SPEAKERS CONTENTS INSERTS Tables

Page 1 TOP OF DOC

71–802PS
2002

H.R. 723: CIVIL PENALTIES FOR NUCLEAR SAFETY VIOLATIONS BY NON-PROFIT DEPARTMENT OF ENERGY CONTRACTORS UNDER THE ATOMIC ENERGY ACT OF 1954

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY
COMMITTEE ON SCIENCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

MARCH 22, 2001

Serial No. 107–33

Printed for the use of the Committee on Science

Page 2 PREV PAGE TOP OF DOC

Available via the World Wide Web: http://www.house.gov/science

COMMITTEE ON SCIENCE

HON. SHERWOOD L. BOEHLERT, New York, *Chairman*

LAMAR S. SMITH, Texas
CONSTANCE A. MORELLA, Maryland
CHRISTOPHER SHAYS, Connecticut
CURT WELDON, Pennsylvania
DANA ROHRABACHER, California
JOE BARTON, Texas
KEN CALVERT, California

NICK SMITH, Michigan
ROSCOE G. BARTLETT, Maryland
VERNON J. EHLERS, Michigan
DAVE WELDON, Florida
GIL GUTKNECHT, Minnesota
CHRIS CANNON, Utah
GEORGE R. NETHERCUTT, JR., Washington
FRANK D. LUCAS, Oklahoma
GARY G. MILLER, California
JUDY BIGGERT, Illinois
WAYNE T. GILCHREST, Maryland
W. TODD AKIN, Missouri

Page 3 PREV PAGE TOP OF DOC

TIMOTHY V. JOHNSON, Illinois
MIKE PENCE, Indiana
FELIX J. GRUCCI, JR., New York
MELISSA A. HART, Pennsylvania
J. RANDY FORBES, Virginia

RALPH M. HALL, Texas
BART GORDON, Tennessee
JERRY F. COSTELLO, Illinois
JAMES A. BARCIA, Michigan
EDDIE BERNICE JOHNSON, Texas
LYNN C. WOOLSEY, California
LYNN N. RIVERS, Michigan
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
BOB ETHERIDGE, North Carolina
NICK LAMPSON, Texas
JOHN B. LARSON, Connecticut
MARK UDALL, Colorado
DAVID WU, Oregon
ANTHONY D. WEINER, New York
BRIAN BAIRD, Washington
JOSEPH M. HOEFFEL, Pennsylvania
JOE BACA, California
JIM MATHESON, Utah

Page 4 PREV PAGE TOP OF DOC

STEVE ISRAEL, New York

DENNIS MOORE, Kansas
MICHAEL M. HONDA, California

Subcommittee on Energy
ROSCOE G. BARTLETT, Maryland, *Chairman*
DANA ROHRABACHER, California
KEN CALVERT, California
VERNON J. EHLERS, Michigan
GEORGE R. NETHERCUTT, JR., Washington
JUDY BIGGERT, Illinois
W. TODD AKIN, Missouri
MELISSA A. HART, Pennsylvania
SHERWOOD L. BOEHLERT, New York

LYNN C. WOOLSEY, California
JERRY F. COSTELLO, Illinois
SHEILA JACKSON LEE, Texas
DAVID WU, Oregon
JIM MATHESON, Utah
NICK LAMPSON, Texas
RALPH M. HALL, Texas

HARLAN WATSON *Subcommittee Staff Director*
TOM VANEK, KAREN KIMBALL, JOHN DARNELL *Republican Professional Staff Members*

Page 5 PREV PAGE TOP OF DOC

CHARLES COOKE *Democratic Professional Staff Member*
TOM HAMMOND *Staff Assistant*

C O N T E N T S

March 22, 2001
Witness List

Hearing Charter

Opening Statements

Statement by Representative Roscoe G. Bartlett (MD–06), Chairman, Subcommittee on Energy, Committee on Science, U.S. House of Representatives
Written Statement
Statement by Representative Lynn Woolsey (CA–06), Ranking Minority Member, Subcommittee on Energy, Committee on Science, U.S. House of Representatives
Written Statement
Statement by Representative Sheila Jackson Lee (TX–18), Member, Subcommittee on Energy,

Committee on Science, U.S. House of Representatives

Panel

Eric J. Fygi, Acting General Counsel, U.S. Department of Energy
Oral Testimony

Page 6 PREV PAGE TOP OF DOC

Prepared Testimony
Biography

Ms. Gary L. Jones, Associate Director, Energy, Resources, and Science Issues, U.S. General Accounting Office
Oral Testimony
Prepared Testimony
Biography

Guy H. Cunningham, Associate General Counsel, Battelle Memorial Institute
Oral Testimony
Prepared Testimony
Biography
Financial Disclosure

Robert L. Van Ness, Assistant Vice President for Laboratory Administration, University of California
Oral Testimony
Prepared Testimony
Biography

Discussion:
Nuclear Safety Issues at Los Alamos and Lawrence Livermore
Suggested Liability Language for H.R. 723
Suggested Changes to Bill

Page 7 PREV PAGE TOP OF DOC

Treatment of For-Profit Versus Non-Profit Contractors
Price-Anderson Appeals Process
Penalty Structures and Exemptions
Double Penalties
Penalty Levels
Determining Penalties Assessed
Contract Awards for For-Profits Versus Non-Profits

Appendix 1: Answers to Post-Hearing Questions Submitted By Members of the Subcommittee on

Energy

Mr. Eric J. Fygi, Acting General Counsel, U.S. Department of Energy
Republican Member Questions:
Status of DOE Rulemaking on Non-Profit Civil Penalties
DOE's Position on Non-Profit Civil Penalties
Discretionary Fees
Civil Penalties
DOE Contract Expiration
Bayh–Dole Definition of Non-Profit Organizations
Democratic Member Questions:
Civil Penalties on Non-Profit Organizations
Violation Subject to Civil Penalties
Size of Discretionary Fees Compared to Penalties Assessed
Penalties and Compliance
Source of Funds for Penalty Payments

Page 8 PREV PAGE TOP OF DOC

Penalty Payments by Non-Profit Entities
Civil Penalties
Discretionary Fees and Civil Penalties Under Price-Anderson

Ms. Gary L. Jones, Associate Director, Energy, Resources, and Science Issues, U.S. General Accounting Office
Republican Member Questions:
Appropriateness of Exemption of Civil Penalties for Non-Profit Entities
Penalties Based on Discretionary Fees
Democratic Member Questions:
Size of Discretionary Fees Compared to Penalties Assessed
Penalties and Compliance
Source of Funds for Penalty Payments
Penalty Payments by Non-Profit Entities
Civil Penalties
Discretionary Fees and Civil Penalties Under Price-Anderson

Mr. Guy H. Cunningham, Associate General Council, Battelle Memorial Institute
Republican Member Questions:
Appropriateness of Exemption of Civil Penalties for Non-Profit Entities
Treatment of Non-Profits Under H.R. 723

Mr. Robert L. Van Ness, Assistant Vice President for Laboratory Administration, University of California
Republican Member Questions:

Page 9 PREV PAGE TOP OF DOC

Bayh–Dole Definition of "Non-Profit"
University of California Contract Structure
Enforcement Actions Against the University of California
University of California Support for Repeal of Exemption From Civil Penalties
Self-Reported Incidents Under Price-Anderson
Democratic Member Questions:
Civil Penalties
Discretionary Fees and Civil Penalties Under Price-Anderson

Appendix 2: Additional Material for the Record

Statement of the Honorable Joe Barton (TX–06), U.S. House of Representatives
Statement of Mr. Robert Zimmer, Vice President of the University of Chicago for Argonne National Laboratory
Biography
Statement of Mr. William A. Schmidt, General Counsel, Universities Research Association, Inc.
Biography
Financial Disclosure
Statement of Dr. Jerry P. Draayer, President, Southeastern Universities Research Association, Inc.
Biography
Financial Disclosure
Mr. Guy Cunningham, Associate General Council, Battelle Memorial Institute

Page 10 PREV PAGE TOP OF DOC

Suggested Legislative Language
Ms. Gary L. Jones, Associate Director, Energy, Resources, and Science Issues, U.S. General Accounting Office
Suggested Legislative Language
Department of Energy Report to Congress on the Price-Anderson Act

H.R. 723: CIVIL PENALTIES FOR NUCLEAR SAFETY VIOLATIONS BY NON-PROFIT DEPARTMENT OF ENERGY CONTRACTORS UNDER THE ATOMIC ENERGY ACT OF 1954

THURSDAY, MARCH 22, 2001

House of Representatives,

Subcommittee on Energy,

Committee on Science,

Washington, DC.

The Subcommittee met, pursuant to call, at 1:05 p.m., in Room 2318 of the Rayburn House Office

Building, Hon. Roscoe G. Bartlett [Chairman of the Subcommittee] presiding.

81200t.eps

81200a.eps

Page 11 PREV PAGE TOP OF DOC

81200b.eps

81200c.eps

81200d.eps

81200e.eps

81200f.eps

81200g.eps

81200h.eps

Chairman **BARTLETT.** Let me call this Subcommittee hearing to order. In the 107th Congress, I have assumed the Chairmanship of the Energy Subcommittee. My colleague, Congresswoman Lynn Woolsey, has similarly assumed the Ranking Membership. This is the first hearing of this Subcommittee, if you forgive the phrase, under its new management.

As such, there is undoubtedly some curiosity about how the Subcommittee's new leadership will affect policies related to the Energy Subcommittee's considerable areas of jurisdiction. Let me assure—at least, inform, those interested parties that under our leadership, the Subcommittee's activities will be vigorous, principled, and civil, and, to the extent we can achieve it, bipartisan.

Page 12 PREV PAGE TOP OF DOC

We don't currently have a national energy policy. The United States has only 2 percent of known world petroleum reserves. We consume 25 percent of daily world petroleum production and we import close to 60 percent of the oil we use. That leaves our economy and national security vulnerable to petroleum supply and price shocks. Clearly, we need a national energy policy. I believe that considering these facts, it is self-evident that we will—it will be an exercise in futility if we expect that domestic petroleum production can solve our Nation's energy problems.

Congresswoman Woolsey and I are united in our commitment that the Energy Subcommittee will pursue and promote technological advances in energy efficiency, the development of alternative and renewable domestic sources of energy, in addition to conservation, as Congress works with the Administration to craft

a national energy policy.

As a Senior Member of the Science Committee, my scientific training and extensive private sector experience, pursuing research, development, and engineering projects, is familiar to many of the people in this room. More specifically, I would like to be up front in explaining my general views about nuclear power. I am very supportive of nuclear power. I believe that nuclear power should be a component of our national energy policy.

That said, I believe that Congress has a constitutional responsibility to examine every Federal program to ensure that it is necessary and it is achieving its goals in an effective and efficient manner. As a part of that ongoing process, it is important to carefully consider modifications to programs.

Page 13 PREV PAGE TOP OF DOC

Today, the Subcommittee will hear testimony about H.R. 723, Civil Penalties for Nuclear Safety Violations by Non-profit Department of Energy Contractors Under the Atomic Energy Act of 1954. The purpose of the hearing is to address the proposed legislation that would amend the Atomic Energy Act of 1954, to remove the exemption of non-profit Department of Energy contractors from civil penalties for violating DOE rules, regulations, and orders relating to nuclear safety.

In 1957, Congress enacted the Price-Anderson Act as an amendment to the Atomic Energy Act of 1954 to encourage the development of the nuclear industry and to ensure prompt and equitable compensation in the event of a nuclear incident. Specifically, the Price-Anderson Act established a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident, and also requires DOE to include an indemnification in each contract that involves the risk of a nuclear incident.

Congress renewed and amended the Price-Anderson Act in 1966, 1969, 1975, and, most recently, in 1988. The Price-Anderson Amendments Act of 1988 created Section 234A of the Atomic Energy Act of 1954, which contains provisions relating to civil penalties. Under this section, DOE has the authority to impose civil penalties for violations of nuclear safety requirements by contractors, subcontractors, and suppliers covered by the DOE indemnification for legal liability arising from a nuclear incident or precautionary evacuation caused by activities under a contract with DOE.

The purpose of these civil penalties is to provide an enforcement tool for the DOE to ensure that its contractors pay proper attention to nuclear safety. All for-profit DOE contractors are currently subject to the civil penalties as provided for in Section 234A. However, the section allows the Secretary of Energy to provide for the automatic remission of any such civil penalties for all non-profit educational institutions.

Page 14 PREV PAGE TOP OF DOC

As implemented by DOE, any educational institution that is considered non-profit in the United States Internal Revenue Code, receives automatic remission of any civil service penalty assessed. In addition, the section specifically exempts seven named non-profit and other DOE contractors from such penalties.

H.R. 723 would amend Section 234A of the Atomic Energy Act of 1954 in two ways. First, it would eliminate the Secretary of Energy's discretion to determine by rule whether non-profit educational institutions should receive automatic remission of any penalty for violation of DOE safety regulations. And, second, it would abolish the exemption for the seven specifically named non-profit and other DOE contractors operating DOE laboratories from payment of civil penalties.

It would, however, limit the maximum amount of such penalties to not more than the—and I quote—"the amount of any discretionary fee paid to such contractors, subcontractor, or supplier under the contract under which such violation occurs." And I hope during our hearing we will have an opportunity to determine what a discretionary fee is, because it is not clear to me what a discretionary fee is.

It would also provide that the H.R. 723 Amendment shall not apply to any such violation occurring under a contract entered into before the bill's date of enactment, a grandfather clause. H.R. 723 is of interest to this Subcommittee because it impacts the management and operating contractors of seven large civilian energy laboratories—Argonne National Laboratory, Fermi National Accelerator Laboratory, Lawrence Berkeley National Laboratory, Princeton Plasma Physics Laboratory, Pacific Northwest National Laboratory, Stanford Linear Accelerator Center, and the Thomas Jefferson National Accelerator Facility.

Page 15 PREV PAGE TOP OF DOC

Today we will hear testimony from Representative Joe Barton, Chairman of the House Energy and Commerce Subcommittee on Energy and Quality, and the author of H.R. 723, and a Panel of four witnesses. If—Congressman Barton is not able to be with us. He has submitted his testimony. It will be a part of the permanent record, as will all of the testimony—the written testimony submitted.

Mr.—the four witnesses are Mr. Eric Fygi, Acting General Counsel, U.S. Department of Energy; Ms. Gary Jones, Associate Director, Energy, Resources, and Science Issues, U.S. General Accounting Office; Mr. Guy Cunningham, Associate General Counsel, Battelle Memorial Institute; and Mr. Robert Van Ness, Assistant Vice President for Laboratory Administration, University of California.

I have read most of your testimony. I look forward to hearing testimony from all of our witnesses about issues regarding this legislation. I especially would like to thank those of you who have traveled to Washington, some of you from a considerable distance, for this hearing. Thank you for sharing your views and expertise about this important matter with the Congress.

Before we get started, I would like to remind the members of the Subcommittee and our witnesses that this hearing is being broadcast live on the Internet, so please keep in mind—that in mind during today's proceedings. I ask unanimous consent that all members who wish may have their opening statements entered into the record. Without objection, so ordered. I also ask for unanimous consent that the testimony for the record submitted by the Universities Research Association, Incorporated, and the University of Chicago, be entered into the record. Without objection, so ordered. With that, I would like to turn to my friend and colleague, the distinguished gentlelady from California, and our Ranking Member, Ms. Woolsey, for her opening remarks.

[The prepared statement of Mr. Bartlett follows:]

PREPARED STATEMENT OF CHAIRMAN ROSCOE G. BARTLETT

In the 107th Congress, I have assumed the chairmanship of the Energy Subcommittee. My colleague, Congresswoman Lynn Woolsey has similarly assumed the Ranking Membership. This is the first hearing of the Subcommittee, if you forgive the phrase, under its new management. As such, there is undoubtedly some curiosity about how the subcommittee's new leadership will affect policies related to the Energy Subcommittee's considerable areas of jurisdiction. Let me assure, or at least inform, those interested parties that under our leadership, the Subcommittee's activities will be vigorous, principled, and civil and to the extent that we can achieve it—bipartisan.

We don't currently have a national energy policy. The United States has only 2 percent of known world petroleum reserves. We consume 25 percent of daily world petroleum production and we import close to 60 percent of the oil we use. That leaves our economy and national security vulnerable to petroleum supply and price shocks. Clearly, we need a national energy policy. I believe that considering these facts, it is self-evident that it will be an exercise in futility if we expect that domestic petroleum production can solve our nation's energy problems.

Congresswoman Woolsey and I are united in our commitment that the Energy Subcommittee will pursue and promote technological advances in energy efficiency, the development of alternative and renewable domestic sources of energy in addition to conservation as Congress works with the Administration to craft a national energy policy.

As a senior member of the Science Committee, my scientific training and extensive private sector experience pursuing research, development, and engineering projects is familiar to many of the people in this room. More specifically, I would like to be upfront in explaining my general views about nuclear power. I am very supportive of nuclear power. I believe that nuclear power should be a component of our national energy policy.

That said, I believe that Congress has a constitutional responsibility to examine every federal program to ensure that it is necessary and is achieving its goals in an effective and efficient manner. As part of that ongoing process, it is important to carefully consider modifications to programs.

Today, the Subcommittee will hear testimony about "H.R. 723: Civil Penalties for Nuclear Safety Violations by Nonprofit Department of Energy Contractors Under the Atomic Energy Act of 1954." The purpose of the hearing is to address the proposed legislation that would amend the Atomic Energy Act of 1954 to remove the exemption of non-profit Department of Energy (DOE) contractors from civil penalties for violating DOE rules, regulations, and orders relating to nuclear safety.

In 1957, Congress enacted the Price-Anderson Act as an amendment to the Atomic Energy Act of 1954 to encourage the development of the nuclear industry and to ensure prompt and equitable compensation in the event of a nuclear incident. Specifically, the Price-Anderson Act established a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident and also requires DOE to include an indemnification in each contract that involves the risk of a nuclear incident. Congress renewed and amended the Price-Anderson Act in 1966, 1969, 1975, and most recently in 1988.

Page 18 PREV PAGE TOP OF DOC

The Price-Anderson Amendments Act of 1988 created Section 234A of the Atomic Energy Act of 1954, which contains provisions relating to civil penalties. Under this section, DOE has the authority to impose civil penalties for violations of nuclear safety requirements by contractors, subcontractors and suppliers covered by the DOE indemnification for legal liability arising from a nuclear incident or precautionary evacuation caused by activities under a contract with DOE. The purpose of these civil penalties is to provide an enforcement tool for the DOE to ensure that its contractors pay proper attention to nuclear safety.

All for-profit DOE contractors are currently subject to the civil penalties as provided for in Section 234A. However, the section allows the Secretary of Energy to provide for the automatic remission of any such civil penalties for all non-profit educational institutions. As implemented by DOE, any educational institution that is considered non-profit under the United States Internal Revenue Code receives automatic remission of any civil penalty assessed. In addition, the section specifically exempts seven named non-profit and other DOE contractors from such penalties.

H.R. 723 would amend Section 234A of the Atomic Energy Act of 1954 in two ways:

First, it would eliminate the Secretary of Energy's discretion to determine by rule whether non-profit educational institutions should receive automatic remission of any penalty for violation of DOE safety regulations.

Second, it would abolish the exemption for the seven specifically-named non-profit and other DOE contractors operating DOE laboratories from payment of civil penalties. It would, however, limit the maximum amount of such penalties to not more than "the amount of any discretionary fee paid to such contractor, subcontractor, or supplier under the contract under which such violation occurs." It also would provide that the H.R. 723 amendments shall not apply to any such violation occurring under a contract entered into before the bill's date of enactment.

Page 19 PREV PAGE TOP OF DOC

H.R. 723 is of interest to this Subcommittee because it impacts the management and operating contractors of seven large civilian energy laboratories—Argonne National Laboratory, Fermi National Accelerator Laboratory, Lawrence Berkeley National Laboratory, Princeton Plasma Physics Laboratory, Pacific Northwest National Laboratory, Stanford Linear Accelerator Center, and the Thomas Jefferson National Accelerator Facility.

