therefore urge the Congress not to adopt this provision in the final legislation.

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The Commission hopes that the views we have expressed will be helpful to the members of the Conference Committee as they consider S. 2166 and H.R. 776 and that our concerns can be accommodated.

Sincerely,

Kenneth C. Rogers

Kenneth C. Rogers
Acting Chairman

Enclosures:
1. Detailed NRC Comments on H.R. 776 and S. 2166
2. Changes to Uranium Enrichment Legislation in H.R. 776

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

August 4, 1992

The Honorable Wendell H. Ford
United States Senate
Washington, D.C. 20510

Dear Senator Ford:

The Nuclear Regulatory Commission appreciates the opportunity to present its views on S. 2166 and H.R. 776, the two bills passed by Congress that would establish a national energy strategy. We are, overall, quite pleased with provisions in these bills that involve the NRC and the extent to which they reflect your leadership. Nevertheless, we have substantial concerns about several provisions of the bills, particularly those relating to uranium enrichment, regulation of nuclear materials containing very low levels of radioactivity, and whistleblower protection. Our detailed comments on these and other issues before the Conference Committee that affect this agency are enclosed.

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UNITED STATES
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WASHINGTON, D. C 20555

CHAIRMAN

August 4, 1992

The Honorable Jeff Bingaman
United States Senate
Washington, D.C. 20510

Dear Senator Bingaman:

The Nuclear Regulatory Commission appreciates the opportunity to present its views on S. 2166 and H.R. 776, the two bills passed by Congress that would establish a national energy strategy. We are, overall, quite pleased with provisions in these bills that involve the NRC and the extent to which they reflect your leadership. Nevertheless, we have substantial concerns about several provisions of the bills, particularly those relating to uranium enrichment, regulation of nuclear materials containing very low levels of radioactivity, and whistleblower protection. Our detailed comments on these and other issues before the Conference Committee that affect this agency are enclosed.

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UNITED STATES
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CHAIRMAN

August 4, 1992

The Honorable Timothy E. Wirth
United States Senate
Washington, D.C. 20510

Dear Senator Wirth:

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UNITED STATES
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CHAIRMAN

August 4, 1992

The Honorable Kent Conrad
United States Senate
Washington, D.C. 20510

Dear Senator Conrad:

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UNITED STATES
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CHAIRMAN

August 4, 1992

The Honorable Richard C. Shelby
United States Senate
Washington, D.C. 20510

Dear Senator Shelby:

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
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CHAIRMAN

August 4, 1992

The Honorable Mark O. Hatfield
United States Senate
Washington, D.C. 20510

Dear Senator Hatfield:

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

August 4, 1992

The Honorable Pete V. Domenici
United States Senate
Washington, D.C. 20510

Dear Senator Domenici:

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UNITED STATES
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CHAIRMAN

August 4, 1992

The Honorable Frank H. Murkowski
United States Senate
Washington, D.C. 20510

Dear Senator Murkowski:

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CHAIRMAN

August 4, 1992

The Honorable Don Nickles
United States Senate
Washington, D.C. 20510

Dear Senator Nickles:

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CHAIRMAN

August 4, 1992

The Honorable Conrad Burns
United States Senate
Washington, D.C. 20510

Dear Senator Burns:

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DETAILED NRC COMMENTS ON H.R. 776 AND S. 2166

1. [illegible]nium Enrichment

Title X of S. 2166 and Titles IX and XI of H.R. 776 both restructure the United States Enrichment Enterprise. The two bills assign differing roles to the NRC. Under the Senate bill, a section 1601 would be added to the Atomic Energy Act which contemplates the NRC's licensing of the two gaseous diffusion facilities. Under the House bill, a section 1601 would be added to the Atomic Energy Act which would require the Commission, after consulting with DOE and EPA, to promulgate standards governing the operation of such facilities. Thereafter, the new United States Enrichment Corporation, which would operate the plants under lease from the Department of Energy, would be required annually to receive from the NRC a certificate that it was in compliance with the applicable NRC regulations. In making that determination NRC would be required to consult with EPA and DOE.