Today we will hear testimony from Representative Joe Barton, Chairman of the House Energy and Commerce Subcommittee on Energy and Air Quality, and the author of H.R. 723, and a panel of four witnesses: (1) Mr. Eric J. Fygi, Acting General Counsel, U.S. Department of Energy (DOE); (2) Ms. Gary L. Jones, Associate Director, Energy, Resources, and Science Issues, U.S. General Accounting Office (GAO); (3) Mr. Guy Cunningham, Associate General Counsel, Battelle Memorial Institute; and (4) Mr. Robert L. Van Ness, Assistant Vice President for Laboratory Administration, University of California.

I look forward to hearing testimony from our witnesses about issues regarding this legislation. I especially would like to thank those of you who traveled to Washington for this hearing. Thank you for sharing your views and expertise about this important matter with the Congress.

Ms. **WOOLSEY.** Thank you, Mr. Chairman. It is my pleasure to be here for our Subcommittee's first hearing of this Congress and I look forward to working with you and the other members of the Subcommittee this year. For the record, because you went on record, I am not a nuclear energy proponent, not because of the energy itself, but because of nuclear waste and the question of where we dispose of nuclear waste, and because of nuclear safety and human error. And I just want you to know that.

Page 20 PREV PAGE TOP OF DOC

And I think what we are going to be talking about today, in your opening statement, Mr. Chairman, in the examination of an amendment that strikes exceptions for non-profit contractors currently managing Department of Energy labs and the safety violations that the Department of Energy—will be very important to me because these issues have been of concern to me for quite a while.

Unfortunately, this past year saw highly publicized incidents at Los Alamos National Laboratory, and that is why I am glad that we will have an opportunity today to revisit Price-Anderson, get up-to-date feedback on the pros and the cons from the pros of removing the exemptions that currently exist for non-profit contractors.

Arguments have been made in the past that non-profit contractors would be dissuaded from bidding for DOE lab contracts if they had to face undue financial risk. It is true we must take into account the financial considerations of university contractors and other non-profits, as well as the enormous scope of managing these large facilities. And overall, these DOE contractors have done a fine job and I don't wish and don't want to diminish any of their achievements.

But this must be weighed against the scenario that the Federal Government is paying for incidents and violations that are the responsibility of the contractor. In the end, I believe the public will want to know that our guiding principle is that all contractors are held accountable, within reason, for nuclear safety violations at the labs they manage.

Finally, Mr. Chairman, I hope that our witnesses can shed light on the various penalty fees associated with this situation. That is, incentive fees and performance-based fees that are part of the contractual agreements between DOE and the lab contractors. These elements are important factors. They must be understood as we consider this contractor exemption issue.

Page 21 PREV PAGE TOP OF DOC

And I thank you. I am looking forward to your witnesses today, Mr. Chairman.

[The prepared statement of Ms. Woolsey follows:]

PREPARED STATEMENT OF REPRESENTATIVE LYNN WOOLSEY

Thank you Mr. Chairman. It's a pleasure to be here for our Subcommittee's first hearing of this Congress. I look forward to working with you and the other members of the Subcommittee this year.

As you mentioned in your opening statement, we're here to examine an amendment that strikes exemptions for non-profit contractors currently managing Department of Energy labs. Safety violations at Department of Energy labs have been a concern for a while. Unfortunately, this past year saw highly-publicized incidents at Los Alamos National Laboratory. That's why I am glad that we will have an opportunity today to revisit Price-Anderson and get up-to-date feedback on the pros and cons of removing the exemptions that currently exist for non-profit contractors.

Arguments have been made in the past that non-profit contractors would be dissuaded from bidding for DOE lab contracts if they had to face undue financial risk. It's true we must take into account the financial considerations of university contractors and other non-profits, as well as the enormous scope of managing these large facilities. And overall these DOE contractors have done a fine job and I don't wish to diminish their achievements. But, this must be weighed against the scenario that the Federal Government is paying for incidents and violations that are the responsibility of the contractor. In the end, I believe the public will want to know that our guiding principle is that *all* contractors are held accountable, within reason, for nuclear safety violations at labs they manage.

Page 22 PREV PAGE TOP OF DOC

Finally, I hope that our witnesses can shed light on the various penalty fees associated with this situation —that is, incentive fees and performance-based fees that are part of the contractual agreements between DOE and the lab contractors. These elements are important factors to understand as we consider this contractor exemption issue.

Thank you, and I look forward to hearing from our panelists.

Chairman **BARTLETT.** Thank you very much. I think I knew where my colleague would be on nuclear energy. And I am glad she is there because she represents a significant percentage of our population. And what I had wanted of this Congress was a vigorous discussion of these issues. I think that when all the facts that are on the table, when you consider the pros and cons of nuclear energy—I think that reasoned people will come down on the side of more nuclear energy, but we certainly need to get those facts on the table. And if we were all of one mind here, we might not get all the facts on the table. So I am glad my colleague is on the other side. That will assure that we get all the facts on the table.

And I would also like to note something that you said—accountable within reason, and I have some concerns that this bill, as written, does not necessarily accomplish that. I have two concerns with the bill. Let me state them up front so that you may have them in your mind as you testify—the Panel testifies.

The first one is very early in the law it says that the company—the actions of the company and its employees—that the company will be held liable for the actions of its employees. Now, I think that what the company ought to be held liable for is adequate training of their employees. If, after they have adequately trained their employees, an employee does something stupid, I am not sure that we should punish the company for that if they can document an adequate training program. And I think that comes under your accountability within reason. I don't see the company as necessarily being negligent, if they have adequately trained their employees, just because one of their employees is negligent.

Page 23 PREV PAGE TOP OF DOC

The second concern I have is with the amount of the fine that can be imposed. I am not sure that I understand why we should treat non-profits differently than we treat profit-making organizations. And I know that at least one of you is caught in this kind of neither fish nor fowl thing in between. All that we can assess the non-profit for is the amount of their discretionary fee, whatever that is, and we need to define that because that is not defined. I understand there are two or three kinds of fees on these contracts and one is a discretionary one, and I think the law needs to be clear on that. I don't think we should necessarily wait for regulations from the agency to define what we meant. And I think the law needs to be clearer on that.

But, you know, I want to ask the fundamental question. Why should we fine a non-profit only to the extent of their fee, but have unlimited ability to fine the profit-making organization, even to the point of perhaps putting them out of business? I don't see that there is a justification for that discrimination, and I would like for you to think about that in your testimony.

I would further like to note that there is a general philosophy, I would hope, for a partnership, rather than an adversarial relationship between DOE and its contractors. I was a small business person. I had employees. There was nobody in the world who was more concerned about my employees than I was. If I failed to protect my employees, there were two—there are two avenues in our society to make sure that I was held accountable. If it was criminal negligence, the criminal law will determine that. If it was a civil negligence, there are 1,400 lawyers out there looking for any opportunity to sue an employer on behalf of his employees.

Page 24 PREV PAGE TOP OF DOC

And I am wondering how many different assurances do we need that employers are going to do reasonable things. And I understand that the agency has a responsibility to assure that their contractors behave responsibly, but I would hope that that would be a partnership relationship. And I don't know the culture in this agency. I do in some other agencies. But I do not know the culture in this agency, but I hope that it is a partnership culture and not I-got-you culture.

I want to thank our witnesses for coming, and if you will try to limit your testimony to 5 minutes. I know that is not long, but let me assure you that there will be more than ample time during the question and answer period to amplify—to expand anything that you want to expand on. Mr. Fygi, we welcome your testimony. Thank you. There is a little button.

STATEMENT OF ERIC J. FYGI, ACTING GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY

Mr. **FYGI.** Well, let us see. Are we on?

Chairman **BARTLETT.** You are on.

Mr. **FYGI.** Yes. Now, we are on. Forgive me. As you suggested, I appreciate the entry of my prepared statement in the record and I will briefly summary—summarize some of the points that is—that are made there. And I also will dispense with summarizing the provisions of H.R. 723 since the Chair already has done so quite satisfactorily.

Page 25 PREV PAGE TOP OF DOC

I think it was—it is well to remember how we found ourselves in the situation that was presented by the 1988 Price-Anderson Amendments Act, which remains current law and is the formulation that contains the seven specifically enumerated exemptions from any civil penalty liability, to which the Chair observed.

At that time, the financial arrangements that were prevalent between non-profit educational institutions and the Department, in general, did not contain what we have come to know of substantial fees. In fact, it seems, on occasion, that there was something of a cultural reluctance on the part of the non-profit higher educational community to suggest that any of its motivation for entering into these contracts was a financial one instead of a commitment to public service.

Now, about the same time that we were seeing the Price-Anderson Amendments Act adopted in 1988, the Congress had adopted other legislation that inevitably had the cumulative effect of enhancing the financial exposure of all sorts of different types of government contractors, including non-profit entities.

In particular—one particular statute that I have in mind, was something called the Major Fraud Act, which had several interesting ingredients that were novel in the context of cost-type contracts and, in particular, limited reimbursement of contractor costs for defense proceedings costs, even when the contractor was completely vindicated of any wrongdoing by the Federal or state regulatory authorities, to 80 percent of those costs.

So it was not too long after the Price-Anderson Amendments Act was adopted, and when we were engaged in another series of negotiations with the University of California, that led to the 1992 extension of its contract, that both that contractor and the Department had to come to grips with the cumulative effect of these financial realities.

Page 26 PREV PAGE TOP OF DOC

That, in turn, led to revised formulations whereby even many of the non-profits earned substantially more fees, for want of a better word, than hitherto had been the case. And they now have a period under which they have operated in this regime, such that the non-profit educational community of our contractors, or prominent members of it, have come to the view that they no longer require the complete exemption from Price-Anderson Act civil penalty exposure that the 1988 law afforded.

And it is that formulation, including the limitation of that formulation to a contractor's fee, that H.R. 723 would observe, irrespective of the fine points, such as, is there such a thing as a discretionary fee. And, as to this last point, I think I should note, in response to the Chair's observations, we, too, are not aware that there is anything called a discretionary fee. That is not a subtle term of art in government procurement law and, therefore, as a technical matter, we believe the legislation would be more aptly drafted by avoidance of any such adjectives, particularly adjectives that have no fixed meaning in procurement law or practice.

Mr. Chairman, that concludes the summary of my remarks, and I will be pleased to respond to any questions you or the Committee may have.

[The prepared statement of Mr. Fygi follows:]

PREPARED STATEMENT OF ERIC J. FYGI

Thank you, Mr. Chairman and members of the Committee, for the opportunity to discuss H.R. 723, concerning civil penalties under the Price-Anderson Act for safety violations by non-profit DOE contractors.

Page 27 PREV PAGE TOP OF DOC

In its *Report to Congress on the Price-Anderson Act* (DOE Price-Anderson Report) (1999), the Department indicated that it supported continuation of the legislated decision in the 1988 Price-Anderson Amendments Act not to apply civil penalties to non-profit contractors for violation of nuclear safety regulations. This decision reflected the understanding of the Department that major universities and other non-profits would be unwilling to put their educational endowments at risk for contract-related expenses such as civil penalties, and that the increase in fees they would insist upon to protect against the risk of such a result would outweigh the benefit of being able to assess penalties.

Subsequent to the submission of the DOE Price-Anderson Report to Congress, several DOE non-profit contractors indicated they could accept civil penalties if the amount of the civil penalties was limited to the amount of the fee the contractors received under their contracts with the Department.

In the information security area, Congress decided, after issuance of the DOE Price-Anderson Report, to impose potential liability for civil penalties on non-profit organizations in a manner similar to that proposed by H.R. 723. For violations of regulations relating to the safeguarding and security of Restricted Data, the National Defense Authorization Act for Fiscal Year 2000 made non-profit contractors, subcontractors, and suppliers subject to civil penalties not to exceed the total amount of fees paid by the DOE to each such entity in a fiscal year. The Department believes that a similar limitation of the exemption, up to the amount of the contractor's or subcontractor's fee paid, also would be a feasible approach for violations of DOE's nuclear safety regulations. The two limitations, however, should be structured to yield the same standards for

decision.

Page 28 PREV PAGE TOP OF DOC

While the Department can generally support H.R. 723, following are some of the concerns raised by its provisions:

Definition of Fee. The emphasis of this bill on capping civil penalties at the amount of a contractor's fee paid lends some importance to clarifying that amount. To avoid exceeding the cap on civil penalties, the enforcement program responsible for issuing civil penalties will need to know the amount of the fee paid under a contract to determine the maximum civil penalties it could impose for a particular violation occurring under a contract.

This bill would exempt non-profits from civil penalties in an amount not to exceed the "discretionary fee" paid. The term "discretionary," however, is not a term of art used in procurement law and regulations. Due to the variety of fee mechanisms found in the Department's contracts, DOE would prefer that the general term "fee" be used and that it not be modified by a term such as "discretionary," "performance," "earned," or "incentive" that denotes a particular type of fee. To the extent that the general term "fee" needs clarification, DOE would promulgate procurement regulations or issue directives to provide necessary direction.

Use of the unmodified term "fee" would also be consistent with Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 for regulations relating to the safeguarding and security of Restricted Data. That Act limited civil penalties to non-profits to the amount of fees paid in a fiscal year.

With respect to those non-profit entities that have been subjected to enforcement actions in the past five years, none of the civil penalties calculated that could have been imposed would even have begun to approach the amount of fees paid under the contract.

Page 29 PREV PAGE TOP OF DOC

Time Period of Fee. H.R. 723 states that the civil penalty may not exceed any discretionary fee paid under the contract under which such violation occurs. The period of time to be used for determining the amount of fee paid under a contract is not specified. Current law establishing civil penalties in the information security area, however, limits the total amount of penalties paid by a non-profit in a fiscal year to the total amount of fees paid in that fiscal year.

In most large contracts, DOE negotiates fee as a total amount for a multi-year contract or contract extension to be earned and paid out in variable annual installments over the term of the contract depending on various factors.

Thus, the cap provided by the bill on civil penalties could vary greatly depending on whether the cap is interpreted to be the total amount of fee paid out over the entire term of the contract or whether the cap is interpreted to be no more than the annual installment of fees paid out each fiscal year.

Rather than clarifying the period of fees to be used as a cap in the language of the bill, the Department would prefer to promulgate regulations or issue directives to provide any necessary interpretations of how fees should be characterized with respect to particular types of contracts. DOE usually enters into five-year management and operating contracts with its non-profit contractors. Because of the variety of contracts as well as the complexities of performance or incentive percentages to be paid out or deducted from fees each year, this portion of the bill should remain as written and leave implementing discretion to the agency.

Effective Date. H.R. 723 provides that its amendments shall not apply to any violation occurring under a contract entered into before the date of the enactment of the Act. This would have the effect of postponing the imposition of civil penalties on non-profits until a new contract or a contract extension is executed. Nonprofit entities will thus remain exempt from civil penalties under the current statutory and regulatory exemptions until a violation occurs under a new contract or extension. The effective date provision in this bill would give parties an opportunity to consider the provisions of this bill in future contract negotiations before the possibility of civil penalties could arise for that particular non-profit contractor, subcontractor, or supplier.

Page 30 PREV PAGE TOP OF DOC

The original 1988 civil penalty authority for DOE was made applicable to violations occurring after the date of enactment of the 1988 act. H.R. 723 would be applicable to violations occurring *under a contract entered into* after the date of enactment of the Act. The Department supports the approach adopted in H.R. 723.

Automatic Remission. The bill would repeal DOE's statutory authority to grant automatic remission of civil penalties. That repeal is a necessary conforming change in connection with eliminating the exemption for non-profit institutions. It is consistent with the DOE Price-Anderson Report that any exemptions for non-profits from civil penalties should be generic. It would eliminate the distinction between "educational" non-profits and other non-profit entities and treat all non-profit contractors, non-profit subcontractors and non-profit suppliers the same with respect to the applicability of civil penalties.

H.R. 723 would make non-profit DOE contractors, subcontractors, and suppliers subject to civil penalties up to the amount of discretionary fee paid to such contractor. The Department supports subjecting non-profit contractors to civil penalties up to the amount of the fee paid under a contract, but believes that the use of the term "discretionary fee" would not be advisable.

This concludes my prepared statement. I will be pleased to respond to any questions the Subcommittee may have.

BIOGRAPHY FOR ERIC J. FYGI

Page 31 PREV PAGE TOP OF DOC

Eric J. Fygi is the Deputy General Counsel of the U.S. Department of Energy (DOE). He has served in that position since October 1977, and periodically has served as Acting General Counsel, most recently from

January 20, 2001 to the present.

In February 1974, Mr. Fygi joined the Federal Energy Office (FEO) as its Assistant General Counsel for General Law and Legislation, and became Assistant General Counsel for General Law, Legislation and Energy Resource Programs of the Federal Energy Administration (FEA) when that agency was established by statute. In March 1975, he was appointed Deputy General Counsel of FEA. He served successively as Acting General Counsel of the FEA and the Department of Energy from February 1977 to May 1978.

Mr. Fygi came to FEO from the Department of Health, Education and Welfare, where he was General Counsel of the Office of Consumer Affairs. Previously, he served as Deputy General Counsel of the Office of Consumer Affairs, Executive Office of the President, and attorney-adviser and Special Assistant to the Assistant Attorney General in charge of the Office of Legal Counsel of the Department of Justice, and a judge advocate officer in the Office of the Judge Advocate General of the Army.

A native of La Jolla, California, Mr. Fygi received his B.A. degree in history from the Virginia Military Institute, and his J.D. degree from the University of California's Hastings College of Law. He served on the *Hastings Law Journal*, was editor-in-chief of the Hastings *Voir Dire* and president of the student body association.

Mr. Fygi is married to the former Mary Hyllis Denninger of Burlingame, California, and they reside in Arlington, Virginia.

Page 32 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Ms. Jones.

STATEMENT OF MS. GARY L. JONES, ASSOCIATE DIRECTOR, ENERGY, RESOURCES, AND SCIENCE ISSUES, U.S. GENERAL ACCOUNTING OFFICE

Ms. **JONES.** Thank you, Mr. Chairman. I am pleased to be here today to provide our views on H.R. 723. My testimony will briefly explain why we continue to support the position we took in 1999, that the exemption from paying civil penalties that exist for certain non-profit contractors at DOE, should be eliminated. We will also offer a number of specific observations about the bill.

We believe that eliminating the exemption would provide more consistent accountability among contractors who violate nuclear safety rules. Further, the primary reason for instituting the exemption that non-profit contractors would be placing their assets at risk, is no longer the situation. As Mr. Fygi noted, at the time the exemption was enacted, DOE non-profit contractors were only being reimbursed for their costs. Now, virtually all of the non-profit contractors have an opportunity to earn a fee in addition to payments for allowable costs. This fee could be used to pay civil penalties. Ensuring that contractors that violate safety rules pay appropriate penalties complements other DOE tools—other tools DOE has to address contractor performance, such as contracting mechanisms.

Let me now turn to three observations that we have on the bill. First, as you noted, Mr. Bartlett, the definition of the amount of fee at risk needs to be clarified. The bill would limit the amount of any payment

for penalties assessed against tax-exempt contractors to the discretionary portion of a contractor's fee. The term discretionary fee is unclear and subject to interpretation. In general, a contractor's total fee consists of a base fee which is set in the contract and an incentive fee, which is based on performance. Since the incentive fee is determined at the contracting officer's discretion, the term discretionary fee may be interpreted to refer only to the incentive, not the base fee.

Page 33 PREV PAGE TOP OF DOC

However, some DOE contracts contain a provision where the entire fee, including the base fee, may be reduced at the discretion of the contracting officer. Therefore, it is not clear whether the term discretionary fee applies to all, or only part of, a contractor's fee.

Our second observation is that there may be unintended effects if the penalty paid by non-profit contractors is limited to the incentive part of the fee. For example, two of the non-profit contractors receive only a base fee and no incentive fee. Therefore, they would continue to be exempt from paying civil penalties. Contractors may also try to limit their exposure to penalties by shifting more of their total fee to a base fee and away from an incentive fee. Such an action has the effect of undermining the purpose of the penalty and also DOE's emphasis on performance-base contracting.

In fact, recent negotiations between DOE and the University of California, to extend the laboratory's contracts, illustrate this problem. According to the DOE contracting officer, of the total fee available to the University of California, more of the fee was shifted from incentive to base fee because of the increased liability expected from the civil penalties associated with security violations.

If the Congress is concerned that the assets of the non-profit contractor not be placed at risk, other statutory provisions already give the Secretary flexibility in setting penalty amounts. This flexibility allows the Secretary to set the penalty amount considering factors such as the contractor's ability to pay and the impact of the payment on the contractor's business decisions.

Page 34 PREV PAGE TOP OF DOC

Our third and last observation concerns when the bill's provisions would apply. H.R. 723 specifies that the penalty provisions apply to contracts entered into after the date of enactment. Consequently, it would be many years before some contractors would have to pay a penalty. For example, the University of California potentially would not be subject to paying penalties until at least 2005 because it recently received a 4-year contract extension to operate the DOE laboratories.

It is also unclear whether a contract modification or extension will provide an opportunity for the penalty provisions of H.R. 723 to be applied. In contrast, when Congress established the initial program of civil monetary penalties in 1988, the penalties applied to existing contracts. Mr. Chairman, we suggest that the language in H.R. 723 should be clarified to address these issues. Thank you.

[The prepared statement of Ms. Jones follows:]

PREPARED STATEMENT OF MS. GARY L. JONES

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to provide our views on H.R. 723, a bill that would modify the Atomic Energy Act of 1954 by changing how the Department of Energy (DOE) treats non-profit contractors who violate DOE's nuclear safety requirements. Various non-profit contractors, such as the Universities of California and Chicago, which operate DOE research laboratories in several states, are currently exempted from paying the civil penalties that DOE assesses under the act. H.R. 723 would remove that exemption. In a 1999 report on DOE's nuclear safety enforcement program, we recommended that the exemption be eliminated.(see footnote 1) My testimony today will briefly explain why we continue to support this position and will also offer specific observations on H.R. 723.

Page 35 PREV PAGE TOP OF DOC

In summary, we support eliminating the exemption because the primary reason for instituting it no longer exists. The exemption was enacted in 1988 at the same time the civil monetary penalty was established. The purpose of the exemption was to ensure that the non-profit contractors operating DOE's laboratories at the time, who were being reimbursed only for their costs, would not have their assets at risk for violating nuclear safety requirements. At the present time, however, virtually all of DOE's non-profit contractors have an opportunity to earn a fee in addition to payments for allowable costs. This fee could be used to pay the civil monetary penalties. Our review of DOE's nuclear safety enforcement program shows that it appears to be a useful and important tool for ensuring safe nuclear practices at all contractor locations. Eliminating the exemption would further strengthen this tool and provide more consistent accountability among contractors for violating nuclear safety rules.

We have four observations about the specific language in the bill. First, the definition of the amount of fee at risk is unclear. H.R. 723, while eliminating the exemption, provides a limitation on the amount of civil penalties that can be imposed on non-profit contractors. The bill would limit the amount of any payment for penalties assessed against tax-exempt contractors to a contractor's "discretionary fee." In general, a contractor's total fee consists of a base fee, which is set in the contract, and an incentive fee, which is based on performance. It is not clear whether the term " discretionary fee" applies to all, or only a part of, a contractor's fee.

Second, if the Congress decides to limit the amount of fee at risk by specifying that "discretionary fee" means only the incentive fee portion of the total fee, the ability to impose penalties on non-profit contractors may be limited. Two of the non-profit contractors receive only a base fee (and no incentive fee) and, therefore, would continue to be exempt from paying civil penalties. Contractors may also try to limit their exposure to penalties by shifting more of their total fee to a base fee and away from an incentive fee. Such an action could undermine both the penalty provision and DOE's emphasis on performance-based contracting because a lower fee will depend on the contractor's performance. If the Congress decides to put the entire fee at risk, other statutory provisions already in place give the Secretary flexibility in setting penalty amounts by considering factors such as the contractor's ability to pay and, therefore, can be used to limit non-profit contractors' financial risk.

Page 36 PREV PAGE TOP OF DOC

Third, under the proposed bill, limitations on payments for civil penalties would be extended to all tax-exempt non-profit contractors, not just non-profit educational institutions. A contractor such as Brookhaven Science Associates, a non-profit organization but not an educational institution, is now subject to the penalty provisions without limit for its work at Brookhaven National Laboratory. Under H.R. 723, Brookhaven Science Associates would be able to limit its payments to the amount of any discretionary fee received. This would provide for a more consistent treatment of non-profit contractors.

Fourth, the penalty provisions specified in H.R. 723 would apply to contracts entered into after the date of enactment. Consequently, it could be many years before some of the contractors would have to pay a penalty. For example, the University of California potentially would not be subject to paying any penalties until at least 2005 because it recently received a 4-year contract extension to operate its DOE laboratories. In contrast to the proposed bill, when the Congress established the initial program of civil monetary penalties in 1988, the penalties applied to existing contracts.

Mr. Chairman, we suggest that the language in H.R. 723 be clarified to address these issues.

Background

DOE maintains nuclear facilities at 34 sites in 13 states. To carry out its missions at these sites, DOE relies on outside contractors. Because of the risks and the potential liabilities inherent in handling nuclear materials, the Price-Anderson Amendments Act of 1988 required DOE to indemnify, or agree to pay damages for, those contractors who could have an accident associated with handling nuclear materials and whose actions could cause damage to persons and property. DOE thus has a clear financial interest in ensuring that its contractors operate in a safe manner. DOE's primary approach to ensuring safe nuclear operations has been to require its contractors to follow DOE directives, including policies, orders, and standards, by incorporating these requirements into the contracts.

Page 37 PREV PAGE TOP OF DOC

The Price-Anderson Amendments Act of 1988 gave DOE another tool for ensuring safe nuclear operations. This legislation allowed DOE to hold its contractors accountable for meeting its nuclear safety requirements through a system of civil monetary penalties. In doing so, the legislation specifically exempted seven contractors at research laboratories, along with their subcontractors and suppliers, from having to pay any penalties assessed. In addition to the specific exemptions, the legislation also gave the Secretary of Energy the authority to exempt from paying penalties other non-profit educational institutions under contract to DOE. In a 1993 rule describing the procedures it would follow in carrying out the enforcement program, DOE specified that all non-profit educational institutions would receive an automatic exemption from paying the penalties. DOE established its nuclear safety enforcement program and began enforcing nuclear safety rules in 1996. As of February 2001, DOE had taken 57 enforcement actions and assessed penalties of over $5.5 million.

Continued Exemption of Nonprofit Contractors From Paying Civil Penalties Is Not Warranted

The rationale for exempting certain non-profit contractors from paying the civil penalties no longer exists. During the initial congressional debates that led to the exemption being established in 1988, several reasons were cited for this exemption. The primary reason appears to have been that the contractors operating DOE's laboratories at the time received no fees in addition to their reimbursable costs and, therefore, had no contract-generated funds available to pay any penalties assessed. There was concern that the contractors operating the national laboratories, mostly non-profit educational institutions, would be unwilling to assume the financial risk of being subject to penalties and thus put the assets of their organizations at risk, and that these contractors might leave the research field rather than accept this financial exposure. In contrast to the situation in 1988, DOE now pays a fee in addition to reimbursing allowable costs to virtually all of its major contractors, including the non-profit educational institutions.(see footnote 2) This fee is used by the non-profit contractors to cover certain nonreimbursable contract costs and to conduct other laboratory research. The fee could also be used to pay civil penalties if they were imposed on the contractor.

Page 38 PREV PAGE TOP OF DOC

Some of these non-profit contractors have committed significant violations of nuclear safety requirements. Since 1996, a total of 13 of the 57 enforcement actions brought by DOE were against contractors managing DOE's laboratories that were exempt from paying the penalties. Their penalties, which DOE assessed but cannot collect, amounted to $1.8 million of the $5.5 million assessed thus far under the program. Table 1 summarizes the number of safety violations and the amount of penalties assessed against DOE laboratory contractors.

81200u.eps

As the following examples illustrate, these violations are cause for considerable concern:

Los Alamos National Laboratory, New Mexico. In January 2001, DOE found that the University of California had inadequate work controls at one of its laboratory facilities, resulting in eight workers being exposed to airborne plutonium and five of those workers receiving detectable intakes of plutonium. This was identified as one of the 10 worst radiological intake events in the United States in over 40 years. DOE assessed, but cannot collect, a penalty of $605,000 for these violations.

Argonne National Laboratory West, Idaho. In February 2001, DOE found that the University of Chicago had violated the radiation protection and quality assurance rules, leading to worker contamination and violations of controls intended to prevent an uncontrolled nuclear reaction from occurring. DOE assessed, but cannot collect, a penalty of $110,000 for these violations.

Page 39 PREV PAGE TOP OF DOC

DOE has cited two other reasons for continuing the exemption, but as we indicated in our 1999 report, we did not think either reason was valid:

DOE said that contract provisions are a better mechanism than civil penalties for holding non-profit contractors accountable for safe nuclear practices. We certainly agree that contract mechanisms are an important tool for holding contractors accountable, whether they earn a profit or not. However, since 1990 we have described DOE's contracting practices as being at high risk for fraud, waste, abuse, and mismanagement.(see footnote 3) Similarly, in November 2000, the Department's Inspector General identified contract administration as one of the most significant management challenges facing the Department.(see footnote 4) We have noted that, recently, DOE has been more aggressive in reducing contractor fees for poor performance in a number of areas. However, having a separate nuclear safety enforcement program provides DOE with an additional tool to use when needed to ensure that safe nuclear practices are followed. Eliminating the exemption enjoyed by the non-profit contractors would strengthen this tool.

DOE said that its current approach of exempting non-profit educational institutions is consistent with Nuclear Regulatory Commission's (NRC) treatment of non-profit organizations because DOE issues notices of violation to non-profit contractors without collecting penalties but can apply financial incentives or disincentives through the contract. However, NRC can and does impose monetary penalties for violations of safety requirements, without regard to the profit-making status of the organization. NRC sets lower penalty amounts for non-profit organizations than for-profit organizations. The Secretary could do the same, but does not currently take this approach.(see footnote 5) Furthermore, both NRC and other regulatory agencies have assessed and collected penalties or additional administrative costs from some of the same organizations that DOE exempts from payment. For example, the University of California has made payments to states for violating environmental laws in California and New Mexico because of activities at Lawrence Livermore and Los Alamos National Laboratories.

Page 40 PREV PAGE TOP OF DOC

The enforcement program appears to be a useful and important tool for ensuring safe nuclear practices. Our 1999 review of the enforcement program found that, although it needed to be strengthened, the enforcement program complemented other contract mechanisms DOE had to help ensure safe nuclear practices. Advantages of the program include its relatively objective and independent review process, a follow-up mechanism to ensure that contractors take corrective action, and the practice of making information readily available to the contractor community and the public.

Modifications to H.R. 723 Could Help Clarify and Strengthen the Penalty Provisions

H.R. 723 eliminates both the exemption from paying the penalties provided by statute and the exemption allowed at the Secretary's discretion. While addressing the main problems we discussed in our 1999 report, we have several observations about clarifications needed to the proposed bill.

The "discretionary fee" referred to in the bill is unclear. H.R. 723, while eliminating the exemption, limits the amount of civil penalties that can be imposed on non-profit contractors. This limit is the amount of "discretionary fees" paid to the contractor under the contract under which the violation occurs. The meaning of the term "discretionary fee" is unclear and might be interpreted to mean all or only a portion of the fee paid.(see footnote 6) In general, the total fee—that is, the amount that exceeds the contractor's reimbursable

costs—under DOE's management and operating contracts consists of a base fee amount and an incentive fee amount. The base fee is set in the contract. The amount of the available incentive fee paid to the contractor is determined by the contracting officer on the basis of the contractor's performance.

Page 41 PREV PAGE TOP OF DOC

Since the base fee is a set amount, and the incentive fee is determined at the contracting officer's discretion, the term "discretionary fee" may be interpreted to refer only to the incentive fee and to exclude the base fee amount. However, an alternate interpretation also is possible. Certain DOE contracts contain a provision known as the "Conditional Payment of Fee, Profit, Or Incentives" clause. Under this contract provision, on the basis of the contractor's performance, a contractor's entire fee, including the base fee, may be reduced at the discretion of the contracting officer. Thus, in contracts that contain this clause, the term "discretionary fee" might be read to include a base fee.

If the Congress intends to have the entire fee earned be subject to penalties, we suggest that the bill language be revised to replace the term "discretionary fee" with "total amount of fees." If, on the other hand, the Congress wants to limit the amount of fee that would be subject to penalties to the performance or incentive amount, and exclude the base fee amount, we suggest that the bill be revised to replace the term "discretionary fee" with "performance or incentive fee."

Limiting the amount of any payment for penalties made by tax-exempt contractors to the amount of the incentive fee could have unintended effects. Several potential consequences could arise by focusing only on the contractor's incentive fee. Specifically:

Contractors would be affected in an inconsistent way. Two of the non-profit contractors—University Research Associates at the Fermi National Accelerator Laboratory and Princeton University—do not receive an incentive fee (they do receive a base fee). Therefore, depending on the interpretation of the term "discretionary fee" as discussed above, limiting payment to the amount of the incentive fee could exempt these two contractors from paying any penalty for violating nuclear safety requirements.

Page 42 PREV PAGE TOP OF DOC

Enforcement of nuclear safety violations would differ from enforcement of security violations. The National Defense Authorization Act for Fiscal Year 2000 established a system of civil monetary penalties for violations of DOE regulations regarding the safeguarding and security of restricted data. The legislation contained no exemption for non-profit contractors but limited the amount of any payment for penalties made by certain non-profit contractors to the total fees paid to the contractor in that fiscal year.(see footnote 7) In contrast, these same contractors could have only a portion of their fee (the "discretionary fee") at risk for violations of nuclear safety requirements. It is not clear why limitations on the enforcement of nuclear safety requirements should be different than existing limitations on the enforcement of security requirements.

Disincentives could be created if the Congress decides to limit the penalty payment to the amount of the incentive fee. We are concerned that contractors might try to shift more of their fee to a base or fixed fee and

away from an incentive fee, in order to minimize their exposure to any financial liability. Such an action would have the effect of undermining the purpose of the penalty and DOE's overall emphasis on performance-based contracting. In fact, recent negotiations between DOE and the University of California to extend the laboratory contracts illustrate this issue. According to the DOE contracting officer, of the total fee available to the University of California, more of the fee was shifted from incentive fee to base fee during recent negotiations because of the increased liability expected from the civil penalties associated with security violations.(see footnote 8)

If a non-profit contractor's entire fee was subject to the civil penalty, the Secretary has discretion that should ensure that no non-profit contractor's assets are at risk because of having to pay the civil penalty. This is because the Secretary has considerable latitude to adjust the amount of any civil penalty to meet the circumstances of any specific situation. The Secretary can consider factors such as the contractor's ability to pay and the effect of the penalty on the contractor's ability to do business.

Page 43 PREV PAGE TOP OF DOC

Preferential treatment would be expanded to all tax-exempt contractors. Under the existing law, in addition to the seven contractors exempted by name in the statute, the Secretary was given the authority to exempt non-profit educational institutions. H.R. 723 takes a somewhat different approach by exempting all tax-exempt non-profit contractors whether or not they are educational institutions. This provision would actually reduce the liability faced by some contractors. For example, Brookhaven Science Associates, the contractor at Brookhaven National Laboratory, is currently subject to paying civil penalties for nuclear safety violations regardless of any fee paid because, although it is a non-profit organization, it is not an educational institution. Under the provisions of H.R. 723, however, Brookhaven Science Associates would be able to limit its payments for civil penalties. This change would result in a more consistent application of civil penalties among non-profit contractors.

Some contractors might not be subject to the penalty provisions until many years in the future. As currently written, H.R. 723 would not apply to any violation occurring under a contract entered into before the date of the enactment of the act. Thus, contractors would have to enter into a new contract with DOE before this provision takes effect. For some contractors that could be a considerable period of time. The University of California, for example, recently negotiated a 4-year extension of its contract with DOE. It is possible, therefore, that if H.R. 723 is enacted in 2001, the University of California might not have to pay a civil penalty for any violation of nuclear safety occurring through 2005. In contrast, when the Congress set up the civil penalties in 1988, it did not require that new contracts be entered into before contractors were subject to the penalty provisions. Instead, the penalty provisions applied to the existing contracts. In reviewing the fairness of this issue as DOE prepared its implementing regulations, in 1991 DOE stated in the *Federal Register* that a contractor's obligation to comply with nuclear safety requirements and its liability for penalties for violations of the requirements are independent of any contractual arrangements and cannot be modified or eliminated by the operation of a contract.(see footnote 9) Thus, DOE considered it appropriate to apply the penalties to the contracts existing at the time.

Page 44 PREV PAGE TOP OF DOC

If the Congress chooses to keep the effective date provision in H.R. 723, we believe it should consider clarifying the language as to whether a modification or extension of an existing contract meets the test of a contract entered into after the date of the enactment of the act. This is important because a number of the contracts to operate DOE's laboratories have been extended rather than recompeted.

Thank you, Mr. Chairman and Members of the Subcommittee. This concludes my testimony. I will be happy to respond to any questions that you may have.

GAO Contact and Staff Acknowledgment

For future contacts regarding this testimony, please contact (Ms.) Gary L. Jones at (202) 512–3841. Carole Blackwell, Doreen Feldman, and Bill Swick also made key contributions to this testimony.

BIOGRAPHY FOR GARY L. JONES

Gary L. Jones is Director for Natural Resources and Environment at the U.S. General Accounting Office. She is responsible for GAO's work on Department of Energy (DOE) programs including environmental cleanup and safety oversight of DOE facilities; nuclear weapons safety and reliability; high and low level waste disposal; and international nuclear safety and nonproliferation. She has been with GAO for 27 years, and prior to her work on DOE issues, she managed GAO's surface transportation work, including highway finance and management of highway and transit construction projects. Ms. Jones has won numerous awards, including GAO's Meritorious Service Award. She has an M.S. in Business Administration from Hood College, Frederick, MD, and has attended management and leadership training provided by the Johnson School at Cornell University and the John F. Kennedy School of Government at Harvard University.

Page 45 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Thank you. Before turning to Mr. Cunningham, let me ask if it is your understanding as to whether or not the fees at risk are for the year of the infraction or for the length of the contract.

Ms. **JONES.** I don't——

Chairman **BARTLETT.** That was not clear to me.

Ms. **JONES.** I don't believe that is clear in the bill, Mr. Bartlett.

Chairman **BARTLETT.** Thank you very much. I think it needs to be clear in the bill.

Ms. **JONES.** I would agree.

Chairman **BARTLETT.** Thank you. Thank you. Mr. Cunningham.

STATEMENT OF GUY H. CUNNINGHAM, ASSOCIATE GENERAL COUNSEL, BATTELLE MEMORIAL INSTITUTE

Mr. **CUNNINGHAM.** Thank you, Mr. Chairman, for the opportunity to appear here today on behalf of Battelle Memorial Institute. I was very interested in your characterization, as you opened the hearing, of one of us contractors being neither fish nor fowl. And that is us, and I am here today to explain our concern. And so I will limit the focus of my testimony to the definition of the term non-profit in H.R. 723.

Page 46 PREV PAGE TOP OF DOC

The definition in the bill is based upon the Internal Revenue Code criteria for tax exemption. That excludes three operators of DOE's national laboratories, specifically, Battelle at Pacific Northwest National Laboratory, Brookhaven Science Associates, at the Brookhaven Laboratory, and UT-Battelle at Oak Ridge.

Battelle has a long history of service to the nation at the national laboratories. We have operated the Pacific Northwest National Laboratory since 1965. In partnership with the State University of New York at Stony Brook, we formed Brookhaven Science Associates, which now operates Brookhaven National Laboratory. Additionally, we, and the University of Tennessee, formed UT-Battelle, which has operated Oak Ridge National Laboratory since April of last year. I would point out that Battelle at Pacific Northwest National Laboratory is one of the seven enumerated contractors that is currently exempt from civil penalties.

You have already summarized the provisions of the bill, so I won't do what I had intended to do and repeat that, but rather just say that we are very concerned about this definition of non-profit being based on the Internal Revenue Code provisions.

Let me explain briefly the non-profit nature of Battelle. We are a non-profit charitable trust that was created pursuant to the will of Gordon Battelle and incorporated under the Nonprofit Corporation Law of the State of Ohio. Battelle has no shareholders, it pays no dividends, and it is committed to distribute at least 20 percent of its annual net income to qualified charities. But because Battelle has no—is not tax exempt, it would not qualify for the cap on civil penalties that is provided for in H.R. 723.