The gaseous diffusion plants in question were constructed in the 1950's and have been operated continuously since then without a license or any other kind of regulatory surveillance by NRC. At this time, we do not know whether standards used in their construction and operation would match those of today. We harbor some doubt as to whether these existing facilities could be licensed or certified to meet the same NRC standards that would have to be met by a new enrichment facility. If the Congress nonetheless concludes that the NRC should be assigned some responsibility for addressing the safe operation of the facilities, careful consideration must be given to shaping a regulatory framework that is appropriate for facilities that have been operating for decades.

The Commission has given considerable thought to the appropriate NRC role should Congress determine that the NRC should be involved in the oversight of the gaseous diffusion facilities. The two bills present a choice in approaches-- licensing the facilities pursuant to the Senate bill or issuing regulations governing the operation of the facilities and annually certifying that the facilities are in compliance with the regulations pursuant to the House bill. We find problems with both approaches, but would prefer the House approach with some clarifications discussed below.

A licensing regime for the existing facilities would consume significant resources and could lead to lengthy litigation. Licensing would require the development of licensing standards, a detailed licensing review, and a licensing proceeding leading to a Commission decision. It would be our expectation that we could not make a licensing decision for at least five years. Any legislation requiring licensing would need to be carefully tailored to define the scope of the environmental review under the National Environmental Policy Act (NEPA). The Senate bill contains some possibly

appropriate limitations in that regard. However, even with those limitations, the NEPA review would be a time-consuming and costly exercise of little apparent value since the facilities have operated for an extended period and continued operation is not likely to cause substantial new adverse environmental effects.

The Commission believes that a certification process could provide meaningful regulatory oversight if the enabling legislation is carefully drafted. Under that approach (which is reflected in our proposed revisions to H.R. 776, Enclosure 2), the NRC role would be limited to developing standards that would govern the radiological safety of the operation of the facilities and ensuring that adequate safeguards and physical security measures are in place. The House bill provides only one year for promulgating the standards. Based on our past experience, we do not deem it likely that the necessary standards could be developed within that time frame. We expect that we could issue such standards no sooner than two years after enactment of the legislation and be prepared to make our first compliance certification determination within one year thereafter. The NRC is not currently familiar with the facilities, and we would need to solicit and evaluate public comments before promulgating final standards.

As we read the statutory terms of H.R. 776 in conjunction with the Atomic Energy Act and NEPA, the establishment of a certification process would not appear to require us to conduct a review of the environmental impacts associated with the continued operation of the facilities. Unnecessary litigation of this issue would be foreclosed if Congress explicitly provided in the statute that NEPA did not apply to the exercise of NRC's responsibilities regarding the gaseous diffusion facilities. To assist the Commission in making its certification decision, it would be useful if the legislation explicitly provided that section 206 of the Energy Reorganization Act, which imposes reporting requirements for defects and non-compliance with agency regulations on responsible officers and directors, would apply to the United States Enrichment Corporation with respect to the operation of the facilities. Moreover, the explicit limitation of our regulatory authority to radiological safety and safeguards during the operating life of the facilities would be useful as it would make clear that we are not responsible for regulating the storage or disposal of the depleted tailings or decommissioning of the facilities. EPA would continue to have responsibility for assuring that facilities are operating in conformity with applicable Federal environmental laws. The approach described above would bring the plants under our oversight sooner than if we were asked to license the facilities and would permit the NRC to use its resources more effectively.

Any legislation assigning a role to the Commission in the enrichment area needs to include an explicit provision granting the Commission authority to charge the Enrichment Corporation user fees under the Independent Offices Appropriation Act. Although the House bill provides the Commission with the authority for licensing and inspection activities relating to the AVLIS facility, neither the House nor the Senate bill authorizes the Commission to charge the Corporation for the costs that the NRC will incur in overseeing the gaseous diffusion facilities. This omission should be rectified.

Finally, the NRC's budget does not include any resources for the regulation of the gaseous diffusion facilities that would be required under this legislation. Congress must provide us with additional resources if we are to carry out our responsibilities effectively.