Page 47 PREV PAGE TOP OF DOC

The situations at Brookhaven and Oak Ridge are somewhat more complex. Each is operated by a limited liability company, which is composed of Battelle and a University partner, each of which has a 50 percent interest. These limited liability companies are neither taxable nor tax exempt. They are transparent in terms of the tax law. But, again, because they don't have the tax status under the Internal Revenue Code of 1954—sorry, 1988, '86, they would not be subject to the cap on limited liabilities.

At the same time, it is important to note that both Brookhaven Science Associates, the contractor at Brookhaven, and UT-Battelle, have been determined by the Department of Energy to be non-profit organizations. In fact, one had to be a non-profit organization to even qualify to compete for the Brookhaven contract. Moreover, both of these entities have been determined to meet the non-profit criteria of Bayh-Dole. Bayh-Dole is the legislation which is designed to promote the utilization of inventions arising from federally sponsored research and development which permits contractors to elect to retain title to certain inventions developed under their contracts.

The definition of non-profit organization in Bayh-Dole is significantly broader than that in H.R. 723. It includes the Internal Revenue Code criterion, but also provides for being determined to be non-profit if—and I quote—"You are any non-profit scientific or educational organization qualified under a state non-profit organization statute." All three of the entities at the laboratories I have been discussing have been qualified under Bayh-Dole's definition.

What Battelle urges the Committee today to do is to look at the definition of non-profit in H.R. 723 and perhaps include the definition which is in the Bayh-Dole legislation. Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that you or the Committee have.

Page 48 PREV PAGE TOP OF DOC

[The prepared statement of Mr. Cunningham follows:]

PREPARED STATEMENT OF GUY H. CUNNINGHAM

Good Afternoon Mr. Chairman and Members of the Committee. My name is Guy Cunningham and I am the Associate General Counsel of Battelle Memorial Institute. Thank you for the opportunity to testify on the proposal to amend the Price Anderson Amendments Act (PAAA) by removing the statutory exemption from civil penalties presently applicable to certain non-profit contractors of the Department of Energy.

Battelle's overall mission is to serve mankind through science and technology. We provide technology solutions and develop new technologies for clients in areas ranging from national security to transportation to the environment to U.S. technology competitiveness. Our 7,500 scientists, engineers, and support specialists have worked on leading-edge technologies for lung cancer treatment, better batteries for U.S. Air Force planes, water quality improvement, and advanced telecommunications.

Battelle has a long history of service to the nation at the national laboratories of the Department of Energy and its predecessors. In 1965 Battelle became the Management and Operating Contractor at the Pacific Northwest National Laboratory. We maintain that contract today. In partnership with the Research Foundation of the State University of New York (SUNY), acting on behalf of SUNY at Stony Brook, we formed Brookhaven Science Associates, LLC, which assumed responsibility for the operation of Brookhaven National Laboratory on April 1, 1998. Additionally, we and the University of Tennessee formed UT-Battelle, LLC, which successfully competed for the contract to manage and operate the Oak Ridge National Laboratory, assuming responsibility on April 1, 2000. We are also a principal subcontractor sharing management responsibilities at the National Renewable Energy Laboratory.

Page 49 PREV PAGE TOP OF DOC

When Congress passed the PAAA, it mandated a new DOE program to assure that contractors operate DOE facilities in accordance with nuclear safety requirements by subjecting those contractors to civil and criminal penalties for safety violations. In response to the concerns of many non-profit contractors that they could not put the endowments of their universities or a trust corpus held for charitable purposes at risk of

being called upon to satisfy potentially large civil penalties, Congress excepted seven named contractors at specifically identified DOE facilities from civil (but not criminal) penalties. 42 U.S.C. Sec. 2282a. All of the excepted contractors were non-profit entities, or, in one case, a for profit corporation which operated Sandia National Laboratory for no fee.

H.R. 723 would do two things with respect to the exemption from civil penalties that was provided to certain non-profit contractors of the Department of Energy. First, it would eliminate the blanket exception and instead provide that non-profit contractors, subcontractors or suppliers would have a capped liability for such civil penalties. The cap would be the amount of the "discretionary fee" paid to such contractor, subcontractor, or supplier. Second, H.R. 723 would provide a definition of non-profit based on Internal Revenue Code Section 501(a) and (c)(3) tax exemption provisions instead of enumerating the contractors who would be subject to this capped liability. We are very concerned that this definition of "non-profit" has the unintended effect of excluding Battelle and the operating entities at Brookhaven National Laboratory and Oak Ridge National Laboratory from its coverage, even though all three are in fact non-profit organizations or composed entirely of non-profit organizations, including two state-owned universities. (NREL does not do nuclear work and is thus not subject to the civil penalty provisions of the Price Anderson Amendments Act of 1988.)

Page 50 PREV PAGE TOP OF DOC

Battelle Memorial Institute is a non-profit charitable trust created pursuant to the will of Gordon Battelle and incorporated under the Nonprofit Corporation Law of the State of Ohio. It has no shareholders (and thus pays no dividends) and has committed to distribute at least 20% of its annual net income to qualified charities. With respect to its operation of the Pacific Northwest National Laboratory, it is one of the non-profit organizations excepted from the civil penalty provisions of the PAAA. Because Battelle is not tax exempt, however, it would not qualify for the cap on civil penalties provided for in H.R. 723.

The management and operating contractor at Brookhaven National Laboratory is Brookhaven Science Associates (BSA), a Delaware non-profit limited liability company whose sole members are Battelle and the Research Foundation of the State University of New York (SUNY), acting on behalf of SUNY at Stony Brook. The Research Foundation is exempt from taxation under the Internal Revenue Code of 1986. BSA is a tax partnership and is neither taxable nor tax-exempt under the Internal Revenue Code. Instead, its income, losses, deductions and other tax attributes are allocated each year to its members whose own tax status determines the federal income tax treatment of allocated items. Thus Battelle, as a taxable entity, is taxed on its allocated share of any earnings of BSA; the Research Foundation, as a tax exempt entity, is not taxed on its allocated share. Although BSA is the contractor, its two non-profit members have each given their corporate guarantee to DOE for all obligations (including civil penalties) to DOE.

A comparable situation exists at Oak Ridge National Laboratory where the contractor is UT-Battelle, a Tennessee limited liability company whose sole members are the University of Tennessee (which is tax exempt) and Battelle.

(Because Brookhaven Science Associates and UT-Battelle were awarded their contracts well after passage of the PAAA, neither of them is exempt from civil penalties although both have been determined to be non-profit organizations.)

Page 51 PREV PAGE TOP OF DOC

In the Bayh-Dole legislation, 35 U.S.C. Sec. 200, *et. seq.*, designed to promote the utilization of inventions arising from federally supported research and development, Congress permitted non-profit contractors to elect to retain title to certain inventions developed under their contracts. The definition of "non-profit organization" in that statute, found at 35 U.S.C. Sec. 201(i) is as follows:

The term "non-profit organization" means universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.501 (c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any non-profit scientific or educational organization qualified under a State non-profit organization statute. (Emphasis added.)

This definition encompasses all of the non-profit contractors currently covered by the definition in H.R. 723 as well as others who are non-profit, but not tax exempt. Battelle, Brookhaven Science Associates, and UT-Battelle have all been determined by the Department of Energy to meet the Bayh-Dole definition and all have clauses implementing the Bayh-Dole legislation in their national laboratory management and operating contracts.

Battelle respectfully urges the Subcommittee to incorporate this definition of "non-profit organization" in H.R. 723.

Mr. Chairman, that concludes my statement. I thank the Subcommittee for the opportunity to express these views on behalf of Battelle and am prepared to answer your questions.

Page 52 PREV PAGE TOP OF DOC

BIOGRAPHY FOR GUY H. CUNNINGHAM

Current Position: Associate General Counsel, Battelle Memorial Institute

As Associate General Counsel, reports to the Senior Vice President and General Counsel of Battelle and has accountability for the legal components and their activities in Columbus, Ohio, Richland, WA and other locations. Has served as manager of the UT-Battelle Transition team at Oak Ridge National Laboratory and as Battelle's transition manager in the Brookhaven Science Associates transition at Brookhaven National Laboratory in 1998.

Prior Experience:

General Counsel and Director, Legal and Contracts, Pacific Northwest National Laboratory—1986–1997

Responsible for legal and contractual affairs and protection of intellectual property at Pacific Northwest National Laboratory (operated for the US Department of Energy by Battelle). Served as member of the Laboratory's executive Leadership Team. Frequent interaction with the U.S. Department of Energy on the entire spectrum of Laboratory activities.

Executive Legal Director, U.S. Nuclear Regulatory Commission—1982–1986

Directed a 100-person legal office, providing a full range of legal services to the 3000-person staff of the NRC. This office provided counsel and acted as advocate in nuclear power plant licensing and enforcement actions and provided legal advice with regard to regulation of uranium mill tailings, nuclear materials licensing, development of agency regulations, and various personnel, contract, security, and budget matters. Various other supervisory positions at NRC, 1978–1982.

Page 53 PREV PAGE TOP OF DOC

Assistant General Counsel for Litigation, U.S. Department of Energy and US Energy Research and Development Administration—1975–1978. Responsible for supervising conduct of litigation of these agencies and their principal contractors.

Past Accomplishments and Areas of Expertise: Recipient of the Presidential Rank of Distinguished Executive from President Ronald Reagan in 1985. As a veteran of seventeen years with the Atomic Energy Commission and all of its successors (ERDA, DOE and NRC) thoroughly conversant in nuclear law issues and DOE contracting practices.

Education and Certification:

M.B.A. 1983 The Wharton School, University of Pennsylvania

J.D. 1967 Georgetown University Law Center

B.A. 1964 Alfred University

Admitted to the practice of law in Washington DC, Washington State and Ohio

81200v.eps

81200w.eps

Page 54 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Thank you very much. If we treated for-profit and not-for-profit the same, then your problem goes away. Doesn't it? If we have the same treatment for for-profit and not-for-profit—if we limit the penalty to the extent of the fee, then your problems goes away.

Mr. **CUNNINGHAM.** Well, that is not quite the direction that I am coming from. Because your question is correct—if you treat non-profits and for-profits the same, then our problem goes away and we are not worried about the definition. What we are concerned about is that different non-profits are being treated differently. What we are urging is that all——

Chairman **BARTLETT.** Oh. I understand that. Under the current law, you are excluded from the limitation of a fine, of penalty.

Mr. **CUNNINGHAM.** Under the current law, Battelle at Pacific Northwest is exempt from fines——

Chairman **BARTLETT.** Okay. Under the proposed law——

Mr. **CUNNINGHAM** [continuing]. And penalties, but it is——

Chairman **BARTLETT.** Under the proposed law then, you do not qualify as a not-for-profit.

Page 55 PREV PAGE TOP OF DOC

Mr. **CUNNINGHAM.** That is correct.

Chairman **BARTLETT.** Okay. But—and—but my observation was that if we did not treat not-for-profits and for-profit differently, then if we treated everybody the way we are proposing to treat not-for-profits, then your problem goes away.

Mr. **CUNNINGHAM.** That is correct, Mr. Chairman.

Chairman **BARTLETT.** Okay. Okay. Thank you very much. Mr. Van Ness.

STATEMENT OF ROBERT L. VAN NESS, ASSISTANT VICE PRESIDENT FOR LABORATORY ADMINISTRATION, UNIVERSITY OF CALIFORNIA

Mr. **VAN NESS.** Mr. Chairman, if—before I begin, I would like to express our best wishes for the success of the Maryland Terrapins tonight and express the fond hope that the UCLA team might have the good fortune of meeting you on the court.

I appreciate very much the opportunity to come before the Subcommittee to discuss implementation of nuclear safety regulations at the University of California-operated Department of Energy laboratories and to comment on H.R. 723. I have submitted a written statement that addresses this, and I would like to spend just a few moments on a few highlights from that testimony.

Page 56 PREV PAGE TOP OF DOC

The University has enjoyed an outstanding record of accomplishment in science, education, and technology. And that reputation of excellence is the single most valuable asset that the University possesses. And that is true both at our campuses and at the national laboratories. It is that reputation that continues to draw outstanding scientists to our doors and allows us to retain them.

Today's student does not typically set out to be a nuclear designer, but the intellectual challenges, theoretical, mathematical, chemical, metallurgical, and engineering, inherent in nuclear weapons and other

big science projects that are carried out at the national laboratories, will continue to attract the finest minds available if the opportunity remains to work with colleagues of national and international repute.

The University has that reputation because of the quality of staff that we attract and retain. Having recruited this outstanding workforce, we are committed to providing them with a safe workplace. Because our work includes nuclear hazards, not only must our workers be safe, but we must assure the public that they, too, will not be harmed. The University is committed to this standard of safety.

In my written statement, I have outlined the integrated safety management programs at our laboratories, our record of overall performance improvement, including safety performance, accomplished through the effective use of performance-based management methodologies. Our Work Smart Standards Program, our practices of encouraging employees to report unsafe practices, are all assisting us to reduce the possibility and a probability of future incidents.

Page 57 PREV PAGE TOP OF DOC

In spite of our commitment and the excellence of our overall safety record, there have been instances, as referred to in testimony that has already been given today, in which nuclear safety violations were deemed serious enough for DOE enforcement action under the Price-Anderson Amendments Act. I have included in my written statement information on those enforcement actions and our laboratories have responded aggressively to correct those deficiencies and to discipline employees who violated procedures.

The University believes that DOE's performance-based management initiative has proven to be a highly effective management-improvement program. At the University of California laboratories we have seen substantial improvements in the management of our administrative and operational functions, including safety. Nevertheless, the University understands the difficulty in maintaining credibility from the public's point of view for any contractor to violate safety rules and appear to be unaccountable.

While reasonable people can differ about how one should measure accountability and how it should be exacted, there can be no appearance of a lack of accountability. H.R. 723, as proposed, takes a balanced approach to accountability for non-profit contractors by scaling the risk of fines to the contract discretionary fees that are actually received.

While removing the exemption, the legislation also establishes a limit on the amount of fines that could be levied against a non-profit contractor. This limitation is vitally important to assure that financial losses are within the discretionary fees and do not threaten the endowments of the University or the funds provided by the taxpayers of the State of California. The University manages these laboratories as a national public service. And we are willing to do so as long as our—the assets of the University are not placed at risk. We believe that the approach that is proposed, with the limitation, allows us to continue to manage and meet that test.

Page 58 PREV PAGE TOP OF DOC

In summary, we believe H.R. 723 can operate in concert with the public service nature of a non-profit

management of the DOE laboratories and the objective to keep the cost of scientific research as low as practical. I thank you for your attention of this matter, and I would be pleased to answer any questions.

[The prepared statement of Mr. Van Ness follows:]

PREPARED STATEMENT OF ROBERT L. VAN NESS

Mr. Chairman and Members of the Committee, I am Robert L. Van Ness, Assistant Vice President for Laboratory Administration for the University of California (UC). The University operates three DOE laboratories—the Los Alamos National Laboratory (LANL), the Lawrence Livermore National Laboratory (LLNL), and the Lawrence Berkeley National Laboratory (LBNL). My responsibilities include administering the performance-based management aspects of our contracts with the Department of Energy (DOE) and conducting oversight of the administrative and operational activities of the laboratories.

The University is indemnified against public liability under the Price-Anderson Amendments Act (PAAA), and, as such, is subject to DOE nuclear safety regulations at the three laboratories. The University is also one of the entities exempt from the civil fines and penalties under Section 234A (d) of the Act.

Thank you for the opportunity to appear before you today to address the Committee regarding H.R. 723 and the proposal to eliminate the statutory exemption from civil fines and penalties under the Act.

Page 59 PREV PAGE TOP OF DOC

Seeking Excellence and Maintaining a Reputation for Excellence

The University of California is an institution that has enjoyed an outstanding record of accomplishment in science, education, and technology. Our faculty and staff have produced an enviable body of work that is reflected through numerous awards and honors. That reputation of excellence is the single most valuable asset that the University possesses, both at our campuses and at the national laboratories we operate for DOE. It is that reputation that continues to draw outstanding scientists to our doors and retains them to carry out world class research.

A student does not typically set as his or her goal to become a nuclear weapons designer. But the intellectual challenges—theoretical, mathematical, chemical, metallurgical, and engineering—inherent in nuclear weapons and other "big science" projects at the DOE laboratories will continue to attract the finest minds if the opportunity remains to work with colleagues of national and international repute. The University has that reputation because of the quality of staff we attract and retain.

The future of the University depends on its ability to obtain excellence in all endeavors. This objective is as true for the administration and operations in support of science as it is for the scientific programs themselves. When our competence is challenged, in any field, it has a significant adverse effect on the reputation of the people involved and the University. We compete in the marketplace for the best minds and talent. We want and need our employees to be proud of their institution and to feel that there is no better institution with which to be associated. When we make a mistake, we respond by taking aggressive corrective action, immediately addressing deficiencies, modifying systems to anticipate and avoid future

problems, and better communicating with our stakeholders about what we are doing.

Page 60 PREV PAGE TOP OF DOC

The University conducts significant nuclear operations at our two DOE national security laboratories. We well appreciate that nuclear hazards are a mystery to many Americans; that mystery requires that we not only be safe, but be seen to be safe. Our reputation for nuclear safety is as important to the University as is our record for outstanding scientific research. We are fully committed to the safety of the public and our workers. Our commitment to the DOE is a public service. Our commitment to the safety of the public and our workers is a public trust. Our future depends on maintaining that public trust.

Implementation of Nuclear Safety

University-operated facilities are safe

The University is fully committed to protecting the health and safety of its employees and the public as our first priority. This commitment is embodied in our contract with DOE in a number of ways. We have the standard contract clause that requires compliance with all applicable laws and regulations. We commit to performing the work in a manner that ensures protection of the employees and the public and to being accountable for the safe performance of work. The performance evaluation and management plans in our contracts measure our results in worker safety, waste minimization, and environmental compliance.

The University follows through on its ES&H commitments through its performance-based management system and has demonstrated success over the past eight years. Our results show the laboratories' success in maintaining radiation exposures to workers far below regulatory standards and consistent with ALARA (As Low As Reasonably Achievable) goals. Public exposure to radiation from our laboratories is far below National Emission Standards for Hazardous Air Pollutants (NESHAPS) set by the U.S. Environmental Protection Agency and below DOE standards for radiation exposure from all pathways. Occupational illness and injury rates show a declining trend approaching "best-in-class" performance at two of our Laboratories and equal to "best-in-class" performance at one Laboratory as determined through benchmarking with the private sector.

Page 61 PREV PAGE TOP OF DOC

Performance-based management

The University's performance-based management system as expressed in our contracts with DOE is designed to provide assurance that our employees and the public are being protected and to drive improvement of the performance of our laboratories over time. It relies on establishing and maintaining effective working relationships with DOE and the public and on a robust self-assessment program that includes reviews by line and support organizations within the laboratories. Since the University's implementation of performance-based management in 1993, there has been a trend of continuous improvement in all administration and operations areas of the DOE laboratories, with DOE ratings moving

from barely satisfactory to excellent overall.

Performance metrics are negotiated annually between the University, the DOE and the laboratories. These metrics describe what is to be measured and contain target performance levels that are used to rate performance as part of an annual contract appraisal process. All three parties monitor performance during the year and performance is evaluated at the end of the year by the University and DOE. The ES&H performance metrics are designed to evaluate both the ES&H outcomes as discussed above and the management systems that produce those outcomes. The DOE, the laboratories and the University have been working to understand the ES&H performance metrics used by the best performing organizations in both the public and private sectors and have adopted or adapted their methods and their performance measures where applicable. Overall ES&H performance has improved substantially over the past 8 years using performance-based management techniques.

The University-operated DOE laboratories are, of course, also subject to the PAAA rules. Each DOE laboratory maintains an independent office reporting at the highest levels of laboratory management to provide independent review and reporting of potential violations of the requirements in these rules, and to track corrective actions when deficiencies are identified. The PAAA requirements are of the utmost importance to both the University and the laboratories, and violations of these requirements are treated very seriously. We have taken aggressive corrective actions to address the deficiencies that led to those events with the intent of avoiding similar safety incidents in the future.

Page 62 PREV PAGE TOP OF DOC

Integrated Safety Management

The University is fully committed to Integrated Safety Management (ISM) as a method for integrating ES&H into our work. This means that:

1) line management is responsible for the protection of employees, the public and the environment;

2) there are clear and unambiguous lines of authority and responsibility for ES&H;

3) our personnel possess the experience, knowledge, skills and abilities that are necessary to discharge our responsibilities;

4) resources are effectively allocated to address ES&H, programmatic and operational considerations;

5) before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established;

6) administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and its associated hazards; and

7) the conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the University.

The ISM systems at our laboratories generally describe how the work scope is defined, how hazards associated with the work are identified and analyzed, how the hazards are controlled, how work is performed within the controls, and how information is fed back to improve safety management. This approach applies to all work at the laboratories, including that subject to compliance with PAAA.

The worker plays a key role in this framework and is responsible for doing the work safely. If the worker notices an unsafe situation or a situation that could cause harm to the public or the environment, he or she has the authority to stop the work.

The PAAA compliance program at the laboratories is fully aligned with ISM at the laboratories. It relies on self-assessment/reporting and a mechanism for feedback to both the DOE and the University and is part of the continuous improvement cycle that is at the core of ISM.

The controls that are identified and implemented through ISM are drawn from a set of external and DOE derived standards that have been incorporated into our contract. These standards come from external regulatory agencies, industry standard setting organizations and the DOE. For those operations subject to PAAA compliance, the standards that have been selected are those developed by DOE in the area of nuclear safety. The University believes that these standards (Work Smart Standards) are effective for managing nuclear safety at our laboratories.

Management, Oversight and Accountability for PAAA Compliance

The University takes PAAA compliance very seriously. At the laboratories, management and employees in nuclear facilities are trained in procedures for safe operations and for reporting violations of procedures or other incidents to the PAAA Coordinator who reports to the Deputy Director for Operations. The PAAA Coordinator also independently reviews other sources of information about ES&H matters in the area of nuclear safety, such as external audit reports and Defense Nuclear Facility Safety Board (DNFSB) staff issue reports. The PAAA Coordinator evaluates self-reported incidents to determine if a noncompliance with DOE nuclear safety rules has occurred. If an incident is determined to be a noncompliance, it is reported either to DOE's Noncompliance Tracking System (NTS) or to an internal tracking system maintained by each laboratory, following guidance provided by the DOE Office of Enforcement and Investigation in its Operational Procedures. The noncompliance report, whether internal or to the NTS, describes associated corrective actions including a schedule of their completion. The PAAA Coordinator routinely does analysis and trending of violations to see if there are systemic concerns or programmatic weaknesses that need to be addressed. In the course of identifying, categorizing, and tracking PAAA noncompliances, the PAAA Coordinator at each laboratory works closely with his or her respective DOE PAAA Coordinator. The laboratory PAAA Coordinators periodically meet with other DOE contractors and the DOE PAAA enforcement staff to review complex-wide information on nuclear safety. The laboratories also conduct independent assessments to determine if the self-reporting system needs improvement. The laboratories use

a combination of line management safety evaluations, independent laboratory safety evaluations, DOE evaluations and management reviews as part of the overall safety program at the laboratories.

The University has established two additional safety review and improvement mechanisms called the Laboratory Operations Management Committee (LOMC) and the ES&H Panel of the President's Council on the National Laboratories. The LOMC includes the three Deputy Directors for Operations from the three laboratories and the Assistant Vice President and Executive Director for Operations from the UC Laboratory Administration Office, and is staffed by the ES&H specialists at the University and at the laboratories. The LOMC works to ensure that the best practices in government and industry are being applied to safety at the laboratories and that the three laboratories work in concert to improve operations. The ES&H Panel consists of experts in environmental protection, safety and health from industry and academia who independently review ES&H performance at the laboratories and advise the President's Council on the National Laboratories on the quality of those programs.

Page 65 PREV PAGE TOP OF DOC

As part of the system for ensuring accountability for safety performance, laboratory managers and workers are assessed annually on their personal performance as part of the laboratory management system. Performance in safety is an important component of this assessment. The University holds managers and workers accountable as part of the review of safety events. In the case of the three FY1998 PAAA violations and the safety incidents in FY1999 and FY2000, disciplinary actions were taken against managers and workers.

Account of PAAA Nuclear Safety Incidents

Since the beginning of the PAAA enforcement program in 1996 there have been 57 enforcement actions undertaken by DOE. Of these, seven have involved University of California-operated facilities. The majority and most significant of these violations involve Los Alamos which has some of the oldest nuclear facilities in the weapons complex. The table below lists these enforcement actions:

Table 1

The most recent enforcement action at Los Alamos came about as a result of a plutonium-238 intake event at the TA–55 facility. This incident exposed a number of individuals to plutonium, with the most highly exposed individual receiving an internal dose that will prohibit him from further work in a radiological area. While there were multiple exposures, there were no injuries or expected long-term medical consequences to any of the employees. The enforcement action identified procedure violations, equipment labeling violations and quality improvement violations relative to the TA–55 incident. The enforcement action also included the failure of the TA–18 facility to operate within the limits and controls established by the facility's safety documents and cited deficiencies that had been previously identified by both LANL and DOE. Some of the violations from both TA–55 and TA–18 were given partial mitigation for early reporting and effective corrective action plans. Extensive correction action plans now exist for both

facilities and a reorganization of the organization responsible for TA–18 has been accomplished.

Page 66 PREV PAGE TOP OF DOC

The September 2000 enforcement action at Lawrence Livermore involved failures to adequately maintain and adhere to the Authorization Basis for the Laboratory's nuclear facilities. The two incidents leading to this violation did not release any radiation and no individuals were harmed. The Laboratory has undertaken a program of corrective actions including the formation of a new organization in the Hazards Control Department specifically dedicated to managing the Authorization Basis process. There was also a reorganization of the line organization responsible for the facility and a number of personnel reassignments were made.

The September 1999 enforcement action at Los Alamos involved a November 1998 exposure to radiation of a LANL worker in the Chemistry and Metallurgy Research Building. The investigation revealed a series of failures to conduct approved work activities in accordance with established procedures, failure to adequately monitor for radioactive material, failure to post and control access to radiological areas, and a failure to implement effective corrective actions. Investigation of a June 1999 incident identified a number of similar issues associated with the November 1998 incident in the same facility. Additional retraining was specified for the individuals involved in both incidents, and disciplinary action was taken against individuals who ignored procedures.

Three enforcement actions were issued during 1998 for violations that occurred in 1997. One involved exposure of five workers to levels of airborne radioactive material (curium-244) at the Hazardous Waste Management Facility at LLNL. One of the workers received a dose in excess of federal limits; however, he is not expected to have any long term health consequences from this exposure. No radioactive material left the laboratory and no members of the general public were affected by this event. A second enforcement action involved infractions of criticality safety controls in the Plutonium Handling Facility at LLNL. There was a voluntary and complete multi-month stand-down of operations at the plutonium facility and a retraining of the staff. Full operations were gradually restored only after a comprehensive Activity Resumption Plan, developed under DOE oversight and incorporating extensive corrective actions, was implemented. The third enforcement action was prompted by a fire and explosion that involved radioactive material and other related events at the LANL Chemistry and Metallurgy Research Building. The enforcement action cited a lack of adequate work planning and work controls to manage the facility safely. No individuals were injured or contaminated, but there was the potential for serious harm. The facility stood down for a number of months during which a significant number of upgrades to the facility were made and all employees working in the building were retrained.

Page 67 PREV PAGE TOP OF DOC

All three of these 1998 enforcement actions resulted in disciplinary actions taken against the individuals who did not comply with safety requirements—including workers, their supervisors, and more senior personnel. The prompt actions by the laboratories and the implementation of a comprehensive set of corrective actions resulted in DOE determining that substantial mitigation of assessed fines and penalties

was warranted in each of the enforcement actions.

The first enforcement action involving the University occurred in December 1996 at LANL and involved unauthorized modifications to tritium monitors and the cutting of a power line to a nuclear facility at LANL. While neither event represented a significant facility hazard due to the existence of other monitors and backup power, a serious electrical injury resulted from the cut power line. The incidents exposed weaknesses in planning and execution of work at LANL, clarified applicability of the Quality Assurance Rule, and clarified thresholds for enforcement actions.

All of the above incidents and nearly all the associated Price-Anderson Act noncompliances were self-reported by the laboratories. Immediate actions were taken to review the incidents and develop corrective actions while the PAAA implications were unfolding.

Statutory Exemption from Civil Penalties

The legislation currently before the Committee would eliminate an exemption from nuclear safety violation fines and penalties for certain contractors. There are two classes of contractors that have that exemption today. Some contractors fall into both categories. The first category is a listing in the statute of DOE national laboratory operators as they existed in 1988 when the Price Anderson Act was last extended. The second category is all DOE non-profit contractors who are educational institutions and exempt from taxation under the Internal Revenue Code. This second category was created by DOE as part of its rule-making authority under the Price-Anderson Act.

Page 68 PREV PAGE TOP OF DOC

The University has operated three DOE laboratories from their inception as a public service without the desire for financial gain. The University, as a non-profit entity, has consistently opposed federal contract policies that have at their base a financial reward or punishment purpose. We believe this approach can blur an important line between for-profit and non-profit motivations and is fundamentally inconsistent with the nature and character of the University. The non-profit nature of the University is an essential element of our makeup and is critical to providing the extraordinarily successful environment for the conduct of outstanding science at the University and its laboratories. That environment is often cited as the principal attraction in the recruitment and retention of the world's leading scientists.

At the time of the Price-Anderson Amendments Act, the University and a number of other DOE laboratory operators performed contract work solely on a cost-reimbursable basis. In the 1980's there was a series of investigations conducted by the Federal Government that revealed serious abuses of cost-reimbursement contracts in the defense industry. These investigations led to legislation affecting defense contracts that were later extended government-wide. The legislation failed to distinguish between for-profit and non-profit contractors, particularly where those contractors were engaged in large cost reimbursable contracts of the type that DOE uses at its federally-funded research and development centers (the DOE laboratories). As a consequence, nearly all non-profit contractors have entered into some form of fee arrangement in the last decade. They did so not to enrich themselves, but to make it possible to continue their public service to the nation given these new risks and the inappropriateness of applying funds from their endowments to the costs of operating DOE laboratories. Non-profit contractors, such as the University,

have a track record of attracting scientific talent to the DOE laboratories that would be lost should non-profit organizations become unable to manage the laboratories because of financial risk.

Page 69 PREV PAGE TOP OF DOC

Fees are paid as part of the cost of performing scientific programs funded by the Congress. The greater the fee, the lesser the funds are available to perform scientific research for any given amount of federal appropriation. Non-financial rewards and punishments are important alternatives to fines in order to maximize the amount of science produced at the national laboratories. (It should be noted that fees to non-profit contractors average less than 1% of budgets at the facilities they operate as compared to about 6% of budget at facilities operated by for-profit contractors.)

The University accepted a fee starting in 1992 that enabled us to continue performing a public service for the nation in the face of increasing risks of non-reimbursement for laboratory operating costs and assessment of penalties. (To do otherwise would be inconsistent with our fiduciary obligation to the State of California, its citizens, and our students and donors.) That does not confer immunity to the University from any consequences associated with poor management. As mentioned above, our most important asset is our reputation for excellence that enables us to attract and retain outstanding workers. Laboratories with poor records run the risk of adverse contract actions, having their facilities shut down, funding from sponsors decreased, loss of confidence in the surrounding communities, and loss of employee morale. Avoiding these consequences is a strong motivation for the University. On the other hand, being known as one of the "best-in-class" managers creates an environment where reputation is enhanced, additional work is funded, communities are highly supportive, and employees thrive and attract more quality workers.

Today, the world is different than it was in 1988. Many of the national laboratory operators have left the scene. Non-profits, including UC, do receive fees for operating laboratories. Given the availability of these revenues non-profits are in a position to absorb some losses today that they could not in the past.

Page 70 PREV PAGE TOP OF DOC

The proposed legislation while removing the exemption does establish a limit on the amount of fines that could be levied against a non-profit contractor. This limitation is important to better assure that any financial losses are within the revenues generated by the contract. I say 'better assure' because there are many sources of potential loss for DOE non-profit contractors today: fines and penalties levied by other regulatory bodies, and unrecoverable defense, investigation and other legal costs, to name a few. These and other risks of loss have been newly created over the last several years by legislation or rule.

The University supports the proposed legislation because we understanding the difficulty in maintaining credibility from the public's point of view for any contractor to violate safety rules and appear to be unaccountable. While reasonable people can differ about how one should measure accountability, there can be no appearance of a lack of accountability. This legislation takes a balanced approach to accountability for non-profit contractors by scaling the risk of fines to the contract revenues actually received.

The University believes that DOE's Performance-Based Management initiative has proven to be a highly effective management improvement program. At the University of California-operated DOE laboratories we have seen substantial improvements in the management of our administrative and operational functions, including safety. Our record of improvement over the past eight years is exemplary. In the past eight years the DOE rating of our performance in these areas has gone from barely satisfactory to excellent while at the same time we have reduced the annual cost of these operations by well over $100 million. Our procurement and property operations, once seen as unsatisfactory, are now at the level of the best in the DOE complex. The performance-based management system in our contract with the DOE promotes the commitment of laboratory management and employees to safety and ensures that there is an active driver for ongoing improvement in all aspects of laboratory operations.

Page 71 PREV PAGE TOP OF DOC

Summary

The future success of the University at both its campuses and the DOE laboratories requires that we have and maintain a reputation for excellence in all endeavors, including nuclear safety. The University employs a performance-based management system in conjunction with the DOE that conveys expectations, measures results and encourages everyone to identify problems and make corrections. The University-operated DOE laboratories have made tangible improvements in administration and operations, including environment, safety and health and are committed to make excellence a reality in all management aspects of the laboratories.

Improvement is not perfection. We have learned from these incidents and are taking aggressive measures to prevent similar problems from arising in the future.

The proposed legislation can operate in concert with the public service nature of non-profit management of the DOE laboratories and the objective to keep costs of scientific research as low as practicable. Fees paid to DOE laboratory non-profit contractors are driven by statutory and policy changes over the last fifteen years. Non-profit organizations face the dilemma of either obtaining a fee or declining to operate national laboratories. Fees are paid for out of the funds appropriated by Congress for the conduct of scientific programs. The need for fee must be minimized to maintain the lowest practicable cost of conducting scientific research. There are an abundant set of contract management tools already available to the DOE to ensure contractor compliance and performance improvement. The proposed legislation while removing the exemption does establish a limit on the amount of fines that could be levied against a non-profit contractor. This limitation is important to non-profit contractors to better assure that any financial losses are within the revenues generated by the contract.

Page 72 PREV PAGE TOP OF DOC

BIOGRAPHY OF ROBERT L. VAN NESS

Robert Van Ness is the Assistant Vice President at the University of California, Laboratory

Administration Office (LAO). Since 1992, this office has provided management and operational oversight to the University-managed Department of Energy laboratories: Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory and Los Alamos National Laboratory.

The DOE–UC 1992 contract pioneered performance-based management in the DOE complex. Within the DOE contractor community, the UC Laboratory Administration Office is a leader in the application of continuous improvement concepts, performance measurement and teamwork to foster management excellence.

Van Ness is a charter member and current chairman of the DOE National Laboratories Improvement Council, established to improve R&D productivity at all DOE laboratories.

Van Ness' career began with the U.S. Navy, where he was the contracting officer for new construction of nuclear submarines, including the first four Trident submarines. He then joined the Department of Energy, serving as director of Procurement Policy and of the Office of Financial Incentives. After entering the private sector, he became chief financial officer and executive vice president of a national construction company. Prior to joining the University of California, he served as associate director for administration at the Superconducting Super Collider Laboratory.

Page 73 PREV PAGE TOP OF DOC

Van Ness earned a bachelor's degree in accounting from UC Berkeley and an MBA from Harvard Business School.

Chairman **BARTLETT.** Thank you very much for your testimony, and I thank all of the witnesses. Oh, my. We are going to have some votes apparently. The bells are going off.

Before yielding to my colleague who can consume what time she wishes before the vote and then after the vote, I would just like to note that in another life I worked for a technical government entity, the School of Aviation Medicine, Pensacola, Florida. I then worked for a captive government contractor, a university-sponsored laboratory, the Johns Hopkins University Applied Physics Laboratory, and then I worked for a contractor who did—a for-profit contractor, IBM, who did contract work for the military. I then ran my own R&D company during—doing contract work for the military. So I have had the opportunity to work in every possible sector of the community—of the technical community. So I can understand where you all are coming from.

That is a 15-minute bell. We don't need that long to get there, and so let me turn to my colleague, Ms. Woolsey, for whatever comments and questions she has.

Nuclear Safety Issues at Los Alamos and Lawrence Livermore

Ms. **WOOLSEY.** Thank you. Great testimony. Aren't you wonderful to keep it within the timelines? We will see if our questions can do the same thing. Mr. Van Ness, in your testimony—in your written testimony, you talk about some of the nuclear safety troubles that occurred at Los Alamos and Lawrence Livermore. Did any of these represent a threat to the public and, if they did, what did you do in response? And, if they did not, how come? I mean, what were you doing to make sure it didn't become a threat?

Page 74 PREV PAGE TOP OF DOC

Mr. **VAN NESS.** Well, I appreciate that question. I would like to make it very—I think I am on. I do—I appreciate the question. I would like to make it very clear that none of the incidents involved any exposure to the public. And the reason for that is that we have safety systems in those facilities that provide protection when an employee makes a mistake or a system fails internally to a given operation. So we have a perfect track record thus far in terms of not exposing the public.

At the same time, when our workers are exposed, and they have been on occasion, that is an extremely serious situation, and we are doing all that we know how to do to limit the possibility for future occurrences.

Ms. **WOOLSEY.** Well, when we talk about the employee's part in this, what would an employee do? Would they be irresponsible or would they just make a human mistake? Or—and does your discipline depend on whose——

Mr. **VAN NESS.** Yes.

Ms. **WOOLSEY.** Yes.

Mr. **VAN NESS.** It runs the gamut——

Ms. **WOOLSEY.** Yes.

Mr. **VAN NESS** [continuing]. From human error to not being as energized and effective about doing the job as they need to be in these highly critical positions. Sometimes it is not their fault. It is a system defect or something that has been the responsibility of someone else that creates an incident that they didn't have to respond to. That is an emergency situation and people don't always get everything right as they respond to emergency situations.

Page 75 PREV PAGE TOP OF DOC

Ms. **WOOLSEY.** And do you have a tracking of near misses so that——

Mr. **VAN NESS.** Yes. We do.

Ms. **WOOLSEY.** Because isn't that where you really learn a lot?

Mr. **VAN NESS.** Yes. Absolutely. In fact, we do have to inform the Price-Anderson Act reviewers when we have a near-miss situation or even when we identify a flaw in our systems.

Ms. **WOOLSEY.** Uh-huh.

Mr. **VAN NESS.** And I think that is excellent. It provides the opportunity for everyone that is involved in this business to learn from those experiences and allows us all to take—to rectify those situations.

Ms. **WOOLSEY.** So what would discipline entail?

Mr. **VAN NESS.** Again, that covers a fairly broad spectrum. It can be a letter of reprimand. It could be reassignment. It could be termination from the job. It could be a suspension of pay. It could be mandatory training.

Ms. **WOOLSEY.** Uh-huh. And it could be—could it be loss of—I mean, could they be fired?

Page 76 PREV PAGE TOP OF DOC

Mr. **VAN NESS.** Yes. They could. In an extremely serious situation——

Ms. **WOOLSEY.** Uh-huh.

Mr. **VAN NESS** [continuing]. That would be true.

Ms. **WOOLSEY.** And they could be dead too, I suppose, if they did it really wrong.

Mr. **VAN NESS.** Yes. Well, and sometimes, if not dead, they incur injuries that can last——

Ms. **WOOLSEY.** Go on for life. Right.

Mr. **VAN NESS.** That is correct.

Suggested Liability Language for H.R. 723

Ms. **WOOLSEY.** Ms. Jones, when you talked about needing suggested language in H.R. 723 to clarify and address the issues of discretionary and back and forth and back and forth, you got me all entangled in what was what and what wasn't. Do you have any recommended language?