2. State Regulation, and Federal Preemption of Very Low Levels of Radioactivity

The Commission continues to oppose legislation found in section 2901 of H.R. 776 which would permit states to set standards regarding regulation of both radioactive waste of very low levels of radioactivity and the uses of substances or practices involving very low levels of radioactivity. The Commission indefinitely halted implementation of its 1990 Policy Statement on such matters and sees no need for legislation in this area. We are particularly concerned that the proposed provision could upset a longstanding legal framework regarding the regulation of radiological hazards and could be subject to an interpretation that provides states with the authority to independently regulate certain activities, including aspects of nuclear power plant operation. Such independent regulation could actually decrease the protection of public health and safety by imposing conflicting regulatory requirements and diverting licensee and agency resources away from necessary safety and compliance efforts. We thus urge that this provision not be included in the final legislation enacted by the Congress.

The proposed new section 276 of the Atomic Energy Act would permit States to set their own individual radiological standards in limited specified circumstances. Under its terms, if, after January 1, 1990, the NRC were to exempt any waste, or other practice or material, involving low levels of radioactivity from regulation or with respect to any such waste or other practice or material substantially reduce protection of the public health and safety, a State could set its own standards. This language could open the door to challenges that specified NRC actions would result in a substantial reduction in protection and thus permit independent State regulation. The NRC would likely become embroiled in a succession of individual State proceedings to determine whether NRC has substantially reduced protection of the public and to assess the validity of NRC regulations which had already gone through appropriate rulemaking procedures. Such a process would disrupt an existing comprehensive system of Federal nuclear regulation and could also drain significant agency resources from protection of the public health and safety.

Moreover, the language in section 276 as adopted by the House covers not only all regulation "on the basis of radiological hazard [of] the management, storage, incineration, or disposal of low-level radioactive waste" but in addition regulation on the basis of radiological hazard of "other practices or materials involving low-level radioactivity." This language is broad enough to include aspects of nuclear power plant operation, consumer product manufacturing and distribution, and other licensed activities. Although the Interior Committee Report implied that broad language in its legislation was limited to waste that the NRC determined was below regulatory concern, the force of that legislative history is weakened substantially in view of the language ultimately adopted by the House. In a colloquy on the House Floor with Representative Dingell, Representative Miller described the amendment as

revoking the Commission's policy "to deregulate certain radioactive wastes" (presumably low level wastes) and also protecting "the right of States to regulate any radioactive wastes, practices or materials if the NRC either deregulates or relaxes regulation in this area." (Emphasis added.) This broad and imprecise language, read literally, could arguably permit States to set more stringent standards than those set by the NRC for a broad sweep of activities regulated by the NRC, including aspects of power reactors. Although such a broad interpretation may not be intended, a literal interpretation of the statutory language could later be urged to fundamentally and unacceptably alter the current Federal framework for nuclear regulation under the Atomic Energy Act and could frustrate current efforts to foster standardization of future facilities.

Moreover, consumer products using very low levels of radioactivity fall within the scope of the legislation. This means that if individual States set radiological standards for such products, national distribution of such products would be severely impeded, hindering interstate commerce.

3. Whistleblower Protection

Section 3004 of H.R. 776 makes numerous changes to the whistleblower protection provisions contained in section 210 of the Energy Reorganization Act. We strongly object to subsection 3004(h) which would: (1) impose an independent duty on the NRC to investigate whistleblower allegations, regardless of the pendency of a Department of Labor (DOL) investigation or Federal court proceeding; and (2) bar the Commission from considering a determination by the DOL that a violation of section 210 had not occurred in determining whether any violation of that section or the Atomic Energy Act had occurred. Under this section the NRC would be directed not to delay any investigation during the pendency of a DOL investigation or Federal court proceeding. It would also be a violation of this section if NRC considered an adjudicatory decision of the Secretary of Labor or a court decision reviewing the Secretary's decision.

Under the current statutory regime both the DOL and the NRC have the independent responsibility to investigate the complaints of whistleblowers employed by NRC licensees or their contractors. The NRC can take appropriate enforcement action against its licensees for discrimination against the whistleblower. To promote governmental efficiency by eliminating unnecessary duplication of effort, the NRC's practice has been normally not to initiate an investigation of a complaint if DOL is conducting, or has completed, an investigation and found no violation. While it is important that the NRC retain the authority to commence its own investigation without regard to a DOL proceeding, our experience has been that in most cases issues raised by whistleblowers have been adequately addressed by DOL without the need to divert NRC's resources in a duplicative investigation. The DOL keeps the NRC informed of its efforts.