Page 77 PREV PAGE TOP OF DOC

Ms. **JONES.** I think that has to be a policy call on the Congress's part, in terms of whether you want to limit the liability to the total fee, which would be the base fee plus the incentive fee, or whether you want to just focus on the incentive fee. But we do point out in our testimony that there are some downsides with just focusing on the incentive fee.

The other—I think the other complication that Mr. Fygi pointed out in his testimony is that any different—and contract that you look at in DOE may have different terms in it. So I think it is very important for this legislation to be very clear about what it is that the Congress wants to do in terms of the liability.

Ms. **WOOLSEY.** All right. Mr. Chairman, I will yield. Thank you.

Chairman **BARTLETT.** Thank you very much. And when we return, you may continue if you wish. Before we recess for the vote, let me recognize Ms. Jackson Lee for just a moment. I think she has a

unanimous consent she would like to make.

Ms. **JACKSON LEE.** I certainly do, Mr. Chairman. First, to thank both you and the Ranking Member for an excellent hearing. I would like unanimous consent to submit my statement into the record, thank the witnesses, and say that this is a question of concern that this hearing hopefully will address. And I remain open to provide for the most safest vehicle for our nuclear research. Thank you. I yield back.

Chairman **BARTLETT.** Without objection——

Page 78 PREV PAGE TOP OF DOC

Ms. **JACKSON LEE.** And I ask unanimous consent, Mr. Chairman.

Chairman **BARTLETT.** Okay. Without objection, so ordered. It will be entered into the record.

Ms. **JACKSON LEE.** Thank you.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF REPRESENTATIVE SHEILA JACKSON LEE

Chairman Bartlett and Ranking Member Woolsey I would like to thank you for bringing this opportunity before the House Science Committee's Subcommittee on Energy to review the goals of H.R. 723, the Civil Penalties for Nuclear Safety Violations by Non-profit Department of Energy Contractors Under the Atomic Energy Act of 1954.

The purpose of this hearing is to address the proposed legislation that would amend the Atomic Energy Act of 1954 to remove the exemption of non-profit Department of Energy (DOE) contractors from civil penalties for violating DOE rules, regulations, and orders relating to nuclear safety.

These non-profit, educational institutions manage many DOE labs should be provide the assistance and guidance necessary to minimize any threat their work may have toward the environment or the public. Civil penalties for nuclear safety violations should be reserved for willful acts that are clearly in opposition with the goals and mission of the DOE and established protocols and procedures for laboratory research.

Page 79 PREV PAGE TOP OF DOC

I believe that this was the goal in 1957 when Congress enacted the Price-Anderson Act, which indemnified private companies engaged in nuclear activities from financial liabilities associated with any damage or injury caused by nuclear accidents. Price-Anderson Amendments Act of 1988 reauthorized and expanded this indemnification, but in light of significant safety problems uncovered at DOE facilities Congress also required DOE to impose civil penalties on indemnified DOE contractors that violate nuclear safety rules.

However, in consideration of educational institutions and other non-profits doing work for the DOE under

the Nuclear Energy Act Congress exempted several educational institutions including the University of California, Los Alamos, and Lawrence Livermore in the University of Chicago at Argonne Labs from paying these civil penalties.

Established in 1996, DOE's Office of Enforcement and Investigations which reports to the Assistant Secretary for Enforcement, Safety, and Health is responsible for investigating nuclear safety violations and imposing civil penalties or other corrective actions when appropriate. DOE relies on its contractors to identify and report on nuclear safety violations when they occur.

In determining whether enforcement action is necessary DOE considers the safety significance of the violation, the contractor's willingness to take corrective action, the contractor's ability to pay, and prior history of other violations.

DOE under its own discretion frequently declined enforcement action when a contractor quickly identifies and corrects nuclear safety problems. In a 1999 hearing it was reported that the DOE's Office of Enforcement had identified more than a thousand cases of nuclear safety noncompliance and had issued only 33 notices of violation and assessed $1.8 million in civil penalties. Of the $1.8 million in fines, non-profit contractors were exempted from $605,000 or a third of the assessed fines. Of that $605,000 in phantom fines assessed on non-profits, the University of California is by far the leader with $425,000 or 70 percent.

Page 80 PREV PAGE TOP OF DOC

University of California at Lawrence Livermore was cited for two of the largest safety violations in 1998 including severity level-one violations. In one occurrence a Lawrence Livermore employee received such an enormous internal dose of radioactivity that even after treatment to remove the radioactive material his dose still exceeded regulatory limits. This exposure may have been prevented, but someone had turned off the radioactivity alarm in the room that the man was working in. However, we cannot measure the effectiveness of DOE's enforcement program or the impact that it has had on worker safety simply by looking at an individual case of noncompliance or the total number of violations and assessed penalties.

In a report released by the GAO found that the DOE had not been aggressive in issuing nuclear safety rules or in holding its contractors accountable for complying with some nuclear safety requirements. According to this report DOE's inaction in obverting several nuclear safety requirements to enforceable rules has limited the overall effectiveness of DOE's enforcement program.

Although none of the university research programs are located in the State of Texas, this issue is of concern because it relates to the full body of research that is being done at the request of the Department of Energy.

I look forward to the valuable insight that today's witnesses will provide on this issue.

Thank you.

Page 81 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** We will now recess for the vote and we will return as soon as possible.

[Recess]

Suggested Changes to Bill

Chairman **BARTLETT.** I will call the Subcommittee to order again. We are in the middle of a series of votes. There will be another vote, but this one needs to run its course, which will be 20 minutes or so, and then they will call another vote and we will have at least 10 minutes of that. I thought we might use this time, but the other members have not returned because their presumption was we would not reconvene until after the last vote. So we will reconvene again after the next vote and they will have a chance to return for whatever questions they want to ask.

I would just like to ask you, after our discussion and your testimony, it would be very helpful to us, if you think that there are some meaningful, structural problems in this bill that could be corrected by some changes in the bill, we would be very appreciative of your input on that. We can discuss it now. It would be very nice if we could have that in writing so that we do not misunderstand your advice. Let us just start with Mr. Fygi and go down the list and see what observations you have.

Mr. **FYGI.** Well, thank you, Mr. Chairman. And I, likewise, value the presence of a writing such that there be no misunderstanding of our views. And if the Subcommittee would like a formal bill report, I think that might be the best way to begin that process whereby we can produce a document that would be the most —of the most use ultimately to the Subcommittee.

Page 82 PREV PAGE TOP OF DOC

But in terms of the assessment of the bill language, I think two of the salient points that occur to me already have been touched upon by both your observations, Mr. Chairman, and those of some of the witnesses here today. The first is the question whether it is wise to include an adjective governing the word fees, particularly one that does not have established—an established and fixed meaning in procurement law.

And I think an unadorned formulation in the bill language probably would be better. My intuitive reaction, prompted by some of the earlier colloquies, to the notion that the bill language contain a more particularized or exhaustive definition, I tend to think that is unwise in that I don't think legislation that looks like a bond indenture proves, over the longer haul, to be the most susceptible of sound administration by the executive branch. The executive has to have a little bit of flexibility to afford some interstitial interpretative gloss on the meaning of the statutorial language to make the statutory machinery work most effectively.

The second question that you raised, as I recall, involved the duration of a fee period that would be an element of the definition of, in any given fiscal year, the amount that—of exposure that the contractor conceivably would be at risk for. I think that this is a sound idea that the Subcommittee may wish to consider as it proceeds toward markup of this legislation.

Chairman **BARTLETT.** Should it be the total fee or the fee for that year?

Mr. **FYGI.** The total fee—I am not sure the total fee is as useful a guidepost, because a given contract in the DOE universe frequently will be, for say, a 5-year duration. And there might well, in a given contract, be a maximum base fee and a maximum potential award fee, for example, that would be set forth in the contract. But the contract further would set forth the installments by which in every fiscal year the contractor was eligible for a portion of that fee.

Page 83 PREV PAGE TOP OF DOC

So I would suspect that even were the bill language to be comparatively silent on that latter issue, when placed in conjunction with one another—the bill language, if enacted, with the typical DOE contracts—it likely would be the outcome that the fee availability, in a given year, would be the usual result.

And my reaction there is further guided by the relatively small amounts of the actual penalties imposed under the Price-Anderson regime that our experience under the 1998—excuse me—1988 Act, which active experience began in 1996, has yielded. With one exception, all of those penalties were only in the five or six-figure range, whereas the fees typically run into the millions.

Chairman **BARTLETT.** Thank you. Ms. Jones, philosophically, should the fee at risk be that year or the total fee?

Ms. **JONES.** I think there needs to be a definition, Mr. Chairman. I——

Chairman **BARTLETT.** What would be your advice?

Ms. **JONES.** I think, as Mr. Fygi said, we are dealing with base fee versus incentive fee. And whether you use the term total fee or just use fee, I think it needs to be very, very clear what we are talking about. If you just want to limit it to the incentive part of the fee, that needs to be very clear in the legislation. There is a model, in terms of the fiscal year 2000 Defense Authorization Act, that set up a similar civil penalties program for security violations. And in that law, I believe, the language is total fee available in a given year. So that is a lot more specific than we have here in H.R. 723.

Page 84 PREV PAGE TOP OF DOC

Treatment of For-Profit Versus Non-Profit Contractors

Chairman **BARTLETT.** Well, thank you. Mr. Cunningham, do you have difficulty defending treating profits and non-profits differently with penalty?

Mr. **CUNNINGHAM.** No. I don't, Mr. Chairman. But thank you for the opportunity to answer that question. The non-profits are fundamentally different in that we don't have shareholders. We don't distribute dividends. In the case of the Universities, they are fiduciaries of the money that is provided by the state. In a case of an organization like Battelle, we are the stewards of a charitable trust so that we don't have the same

situation that you have with a profit-making corporation. And I feel that there is both a difference in the substance, and a difference in treatment is, therefore, warranted.

Chairman **BARTLETT.** So how should we fix your problem?

Mr. **CUNNINGHAM.** The problem that I came here to address today is to treat all non-profits the same. They are all either fish or they are all fowl. But——

Chairman **BARTLETT.** How do you define a non-profit? As the proposed bill now defines it, you are not a non-profit.

Mr. **CUNNINGHAM.** That is correct, Mr. Chairman. And I would propose that that be fixed by using the language which is currently in the Bayh-Dole legislation, which defines a non-profit either as a tax-exempt organization or as an organization that is chartered under the non-profit organization laws of any state, more specifically, a scientific or educational organization chartered under the non-profit laws of any state.

Page 85 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Thank you. Mr. Van Ness, do you have suggestions that might improve the bill?

Mr. **VAN NESS.** Yes, Mr. Chairman. And I would like to address the question that you have been discussing here in terms of the differences between industry and not-for-profits and what effect, if any, that should have on the language of this bill. I agree with Mr. Cunningham's characterization of a number of differences between a private sector firm, a for-profit, and a not-for-profit. I would like to add to that that it is generally a line of business for a for-profit company. They are in business to manage these laboratories, as well as other things. It is not a line of business for the University of California or any of the other universities that manage these contracts. The University of California's part, we do it strictly as a national public service.

Further, the fees that we receive and that other universities receive are a fraction of those fees that are paid to for-profits, like ten to one or five to one. So there is a much smaller amount of fee at our disposal to deal with such things as fines and penalties than there is with a for-profit company. I think those are important differences that mandate different treatment of exposure of the not-for-profits to find some penalties under this legislation.

Chairman **BARTLETT.** But are not the for-profits exposed potentially far beyond any fee?

Mr. **VAN NESS.** Well, I think you have just heard a description that the fine levels are in the hundreds of thousands of dollars, perhaps getting as high as a million dollars. Their fees are in the multiple millions of dollars, generally speaking.

Page 86 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** That is a historical perspective——

Mr. **VAN NESS.** Yes.

Chairman **BARTLETT** [continuing]. That the fines assessed in the past have not exceeded the fees.

Mr. **VAN NESS.** That is correct. But I would also argue, with respect to the possibility of risk, when you are in business, risk is a part of being in business. And if you choose that business line, you are accepting those risks and you are negotiating the fees that you get to address that risk. And when you are doing it as a public service, that is not—those aren't the factors that are in the equation. And we, in fact, do not want to take money from science and put it into a large store or fee to be held as a reserve against a fine or penalty.

I think the law—the legislation, as it is proposed, is a big step forward and you are removing what has been a historical exemption for the not-for-profits. Your testimony and others have talked about a balanced approach. The balance here is in—at—while at the same time we are exposing the not-for-profits to real fines and penalties, we need to protect their assets because they are, in fact, a different form of organization than the for-profits. And I—and that is absolutely essential to attracting not-for-profits to continue to manage these laboratories.

Chairman **BARTLETT.** Let me return again to our Ranking Member for her questions and comments.

Page 87 PREV PAGE TOP OF DOC

Ms. **WOOLSEY.** I think—thank you, Mr. Chairman. Mr. Van Ness, it seems to me that I am here it is—without the balance, if we go all—the full scale to for-profit, using that as our model, then it is not worth non-universities to get into the business.

Mr. **VAN NESS.** It would be a major impediment.

Ms. **WOOLSEY.** Right.

Mr. **VAN NESS.** Yes.

Ms. **WOOLSEY.** And we need the universities. We need the skills and the intelligence and the labs——

Mr. **VAN NESS.** Correct.

Ms. **WOOLSEY** [continuing]. And et cetera.

Mr. **VAN NESS.** That is correct. And——

Ms. **WOOLSEY.** Okay. Mr. Fygi—thank you. I just want to make sure I was hearing what I thought I heard. Mr. Fygi, in Ms. Jones' testimony, she referred to a contract provision whereby the contractor could lose some of its base fee as a result of poor performance. So I—could you give me an example? I—this is words to me. I need examples. Have any of your contractors—do any of your contractors have such a provision and has this measure ever been exercised?

Mr. **FYGI.** I think—let me try to respond by saying the base fee usually is not the variable in a nonpunitive evaluation of a contractor's performance in a year. It usually would be the award or performance or incentive fee component. And there have been many, many, many occasions in a given year, and within a given year, when the Department has made judgments about the performance of a given contractor, say, during a given quarter or half year, and has made a fee award judgment that is far less than the maximum that could have been awarded. And that is not at all uncommon. It is not even necessarily an indicator of truly, noteworthy, mediocre performance. The maximum fee entitlement is not necessarily the presumption of just normal everyday performance. So the answer to your question is, yes, that happens very frequently.

Ms. **WOOLSEY.** Out of the performance incentive, but not out of the base.

Mr. **FYGI.** I would think usually not out of the base.

Ms. **WOOLSEY.** Is there an appeal process for this?

Mr. **FYGI.** For the—again, we are straying away from the issue of Price-Anderson, mind you.

Ms. **WOOLSEY.** All right.

Mr. **FYGI.** No. That is perfectly all right. It is not that Price-Anderson is necessarily such a captivating topic that it need command all of our attention. But fee evaluations, as I said, are a routine element of contract administration. And it strikes me that part of the reason for having potentially generous performance fees the industrial sector is to afford incentives to truly superior and innovative performance. So that it is that kind of decision-making rather than a punishment type of decision-making that typically is applied when, in a given year, fee award decisions are made.

If, in fact, however, a contractor has performed its missions that year in a way in which it has incurred significant violations of the nuclear safety regulations that are called for in the Price-Anderson Act, the same conduct, the same evident lack of skill and diligence in the performance of its nuclear-related responsibilities, likely would be evocative of mediocre performance that would not warrant granting the entirety of the potential performance or award fee.

Ms. **WOOLSEY.** Would either of the contractors want to respond to that question that wasn't on Price whatever?

Ms. **JONES.** Ms. Woolsey——

Ms. **WOOLSEY.** Yeah. Oh.

Price-Anderson Appeals Process

Ms. **JONES** [continuing]. When you do, though, look at the Price-Anderson Act Program within DOE, the Nuclear Safety Enforcement Program, if a violation on a particular contractor was decided and a penalty amount set, there is an appeal process. DOE does sit down with the contractor as part of that process and get the contractor's views how they are going to handle the problem that had been——

Mr. **WOOLSEY.** Uh-huh.

Page 90 PREV PAGE TOP OF DOC

Ms. **JONES** [continuing]. Found. And then there is a negotiation in terms of the dollar amount. So there is, in a sense, an appeal process. The other point I wanted to make in terms of this overall issue of non-profits versus profits, if under the current law the Secretary has considerable discretion, in terms of setting the amount of the penalty fee, such factors as, can the contractor pay and the impact on their ability to perform their business, all can be considered when the penalty amount is being set.

Ms. **WOOLSEY.** I think my time—oh, Mr. Van Ness.

Mr. **VAN NESS.** Well, to respond to your question and to testimony that was just given, it is true that there is this discussion process, however, the final decision is the province of the Department of Energy and there really is not an appeal to that decision.

And I think the second thing I would like to comment on is the base fee concept. In our contracts, we have a base fee and a performance-incentive fee. That base fee is critical to the protection of the endowment funds of the University of California. We may or may not earn the performance fee. We know we are going to receive that base fee amount. So that is why we argue that this legislation needs to be written so that it limits the fines to available incentive fee dollars, not impacting the base fee dollars.

Ms. **WOOLSEY.** Thank you.

Chairman **BARTLETT.** Thank you. Now, turn to Mr. Grucci for his questions and comments.

Page 91 PREV PAGE TOP OF DOC

Penalty Structures and Exemptions

Mr. **GRUCCI.** Thank you, Mr. Chairman. First, I would like to acknowledge Mr. Cunningham and his organization, Battelle, for doing such an outstanding job in restoring the credibility in the Brookhaven National Laboratory, which is located in my district. It has gone under a significant issue with some tritium leak and, as a result, it had a great deal of problems in the community. Management, prior to Battelle taking over, perhaps, didn't do an adequate job in inferring that to the community. Their able guidance, along with Stony Brook University, has done an outstanding job in bringing that fine institution back into good stead in the public community. Now, that being said, that doesn't mean that there won't be a group of people out there who would like to see all sorts of research being done to stop, but I am not one of them.

My question, sir, deals with this issue of concern that has been expressed to me by Battelle regarding your penalties because you wouldn't fit the definition of a not-for-profit. And I see the definition that is being asked to be considered in this legislation, which I would recommend that we consider very seriously. What is the penalty structure at the universities that are contracted by the Department of Energy, and how does that differ from the exposure and the liability that you would be—would have to incur?

Mr. **FYGI.** Perhaps I can respond to that, sir.

Mr. **GRUCCI.** Thank you.

Page 92 PREV PAGE TOP OF DOC

Mr. **FYGI.** Under current law, the seven listed non-profit educational and other institutions have no Price-Anderson penalty liability at all. They were exempted altogether. Current law also provides the Secretary the authority to specify automatic remission of any penalties that might have been imposed on a non-profit educational institution. So that what we have in terms of a track record in the years since 1996, when the enforcement program began, is a total, over that whole period, of deemed penalties that would have been imposed, but for the exemptions, of 1.788 million. That is over the period since 1996.

Whereas, for the for-profit contractors and the like, penalties that aggregated $3.745 million. So that, as you can see, given the length of time and given the fact that those dollar numbers I have read correspond to 57 separate Price-Anderson nuclear safety violation charges, one can understand that our experience thus far does not suggest that the penalty regime has yielded onerous fiscal consequences.

And in that connection, I might add an observation to my colleague from the University of California, even as to the Price-Anderson penalty regime itself, there is, in fact, an administrative appeal pathway provided by the 1988 statute. But the way the program has been administered is such that the enforcement personnel—and this gets back to the culture question that the Chairman asked about earlier—the enforcement personnel appear to have consciously chosen a posture of extreme professionalism in how they handle this particular responsibility, such that there is an iterative process that stems from the first enforcement document being issued, styled a Notice of Proposed Violation.

And that, in turn, prompts the kind of intense scrutiny by both the contractor personnel and the Price-Anderson enforcement personnel of the Department such that it yields almost a consensus in almost every case, albeit sometimes a grudging one, but a consensus, such that, in the entire life of this program, we have never had a single appeal. I hope that answers some of the thoughts in your question.

Page 93 PREV PAGE TOP OF DOC

Mr. **GRUCCI.** It does. I would need a little time to think that one through. But I guess, the bottom line here for me is to make sure that companies like Battelle could continue to do the work that it does in managing and running these facilities without fear of being penalized, you know, unfairly. And if, indeed, they meet the criteria of what a not-for-profit organization is, as defined by the Internal Revenue Service,

and those laws in the state of which they operate, perhaps they should also then be included in the exemption for not-for-profits, such as the universities. And, I guess that was the——

Mr. **FYGI.** I think——

Mr. **GRUCCI** [continuing]. Meat of my question.

Mr. **FYGI.** I think that Mr. Cunningham has raised a question that warrants careful thought and attention. And I have not yet had occasion personally to think it through completely yet. Among other reasons is that I don't personally have quite the same feel yet for the overall financial posture of Battelle to understand whether, and to what extent, it might, in fact, more closely resemble an industrial enterprise or more closely resemble a non-profit higher educational or charitable institution. So just to understand, myself.

Now, intuitively, there is a certain appeal to his suggestion, but I have not thought through completely enough nor have I had available yet the information that would probably aid such a consideration to form any even personal judgment on that. And, therefore, of course, neither has the Department yet formed any position on that element of his proposal.

Page 94 PREV PAGE TOP OF DOC

Mr. **GRUCCI.** During that deliberation, I would hope that you would look favorably upon the request. I thank you for your answer. I yield back my time, Mr. Chairman.

Chairman **BARTLETT.** Mr. Cunningham, did you have an observation?

Mr. **CUNNINGHAM.** Yes. I did. Thank you, Mr. Chairman. First of all, I would like to thank Mr. Gucci for his kind opening remarks there with respect to Battelle and its university partner, Stony Brook at—National Laboratory. In those remarks, you also pointed out the ultimate sanction for violation of DOE's nuclear safety rules—indeed, all of its safety rules—and that is termination of the contract for default, which is what our predecessor there experienced.

I would also like to point out that I understand Mr. Fygi is not completely understanding the nature of Battelle. As the Chairman earlier referred to as neither fish nor fowl. But in addition, we have to be concerned here about the two university partners that Battelle has, University of Tennessee at Oak Ridge, and Stony Brook University at Brookhaven. Those universities, unlike the other universities, would be subject to a payment of fines and penalties in the final analysis.

Of course, if the Department were to impose a civil penalty on the contractor at Brook Haven, for example, or at Oak Ridge, it would be imposed upon the contractor. But those contractors are limited liability companies with limited assets, and both the University and Battelle have guaranteed the obligations of those contractors to the Department of Energy. So in the event that a fine were to exceed, for example, the fee, it would very likely exceed the total assets available to that contractor, meaning that the University and Battelle would have to step in and accept responsibility. Thank you, Mr. Chairman.

Page 95 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Thank you. It has been the custom of the Science Committee to recognize Members alternately on the two sides of the aisle. We will honor that for the moment. But let me explain that, in the future, for those who are here at gavel fall, we will alternate two sides of the aisle. After gavel fall, it will be in the order of their appearance at the Committee. That seems fairer to me—that someone who has been here for 20 minutes should be recognized before someone who has just come. But for the moment, we need to honor the tradition of the Committee. So we will do that and recognize Mr. Matheson.

Mr. **MATHESON.** I yield back my time. I don't have any questions today.

Chairman **BARTLETT.** That was easy for us. Thank you. Okay. Mrs. Biggert.

Double Penalties

Mrs. **BIGGERT.** Thank you, Mr. Chairman. I have a question about—the University of Chicago submitted written testimony for this hearing also. And in it, they express—it expresses concern that this bill could create a double penalty for non-profit contractors. And they said that the contractors could be double penalized, once by the imposition of civil penalties, and then by a reduction or eliminated performance fee. And in the University of Chicago's case, the performance fee helps cover operating costs. And without the performance fee, the University could not cover its operating expenses. So my question to you, Mr. Fygi, is —Fygi—is it Fygi, sir?

Page 96 PREV PAGE TOP OF DOC

Mr. **FYGI.** No. It is Fygi.

Mrs. **BIGGERT.** Fygi. Oh. I was way off. I wasn't even close. Thank you. Fygi. Do for-profit contractors face similar double penalties?

Mr. **FYGI.** Yes. They would be susceptible. As I described a moment ago on how contractor performance routinely is evaluated, a year, in which—or a quarter, or a half year, in which a contractor's performance at a site was sufficiently lackluster, that lackluster performance could well also have included instances in which the contractor and its personnel committed violations of nuclear safety regulations that would make them exposed to a penalty, civil penalty, under the Price-Anderson Act. So both regimes can work together.

Penalty Levels

Mrs. **BIGGERT.** But how does the DOE then determine the amount of civil penalties?

Mr. **FYGI.** In the Price-Anderson regime, there is a statement of enforcement policy that is appended to the relevant regulations, codified in the Code of Federal Regulations, that describes how the enforcement program works.

Mrs. **BIGGERT.** Do you have—do you——

Mr. **FYGI.** I don't have them, nor do I profess to be an expert in the fine gradations. But, in essence, building upon the statutory criteria that are already in the Price-Anderson Act itself, violations are graded in terms of relative severities in that, relative severity has a bearing on the dollar amount of the penalty that is proposed to be imposed. Thereafter, during the iterative process that I described to you a moment ago, the conversations likely would also embrace not only what happened, why it happened, why the event was indicative of noncompliance with the Department's nuclear safety regulations, but also, all right, now, that we understand what the facts were and what the rules of engagement were, what should be the final result that, likewise, is an area of conversation and ultimate negotiation between the contractor and the enforcement office. And as I——

Mrs. **BIGGERT.** You——

Mr. **FYGI.** And as I indicated earlier, there has not been one instance in which there has been an administrative appeal of a final determination by the enforcement office.

Determining Penalties Assessed

Mrs. **BIGGERT.** About how many penalties have been applied?

Mr. **FYGI.** There have been 57 instances, and it may be 58 now—I think there may have been just another one recently announced in the last day—since 1996, the net dollar amount for for-profit contractors of civil penalties paid, was $3.745 million. The net amount of deemed civil penalties that were assessed, but not paid against these specifically exempt non-profit educational contractors that are mentioned in the statute, was $1.788 million. Now, again, that is a period of years beginning in 1996, which embraces 57 separate violations. Only one of those violations, concluded with a—as I briefly read the summary, concluded with a civil penalty of over a million dollars. They are typically in five- and six-figure dollar amounts.

Mrs. **BIGGERT.** Thank you. Then, Mr. Van Ness, is the University of California's contract structured in such a way that you would have a double penalty too?

Mr. **VAN NESS.** Yes. It is. I think that is one more reason to be—argue for the limitation.

Mrs. **BIGGERT.** Okay. And then, Mr. Cunningham, does Battelle ever find itself in a similar situation or are you able to cover all the operating expenses without the use of performance fees?

Mr. **CUNNINGHAM.** That is a variation on the question.

Mrs. **BIGGERT.** Right.

Mr. **CUNNINGHAM.** Battelle operates the Pacific Northwest National Laboratory without a partner.

And while we do get some performance fees, we are able to use other fees to cover those expenses which are not reimbursed by the government. But those expenses are substantial each year, and I think that is a point worth making when we talk about limiting penalties to the amount of the fee. It should be recognized that fee is not a profit, necessarily. We use our fee to cover many expenses which are unallowable, such as travel in excess of the Federal per diems, salaries in excess of what the Federal Government reimburses, expenses like that. But we have been able to do that out of our base fee at Pacific Northwest National.

Mrs. **BIGGERT.** Thank you. I see my time is up. Thank you, Mr. Chairman.

Page 99 PREV PAGE TOP OF DOC

Contract Awards for For-Profits Versus Non-Profits

Chairman **BARTLETT.** Thank you very much. Mr. Fygi, the numbers you gave us were something over a million dollars for potential penalties for the not-for-profit and something over $3 million for penalties for the for-profit. Those numbers have relevance only in terms of the size of those bases. What is the relative percentage of our contract dollars that go to for-profit as compared to not-for-profit so that we can look at the real significance of those numbers you gave us?

Mr. **FYGI.** Let me—sorry. The numbers that I gave you were cumulative that cover the period beginning in 1996.

Chairman **BARTLETT.** Yeah. Do you have the cumulative total contract prices during those periods so that we can put these numbers in perspective?

Mr. **FYGI.** Well, I don't have them——

Chairman **BARTLETT.** If you don't, if you could give that to us, that will be helpful to us in looking at the historical significance.

Mr. **FYGI.** Let me tell you what I do have, but, yes, of course, we will be happy to arrange the information in that fashion.(see footnote 10) But for just the year 2000, for example, Kansas City plant, the total available fee is $23 million. Just for the year 2000, the total available fee for the University of California at Los—for Los Alamos, is $8 million, of which 2.1 million is the base fee. Again, this is all for 1 year, of 2000. Okay.

Page 100 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** But what is the size of the contracts of those two?

Mr. **FYGI.** For that same period, the size of the contract for the Kansas City figure that I was the first to read, was $370,897,000. And the Los Alamos contract size for the same year was $1.345 billion. Those are examples. I think——

Chairman **BARTLETT.** Yeah. Okay.

Mr. **FYGI** [continuing]. You can see from those numbers that comparatively, where the—what I—the numbers that I was reading you was for a single fiscal year, 2000.

Chairman **BARTLETT.** I understand.

Mr. **FYGI.** Okay. And that——

Chairman **BARTLETT.** But with the totals for the period through which you accumulated that, we will be able to better understand the significance of that. Ms. Jones, let me ask you a question. Do you have, in your research, any indication as to the effect of the unlimited potential, unlimited exposure, of the for-profit? How much effect does that have on their bid price?

Ms. **JONES.** On the for-profits?

Page 101 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** Yes. The for-profits. You see, the for-profits, although historically, I understand, that the fines have never exceeded the profits for a given time period. That is historical. But the potential exposure is, I understand, without limit. Now, my question is, how much of a cushion have they built into their bid price, because the potential fine is so large, and how much has the taxpayer, therefore, paid because the potential exposure from their perspective is—could be unlimited?

Ms. **JONES.** I think that is a very good question, Mr. Chairman, and we have not looked at that specific issue. And I think you would have to look at fixed-price contracts. You would have to look at cost-plus contracts. And we have not done that kind of analysis to see if we could figure out, you know, how they were factoring that into the bid.

Mr. **FYGI.** And can——

Ms. **JONES.** It would be a very difficult thing to do.

Mr. **FYGI.** Can I address that, Mr. Chairman?

Chairman **BARTLETT.** Yes, sir.

Mr. **FYGI.** These contracts are not fixed-price contracts. The bid variable is not the dollar amount. These are cost-type contracts. And the bid variables or proposal variables, the evaluations done by the Department of competing contracts proposals, when there is one, tend to be more qualitative, in my experience. So that that observation would make even more difficult any of the kind of analysis that my colleague from the General Accounting Office just addressed.

Page 102 PREV PAGE TOP OF DOC

And it is not terribly—I am not sure that it is capable of discernment because every industrial company that chooses to compete to acquire one of these contracts, makes its own business judgments based on the fact that it is going to be a cost-reimbursement type contract, that inevitably there will be some costs that will not be reimbursable given the nature of the government regulatory regime that has been enacted over the last 30 years. That, in some respects, an entry into DOE's business raises certain prospects of larger corporate opportunities because of the proximity of the corporate presence to the government's research and development undertakings, particularly in the nuclear area.

But, likewise, conducting DOE business involves some real business risks, including the business risks one can associate with environmental liabilities, given the complex quality of the environmental enforcement profiles of many of these old sites that contain the residue of historical work done in the '40's and '50's, years before modern environmental control standards were routinely applied.

So it is a very complex business decision and it doesn't really have a bid variable. So I would caution you, Mr. Chairman, in propounding any such inquiry to the General Accounting Office, not to underestimate the magnitude of what you would be seeking from it.

Chairman **BARTLETT.** Yeah. I understand that. But having lived in that world, I know that you would be grossly irresponsible in bidding a contract if you did not—if you not include a consideration of the risk, of the exposure. So I know that companies do that because I have been there and I have submitted these bid proposals, and I know that one does that.

Page 103 PREV PAGE TOP OF DOC

And my question is, because the potential exposure is essentially unlimited, although historically, it has never been excessive, to what extent has the taxpayer paid more? And that may be that we are going to have to make a presumptive judgment on that. But I am just looking at whether or not we can protect the interests of the taxpayer, protect the interests of the community by a somewhat different regimen than we now have for the assessment of fees to the—for the for-profit organizations. Because I know, having lived in that world, that you would be irresponsible if you did not consider your exposure.

So I know they consider exposure and I know that one way or another they build that into their contract. It may be difficult to discern, but they sure—they certainly do it because they wouldn't be responsible business people if they didn't do it. And if they weren't responsible, they probably wouldn't—still wouldn't be in business. Ms. Jones.

Ms. **JONES.** I was just going to make one more comment, Mr. Bartlett. And that is that, you know, when you are building that business model that you are talking about, I would assume that companies would look back at the historical pattern, because that is really all they have to go on. And given the fact that the historical pattern has been that the penalties have been relatively small, relative to the total fee, I would imagine that would be a factor in their decision-making.

Chairman **BARTLETT.** That would be one factor. And, you know, a new pharaoh may arise who didn't know Moses and so it could be different in the future and I am sure they also built that in. Let me ask my

colleagues——

Page 104 PREV PAGE TOP OF DOC

Mr. **FYGI.** Mr. Chairman, forgive me for——

Chairman **BARTLETT.** Sure. Okay.

Mr. **FYGI** [continuing]. Interrupting. My colleague to my rear has brought to my attention a dereliction on my part in that, I did not previously observe that the statute, as it now exists, does limit civil penalties to $110,000 per violation per day.

Chairman **BARTLETT.** Per day.

Mr. **FYGI.** Right.

Chairman **BARTLETT.** That is essentially—given enough time, essentially unlimited. Isn't it?

Mr. **FYGI.** Well, it is certainly big bucks for my budget. But in the interest of completeness, I felt constrained to——

Chairman **BARTLETT.** Okay. Yeah. I noted that in the testimony and in the legislation itself. Thank you. In fact, I saw two figures, 110,000 per day and 100,000 per day, and I wasn't sure which was the correct figure. I saw both of those. And we will find out which is occurring. But that is per day.

Mr. **FYGI.** That is per day.

Page 105 PREV PAGE TOP OF DOC

Chairman **BARTLETT.** That can get big in 6 months or so. Well, I thank you all very much. Let me ask my colleagues if they have any further questions or observations. And I want to thank you all very much. If you don't—and I would ask the members of our Panel, if you could be so kind as to provide us with any suggestions you have for possibly improving the legislation, in writing, so that we will not misunderstand your intent. And with that, thank you very much. I want to thank my colleagues very much. And we will be in adjournment.

Mr. **FYGI.** Thank you, Mr. Chairman.

Chairman **BARTLETT.** Thank you.

[Whereupon, at 2:59 p.m., the Subcommittee was adjourned.]

Appendix 1:

Answers to Post-Hearing Questions Submitted by Members of the Subcommittee on Energy

ANSWERS TO POST-HEARING QUESTIONS

Responses by Eric J. Fygi, Acting General Counsel, U.S. Department of Energy

REPUBLICAN MEMBER QUESTIONS

Status of DOE Rulemaking on Non-Profit Civil Penalties

Page 106 PREV PAGE TOP OF DOC

Q1. You noted in your testimony that Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 made non-profit contractors, subcontractors, and suppliers subject to civil penalties not to exceed the total amount of fees paid by the DOE to each such entity in the fiscal year for violations of regulations relating to the safeguarding and security of Restricted Data. Has DOE started to implement this provision? If not, why not, and if so, when will the rulemaking be completed?

A1. The Department's Office of Security expects to issue a Notice of Proposed Rulemaking in December 2001 to adopt procedures for issuance of civil penalties under Section 3147 of the National Defense Authorization Act for Fiscal Year 2000. After reviewing the public comments expected to be received on the proposed rulemaking, DOE will promulgate a final rule. The Department will begin implementation of Section 3147 when the rulemaking is complete.

DOE's Position on Non-Profit Civil Penalties

Q2. The Department has changed its position on the civil penalty for non-profit contractors (as stated in DOE's 1999 Report to Congress on the Price-Anderson Act) from wanting to continue and expand the exemption to its current position of agreeing to eliminate the exemption. Please explain why the DOE has changed its view.

A2. In its DOE Price-Anderson Act Report to Congress (Report), DOE supported continuation of the Congressional decision enacted in the Price-Anderson Amendments Act of 1988 not to apply civil penalties to non-profit contractors and their subcontractors and suppliers and recommended that all non-profit entities be treated the same. To prepare the Report, DOE sought public comment concerning whether non-profit contractors should continue to be exempt from civil penalties. 61 Fed. Reg. 68,272 (Dec. 31, 1997). The public filed comments indicating views which ranged from elimination to, retention of the exemption. DOE's non-profit contractors were the primary proponents of retaining the exemption.(see footnote 11)

Page 107 PREV PAGE TOP OF DOC

Subsequent to the submission of the Report, two major DOE non-profit contractors indicated that they could accept civil penalties if the amount of civil penalties was limited to the amount of the fee they received under their contracts with the Department.(see footnote 12) In addition, after the Report was issued, Congress decided to impose potential liability for civil penalties on non-profit entities for information security violations in a manner similar to civil penalties under the Price-Anderson Act. For violations of regulations relating to the safeguarding and security of Restricted Data, section 3147 of the National

Defense Authorization Act for Fiscal Year 2000 made non-profit contractors, subcontractors, and suppliers subject to civil penalties not to exceed the total amount of fees paid by the DOE to each such entity in a fiscal year.

As a result of these developments, DOE modified the position in the Report and stated that it could support an approach of imposing civil penalties on non-profit entities up to the amount of fee paid under the contract with DOE.(see footnote 13) This position, while different in scope, is consistent with the overall rationale articulated in DOE's Report that non-profit entities have limited financial resources for paying civil penalties. Moreover, imposing limited civil penalties on non-profit entities up to the amount of fee paid is consistent with DOE's suggestion in the Report that consideration should be given to a generic exemption to treat all non-profit DOE contractors, non-profit subcontractors and non-profit suppliers the same.

Discretionary Fees

Q3. With respect to "discretionary fee," you said that "The term "discretionary," is not a term of art used in procurement law and regulations." What are the other types of fees DOE contractors receive and how are those fees determined?

Page 108 PREV PAGE TOP OF DOC

A3. The Department establishes two primary types of fees in its contracts. Whether a contractor actually receives fee depends on the type of fee and the contractor's performance. In Fixed Fee type contracts, the contractor receives the pre-determined fee amount for satisfactory performance. In Performance-Based Incentive type contracts, the Department generally establishes a maximum fee amount that the contractor subsequently may earn depending on its actual performance against pre-determined criteria. This type of contract may also contain a base fee. The base fee, which typically is a small percentage of the maximum fee, is similar to a fixed fee in that the contractor receives the base fee if performance is satisfactory. However, DOE's major site and facility contracts, regardless of the fee structure, contain a provision that permits DOE to reduce the fixed fee due to the contractor's poor performance in the areas of safety and security.

Civil Penalties

Q4. How does DOE determine the amounts of the civil penalties?

A4. The criteria DOE uses to determine civil penalties are found in Section 234A of the Atomic Energy Act and are documented in 10 CFR 820, *Procedural Rules for DOE Nuclear Activities and the General Statement of Enforcement Policy.* The maximum civil penalty is $110,000 per day for each violation. The *Enforcement Policy* specifies that the base civil penalty is $110,000, and that all or part of that amount will be applied to each violation. The criteria set forth in the Section 234A of the Atomic Energy Act include "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

As part of the investigation and enforcement process, DOE evaluates the actual or potential safety consequences of the violation to workers and the public. DOE also considers how long the problem has existed, how it was identified (whether by the contractor or others), if it is recurring, and the effectiveness of any corrective actions that may have taken. The Enforcement Policy establishes three levels of severity for nuclear safety violations: Severity Level I is reserved for violations that involve actual or highly-likely harm to workers or DOE facilities or the public. Severity Level II violations are less significant, but represent problems that could lead to an adverse impact on public or worker safety at DOE facilities. Severity Level III violations are the least significant but have more than minor concern.