The approach contained in section 3004(h) is unsatisfactory because it will mandate unnecessary and costly NRC duplication of DOL efforts, particularly if we are precluded from considering a DOL finding rejecting the whistleblower's claims. Without additional resources to accommodate this new workload, NRC

investigatory resources will necessarily have to be diverted from other efforts. Moreover, the proposed approach could result in duplicative Federal district court review of the same whistleblower's complaint based on challenges to the results of separate NRC and DOL investigations. This could result in inconsistent court rulings. In this era of limited Federal resources, the NRC believes that the costs of the proposed approach far exceed any benefits to be derived. Therefore, we request that the conferees not adopt section 3004(h).

Under both the House and Senate bills, victims of alleged discrimination would have a year after the alleged discrimination to file a complaint with the Department of Labor. While the Commission believes this is preferable to the current 30 day filing period, the Commission supports a six month statute of limitations period. This would provide a reasonable time to file a complaint, while still encouraging early filing. The longer investigations of complaints are delayed, the more difficult investigations become.

4. Uranium Mill Tailings Cleanup

Both S. 2166 and H.R. 776 contain provisions relating to remedial action at active uranium mill tailings sites. Two aspects of these provisions are of concern to the Commission. Section 10213(1)(B) of the Senate bill and section 1004(1)(B) of the House bill would require the NRC to identify the vicinity properties around the active mill tailings sites that must be cleaned up. This responsibility should be assigned to the Department of Energy (DOE). In the Uranium Mill Tailings Radiation Control Act of 1978, Congress assigned DOE the responsibility for identifying the vicinity properties for the uranium mill tailings sites that were closed at the time the legislation was enacted. As a result of this responsibility, DOE has developed necessary expertise and acquired necessary equipment to carry out the difficult task of identifying contaminated vicinity properties. Under the circumstances, it would be far more efficient and effective for DOE to be responsible for identifying vicinity properties for the active tailings sites.

A second concern in this area relates to the provisions in section 10231(b)(1)(B) of S. 2166 and section 1001(b)(1)(B) of H.R. 776 which state that reimbursements are to be provided for mill tailings cleanup costs incurred not later than December 31, 2002. These provisions suggest that a facility must be decommissioned by that date for its licensee to receive a reimbursement. Thus, these provisions would strongly discourage companies from keeping mills open after the year 2002, even where the mill may be viable for continued operation. To eliminate this disincentive for mills to continue operating, provision should be made to permit a facility to remain open after 2002 and still obtain financial relief for tailings generated in the production of government-purchased uranium. This could be done by providing for clean-up costs to be estimated and for an appropriate amount to be placed in an escrow account for use when reclamation is actually accomplished.

5. Disposal of Waste in Mill Tailings Impoundments

Section 2911 of H.R. 776 amends section 84 of the Atomic Energy Act to provide that no radioactive material may be buried at an active mill tailings site

unless: (1) the Governor of the State has agreed to such disposal or (2) the radioactive material to be disposed of is byproduct material as defined in section 11e.(2) of the Atomic Energy Act. The NRC recommends that this provision not be included in the final legislation. Over the past several years both the NRC and Agreement States have granted requests which authorized the disposal of small amounts of non-11e.(2) material in mill tailing impoundments. The NRC approved these disposals because the quantities were negligible in comparison to the quantities of the mill tailings generated by the milling operation, and the mill tailings impoundments in question provided adequate protection of the public health and safety and the environment. In this regard, for some types of low-level radioactive waste, disposal at a mill tailings site may be the best alternative, both technically and economically.

During the past several years, the NRC has been developing policy and guidance on the disposal of non-11e.(2) material in mill tailing impoundments. We have worked with the Department of Energy, the Federal agency identified in the Uranium Mill Tailings Radiation Control Act as responsible for long-term custody of 11e.(2) disposal sites, to develop guidance that would allow such disposals, provided that the public health and safety and the environment are protected and that the disposals would not add to the government's costs as long-term custodian.

On May 13, 1992, the NRC solicited public comment on its proposed policy and guidance. The guidance would require, among other things, approval by the regional low-level waste State Compacts from both the generating State and the receiving State.

This agency cannot support the provisions that would give a State veto power over waste disposal, as this would be detrimental to the development and implementation of national waste management strategies. The NRC strongly believes that approval of the disposal of non-11e.(2) material by regional low-level waste State Compacts, consistent with the Low-Level Radioactive Waste Policy Amendments Act, rather than by individual States, would best ensure that neither national nor regional low-level waste programs are compromised.

6. Highly Enriched Uranium

Section 903(b) of H.R. 776 would require the NRC, after consulting with other pertinent Federal agencies, to submit within 90 days after enactment of the legislation a report to Congress detailing the current disposition of previous U.S. exports of highly enriched uranium (HEU). The NRC recommends that this provision not be adopted by the Conferees. Preparation of such a report would not likely produce the authoritative information, particularly regarding Euratom-possessed HEU, that might be desired. NRC's export licensing files contain records of HEU cases since 1975; information on earlier cases would be available at the Nuclear Material Management and Safeguards System located at Oak Ridge National Laboratory. However, these and related U.S. records would contain only piecemeal information on the irradiation of the HEU in foreign reactors and retransfers within Euratom. Most of the U.S.-exported HEU is in Euratom. For many years this material has been transferred among Euratom member countries without notifying the U.S. These transfers are permitted

under the U.S.-Euratom Agreement for Cooperation, and Euratom has denied a recent request from the Executive Branch for this information. Under the circumstances, the NRC believes that it may be impossible to produce a report containing the information requested.

While the restrictions on the export of HEU contained in Section 903 are generally consistent with the Commission's 1982 Policy Statement on the Use of HEU in Research Reactors, the provisions could significantly affect the Executive Branch's foreign policy objectives with regard to HEU exports. The Commission would prefer the greater flexibility under the existing Policy Statement to evaluate licensing of HEU exports. We believe that the Executive Branch should be consulted for their views on this provision.

7. User Fees

Section 1910 of S. 2166 expresses the sense of the Senate that the Nuclear Regulatory Commission should review its implementation of the legislation directing the collection of 100% of its budget in user fees and recommend to Congress whether any legislation is needed to prevent the placement of unfair fee burdens on NRC licensees, in particular those that hold licenses to operate Federally-owned research reactors used primarily for educational training and academic research purposes. Section 3009 of the House bill takes a different approach by specifically exempting one Federally-owned research reactor from NRC annual fees.

The Commission prefers the approach set forth in the Senate bill. The implementation of the 100% user fee legislation has presented many difficult issues in addition to those related to the Federally-owned research reactor addressed in the House bill. The Commission believes that it would be more prudent to address the Federal research reactor issue in the broader context described in the Senate bill.

8. Transportation of Plutonium Through United States Ports

The House bill would bar ships transporting plutonium from one foreign nation to another from entering, even under emergency conditions, the United States or its navigable waters, unless the container for such plutonium has been certified as safe by the NRC. In making its safety determination, the Commission would be required to test the container to the fullest extent possible under conditions approximating a maximum credible accident involving collision, fire, and sinking, based upon actual worst case maritime accident experience.

Assigning the NRC the role of testing the packages is inappropriate. That is not our normal regulatory role in the certification of containers for transportation of radioactive materials.

FAX 3pgs

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

June 12, 1992

LEGISLATIVE REFERRAL MEMORANDUM LRM #I-3765

TO: Legislative Liaison Officer -

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FROM: RONALD K. PETERSON (for) Ronald K. Peterson
Assistant Director for Legislative Reference

OMB CONTACT: Holly FITTER (395-6194)
Gary KENNETHUM (395-3634)

SUBJECT: OMB Request for Views RE: HR 776, Comprehensive National Energy Policy Act

DEADLINE: 10:00 AM June 22, 1992

COMMENTS: Please review HR 776 as passed by the House on 5/27/92. If your agency has substantive concerns, identify and describe the relevant provisions. The basis for your concerns and the specific resolution thereof (delete, modify by . . ., etc.) should also be included. Your comments may

be used by the Energy Department in developing a letter to the conferees. As you may recall, your comments on S 2166, the comparable Senate bill, were requested by this Office on 3/26/92. In compiling your comments on HR 776, you may wish to reference your earlier comments, and advise whether your agency would prefer a particular provision of one bill over the other.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
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