DOE can mitigate civil penalties based on several factors: whether the contractor proactively identified the problems before the event, whether the contractor promptly reported the problems to DOE, and whether the contractor took effective corrective actions. Conversely, DOE can escalate a civil penalty if corrective actions are not prompt and unacceptable or only minimally acceptable.

Q5. When did DOE begin assessing civil penalties, how many penalties have there been and what is the total dollar amount of these penalties?

A5. DOE assessed the first civil penalty in 1996 and has since issued 61 enforcement actions. Of these, 46 actions included civil penalties that totaled $6,262,500. This total includes $1.9 million that was waived due to a statutory exemption for non-profit DOE laboratories.

DOE Contract Expiration

Q6. H.R. 723 provides that its amendments shall not apply to any violation of the Atomic Energy Act of 1954 occurring under a contract entered into before the bill's date of the enactment. Which DOE contracts with currently exempted DOE contractors are scheduled to expire over the next few years?

A6. The Price-Anderson Amendments Act of 1988 specifically exempted seven contractors and their subcontractors and suppliers for work at the named sites. At those seven sites, two contracts are no longer being performed by the named contractors. The status of the seven specific contracts is:

(1) The University of Chicago for activities associated with Argonne National Laboratory. This contract expires on September 30, 2004.

(2) The University of California for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory. The contracts for the Los Alamos National Laboratory and the Lawrence Livermore National Laboratory expire on September 30, 2005. The Lawrence Berkeley National Laboratory contract expires on September 30, 2002.

(3) American Telephone and Telegraph Company and its subsidiaries for activities associated with Sandia

National Laboratories. This contract is no longer in effect. The current contractor for the management and operation of the Sandia National Laboratories is Sandia Corporation, a subsidiary of Lockheed Martin Inc. Its contract expires on September 30, 2003. However, Sandia Corporation is not exempt from civil penalties.

Page 111 PREV PAGE TOP OF DOC

(4) University Research Association, Inc. for activities associated with Fermi National Laboratory. This contract expires on December 30, 2002. The Department has recently concluded negotiations with the contractor for a five-year extension to the contract; however, the contractual modification effecting the extension has not yet been executed.

(5) Princeton University for activities associated with Princeton Plasma Physics Laboratory. This contract was recently extended for a five-year period and expires on December 31, 2006.

(6) The Associated Universities, Inc. for activities associated with the Brookhaven National Laboratory. This contract is no longer in effect. The current contractor for the management and operation of the Brookhaven National Laboratory is Brookhaven Science Associates, Inc., which is not exempt from civil penalties. The contract with Brookhaven Science Associates expires on September 30, 2003.

(7) Battelle Memorial Institute for activities associated with the Pacific Northwest Laboratory. This contract expires on January 4, 2003.

Bayh-Dole Definition of Non-Profit Organizations

Q7. Mr. Cunningham suggested using the Bayh-Dole legislation definition of a non-profit organization. What is your reaction to his suggestion?

A7. The exemption for non-profit entities from civil penalties primarily recognizes that non-profit institutions providing services as government contractors provide a public service to the government and that they do not have the same resources available to pay civil penalties as for-profit contractors.

Page 112 PREV PAGE TOP OF DOC

In the Price-Anderson Amendments Act of 1988, Congress required DOE to determine by rule whether non-profit educational institutions should receive automatic remission of civil penalties under that Act but did not provide guidance how "non-profit" should be defined. In adopting regulations to implement the Act, DOE defined non-profit educational institutions as any educational institution "that is considered non-profit under the United States Internal Revenue Code." 10 C.F.R. §820.20(d).

To define non-profit organization, the Bayh-Dole legislation also refers to the Internal Revenue Code. It adds a phrase, however, to include "any non-profit scientific or educational organization qualified under a state non-profit organization statute." 35 U.S.C. §200, *et seq.* That definition would seem to cover certain DOE's contractors that are non-profit institutions under state law but are not exempt under the Internal Revenue Code. While DOE has referred to the Internal Revenue Code to define non-profit entities in its

regulations, other definitions of non-profit entities could be used to accomplish the same purposes.

DEMOCRATIC MEMBER QUESTIONS

Civil Penalties on Non-Profit Organizations

Q1. What evidence does DOE have to support its contention in the Report to Congress on the Price-Anderson Act that "major universities and non-profits would be unwilling to put their educational endowments at risk for contract-related expenses such as civil penalties"?

Page 113 PREV PAGE TOP OF DOC

Similarly, what evidence is there that DOE would have to increase the fees its pays to its non-profit contractors to compensate for the additional risk that civil penalties could be assessed"?

A1. DOE based this position on its substantial experience in contracting with non-profit institutions for management and operation of its major nuclear facilities and national laboratories for over fifty years. DOE's contractors have often contended that they would need increased fees to cover the additional risk of civil penalties and certain other costs. Comments expressing such views have been received in negotiations for contracts and contract modifications, contract reform rulemakings, and efforts to shift costs into the unallowable cost category.

Violation Subject to Civil Penalties

Q2. What types of violations are subject to the civil penalties under Section 234A of the Atomic Energy Act of 1954? What types of violations occur at nonreactor facilities that handle nuclear materials?

A2. DOE enforces several substantive nuclear safety rules under authority of the Atomic Energy Act, including rules entitled *Occupational Radiation Protection* (10 CFR 835), and *Nuclear Safety Management* (10 CFR 830), among others. Violations of the DOE nuclear safety requirements in these rules are subject to civil penalties. The DOE *General Statement of Policy Enforcement* (Appendix to 10 CFR Part 820) states that civil penalties will typically be assessed for Severity Level I or II violations but not for Level III violations. Before assessing a civil penalty, DOE will carefully consider all factors established by Sec. 234A of the Atomic Energy Act and the Enforcement Policy relevant to the violation, including possible mitigation of all or part of the penalty or escalation if the circumstances require.

Page 114 PREV PAGE TOP OF DOC

While there are several operating nuclear reactors in the Department of Energy, DOE's nuclear activities typically focus on nonreactor facility operations, research, and decommissioning and deactivation activities involving plutonium or other transuranics. Some of the most 'safety significant' events that have occurred at DOE in recent years involved nonreactor nuclear facilities. Certain events have resulted in significant worker doses from radiological material which have exceeded federal regulations. The types of violations have included failure to apply appropriate work controls for worker safety, failure to implement and follow the site's established safety procedures, and failure to correct long-standing deficiencies.

Size of Discretionary Fees Compared to Penalties Assessed

Q3. What is the maximum discretionary fee typically included in non-profit DOE contracts? How does this compare with the typical civil penalties that have been imposed on the non-exempt contractors in the past?

A3. The average fee included in DOE's major site and facility contracts with non-profit organizations is .88% percent of budget. This percent is the average of the percentages in the 12 non-profit contract fees for FY 2000. The lowest fee percent was zero and the highest was 2.5%. The budgets for these contracts ranged from $1,345,000,000 to $22,000,000 and the fees from $16,040,000 to zero. However, there is no direct correlation between the budget and the amount of fee, i.e., a higher budget amount does not equate to a higher fee percentage. The range of individual civil penalties imposed on non-exempt contractors in the past has been from $100,000 to $200,000.

Page 115 PREV PAGE TOP OF DOC

Penalties and Compliance

Q4. The University of California referenced their recent violations in their testimony. What is the overall record of nuclear safety compliance among the various types of DOE contractors? Is there any clear indication that compliance is different between contractors who are subject to civil penalties and those who are exempt?

A4. Nuclear safety incidents have occurred at both exempt and non-exempt nuclear facilities across the complex. These incidents involved unplanned radiation exposures (including some that have exceeded regulatory limits), unplanned challenges to nuclear safety systems due to compliance failures, and fundamental problems involving the failure to perform work in accordance with established safety requirements. None of the incidents has resulted in substantial risks to the public. Over the last several years, the complex has shown a continual positive trend, with the number of radiation exposures decreasing and the number of events declining. However, a number of continuous improvement initiatives are underway in the DOE complex to provide safety performance.

Approximately 25 percent of the contractors, subcontractors and suppliers performing nuclear activities at DOE sites are exempt from civil penalties. The exempted contractors have been involved in 20 percent of the total number of enforcement actions. They have reported approximately 15 percent of the total number of noncompliance issues formally identified to DOE's Office of Price Anderson Enforcement. A comparison of overall safety performance and conclusions with respect of the regulatory performance between exempt and non-exempt contractors, are difficult because several of the exempt contractors perform limited research work that involves significantly fewer hazards than some of the non-exempt contractors.

Page 116 PREV PAGE TOP OF DOC

Source of Funds for Penalty Payments

Q5. From what source would non-profit contractors find the funds to pay civil penalties assessed by DOE?

Would the contractor otherwise have spent such funds on the mission of the DOE facility it was operating?

A5. Non-profits would have to find funds to pay civil penalties from any fee DOE pays under their contracts, their endowments, or other sources of funds congruent with their non-profit status. Generally, the contractor would not otherwise have spent such funds on the mission of the DOE facility it was operating, unless it voluntarily chose to do so. Non-profits may spend fee or endowments as they see fit or as otherwise directed by non-DOE entities.

Penalty Payments by Non-Profit Entities

Q6.1. Is DOE likely to be more willing to impose civil penalties than it has been to reduce fees to punish nuclear safety violations?

A6.1. DOE imposes civil penalties and invokes contract sanctions when the circumstances dictate. However, the process and objectives of these two management tools are quite different in scope and application.

The deliberative process the DOE Office of Price-Anderson Enforcement uses to decide whether to impose civil penalties is based on established criteria linked directly to the determination of actual or potential safety significance. This decision is made by a single office using a single set of criteria that is consistently applied across the DOE complex and based on objective evidentiary standards. Decisions are based on these nuclear safety criteria without regard to mission and schedule accomplishments or failures.

Page 117 PREV PAGE TOP OF DOC

By contrast, DOE's decision to reduce contractual fees for safety violations is made by contracting officers, in consultation with DOE Program and Field Office management, decisions are premised on performance objectives and expectations that are balanced against a broad array of both nuclear and non-nuclear safety considerations. These elements are established through negotiations under individual contracts by the various Program offices and the involved contractors.

Q6.2. Are DOE's decisions on civil penalties made independently from decisions on performance fees made by program offices.

A6.2. The legislative history of the Price Anderson Amendments Act and the Preamble to 10 CFR 820 (Procedural Rule) make clear that enforcement actions are to be independent of contractual considerations. The Office of Price Anderson Enforcement takes enforcement actions based on specific evaluation criteria related solely to safety significance and not based on what may or may not occur under separate contract provisions. This process ensures predictability and stability in the enforcement process. At the same time, the Office of Price Anderson Enforcement works closely with the various field and program offices in making its determinations to ensure that those responsible for managing DOE's contracts are fully cognizant of the nuclear safety issues.

Q6.3. How are decisions on civil penalties and performance fees made within the new National Nuclear Security Administration (NNSA), which independently administers DOE's defense programs?

A6.3. NNSA establishes performance objectives and expectations for all of its contractors in the environmental, safety and health aspects of its operations. Selected objectives and expectations are included in the annual contractor performance evaluation plans and each contractor's performance against those objectives has a bearing on the amount of fee that it earns. Moreover, each NNSA contract includes a Conditional Payment of Fee clause that can cause the contractor to lose up to all otherwise earned fee for catastrophic events such as a fatality, serious injury or illness, loss of control over classified or special nuclear material, or significant damage to the environment. NNSA has established a corporate process for its evaluation of contractor performance. The NNSA Management Council, chaired by the Principal Deputy Administrator, will review and approve all of the recommended performance ratings and fee awards for our eight facility management contractors following the end of the fiscal year. This will ensure a consistent and fair approach to these important decisions, and ensures that senior NNSA management is holding our contractors accountable for their performance.

NNSA's field offices and the NNSA Office of Environment, Safety and Health have on-going operational awareness and conduct line management oversight of contractor performance against our objectives and expectations, and against all rules and policy directives.

Price-Anderson Amendments Act (PAAA) applies to all of our contractors with the exception that the civil penalties associated with the Act do not apply to our two non-profit University of California Laboratories: Los Alamos National Laboratory, and Lawrence Livermore National Laboratory. All of the other for-profit contractors are subject to civil fines and penalties. All of our contractors, including the University of California laboratories are subject to Notices of Violation under the Price Anderson Act, and we believe these are a significant accountability tool and motivator of safe operations even without the civil fines and penalties. In accordance with a memorandum of understanding between NNSA and the DOE Office of Environment, Safety, and Health, potential PAAA non-compliances are investigated by the Office of Enforcement with NNSA cooperation and coordination. This is the same office that conducts these investigations for the rest of the Department, thereby ensuring a consistent application of the nuclear safety rules. However, in the case of NNSA, Notices of Violation are approved by the NNSA Administrator, in accordance with the NNSA's enabling legislation."

Civil Penalties

Q7. The current non-profit contractor for Brookhaven National Laboratory, Brookhaven Science Associates, is fully subject to civil penalties for nuclear safety violations because it is not on the statutory exemption list nor is it an educational institution with automatic penalty remission. Is this situation an indicator that non-profit institutions would be willing to operate DOE facilities without special limits on civil penalties?

A7. DOE's termination of the previous contract with Associated Universities Inc. before its normal termination date created an unusual situation, which required a expedited solicitation process for a new

contractor and provisions for transition to new management. The new contractor, Brookhaven Sciences Associates, a consortium of institutions, was created to bid for the new contract. This outcome is not necessarily a predictor of what non-profit contractors would do under other circumstances.

Q8. The statutory exemption for certain DOE contractors also applies to their subcontractors, whether they are for-profit or non-profit. Would elimination of the exemption make it more difficult for the currently exempt contractors to retain their for-profit subcontractors or hire new ones under future contractors with DOE?

A8. Subcontractors and suppliers of the statutorily-identified contractors, whether they are for-profit or non-profit, are exempt from civil penalties. However, civil penalties currently apply to the for-profit subcontractors and suppliers of educational non-profits that are covered by the automatic remission and this has worked well. This experience indicates that elimination of the exemption would not make it more difficult for the currently exempt contractors to retain their for-profit subcontractors or hire new ones under future contractors with DOE if these for-profit subcontractors were subject to civil penalties on the same basis as other for-profit contractors, subcontractors and suppliers.

Page 120 PREV PAGE TOP OF DOC

Discretionary Fees and Civil Penalties Under Price-Anderson

Q9. Exempt DOE contractors already risk losing discretionary fees, which are based on performance. If civil penalties are limited to the level of discretionary fees, how much additional safety incentive is being provided?

For example, if a non-profit contractor performed extremely poorly and lost all of its discretionary fees during a particular evaluation period, would no civil penalties then be possible? Or could civil penalties be assessed up to the level of all past and future discretionary fees awarded under the contract.

A9. If civil penalties are limited to the level of discretionary fees earned, then the monetary safety incentive provided would depend on the amount of fee earned by the contractor. If the contractor earns no fee due to poor performance (including poor performance in the safety and health area), then the imposition of civil penalties would provide no additional safety incentive. Non-monetary safety incentives, however, might still affect contractor actions. Non-profit organizations would not, for example, wish to be publicly embarrassed by DOE issuing notices of violations against them. Such notices are publicly available information.

ANSWERS TO POST-HEARING QUESTIONS

Responses by Ms. Gary L. Jones, Director, Natural Resources and Environment, U.S. General Accounting Office

Page 121 PREV PAGE TOP OF DOC

REPUBLICAN MEMBER QUESTIONS

Appropriateness of Exemption for Civil Penalties for Non-Profit Entities

Q1. In its 1999 report and two previous testimonies, GAO has urged the Congress to eliminate the exemption from civil penalties for violations of nuclear safety requirements, that certain contractors, primarily non-profit educational institutions, have enjoyed since 1988, for their activities operating DOE's laboratories. Please explain why you believe the exemption is no longer appropriate, and how contractors now benefiting from the exemption will be affected if it is eliminated.

A1. The primary reason for exempting certain non-profit contractors from paying the civil penalties—that the contractors operating the national laboratories received no fees in addition to reimbursable costs—no longer exists. During the initial congressional debates that led to the exemption, there was concern that these contractors would be unwilling to assume the financial risk of being subject to penalties and thus put the assets of their organizations at risk. In the absence of a fee in addition to reimbursable costs, the contractors would have no contract-generated funds to cover civil penalties, and thus might leave the federal research field rather than accept financial exposure. Since virtually all of DOE's non-profit contractors now receive a fee in addition to reimbursed costs, the non-profit contractors would have contract-generated funds available to pay any civil penalties. Eliminating the exemption would result in non-profit contractors who violate nuclear safety requirements having to use fee to pay the civil penalties assessed.

Eliminating the exemption would provide for more equitable treatment for DOE's contractors. Currently DOE's for-profit contractors and several of its non-profit contractors are subject to civil penalties for nuclear safety violations, while the non-profit educational institutions are exempt. Removing the exemption would also provide additional incentives for the affected contractors to comply with DOE nuclear safety requirements and thus avoid the civil penalties.

Page 122 PREV PAGE TOP OF DOC

Penalties Based on Discretionary Fees

Q2. Your primary concern with H.R. 723 appears to be with the term "discretionary fee". Please elaborate on your reasons for this concern.

A2. The meaning of the term "discretionary fee" is unclear and might be interpreted to mean all or only a portion of the fee paid. Fees available to contractors can include a base fee and an incentive fee based on performance. If only the incentive portion of the fee is subject to civil penalties, the ability to impose penalties may be too limited. For example, two of the non-profit contractors receive only a base fee (and no incentive fee) and, therefore, would continue to be exempt from paying civil penalties. Also, contractors may try to limit their exposure to civil penalties by negotiating to shift more of their total fee to a base fee and away from an incentive fee. Such an action could undermine both the penalty provision and DOE's emphasis on performance-based contracting because a lower amount of fee would be at risk and depend on the contractor's performance.

Q3. Would there be any problems or inequity if, for the non-profit contractors, their entire fee (base fee plus incentive fee) was considered to be available to pay penalties assessed for violations of DOE's nuclear safety requirements?

A3. If the entire fee (base plus incentive fee) for non-profit contractors was available to pay penalties assessed for violations of DOE's nuclear safety rules, this would reduce the effects of two existing inequities between for-profit and non-profit contractors. First, there is no statutory limit on the total amount of civil penalties that can be assessed against for-profit contractors, which could put both total earned fee and corporate assets at risk. Second, not all non-profit contractors have incentive fees, so making the entire fee available to pay civil penalties would ensure more equitable treatment of all non-profit contractors. Using the entire fee would also be consistent with the precedent established in the National Defense Authorization Act for Fiscal Year 2000 for violations of DOE regulations on safety and security of restricted data. The system of civil penalties for security violations limits the amount of payment for penalties made by certain non-profit contractors to the total (entire) fees paid to that contractor in that fiscal year.

Page 123 PREV PAGE TOP OF DOC

If problems or inequities were to arise, they could be addressed on a case-by-case basis. When deciding on the amount of civil penalty to be assessed for a violation, the Secretary has the authority and discretion to consider such factors as the contractor's ability to pay and the effect of the civil penalty on the contractor's ability to continue to do business. Given this flexibility, there should not be a situation where a non-profit contractor had its assets placed at risk because of having to pay the civil penalty. In fact, several of the non-profit contractors have stated that they would be willing to pay civil penalties up to the extent of their available fee.

DEMOCRATIC MEMBER QUESTIONS

Size of Discretionary Fees Compared to Penalties Assessed

Q1. What is the maximum discretionary fee typically included in non-profit DOE contracts? How does this compare with the typical civil penalties that have been imposed on the non-exempt contractors in the past?

A1. The amount and type of fee included in non-profit contracts varies widely depending upon the size of the contract and the type of work being done. Total fees may include a base amount and an incentive portion that is based on performance. If "discretionary" fee is meant to be the incentive portion, two of DOE's non-profit contractors—Princeton University and Universities Research Association—have no available incentive fee, the fee amounts are all considered base fee. For the remaining non-profit contractors, the available incentive fees for fiscal year 2000 range from $1.18 million for the University of California at Lawrence Berkeley National Laboratory to $7 million for Battelle Memorial Institute at the Pacific Northwest National Laboratory.

Page 124 PREV PAGE TOP OF DOC

DOE assesses civil penalties against all contractors, for-profit and non-profit, for violations of nuclear safety rules, but does not collect the penalties assessed against the non-profits. Since the Price-Anderson enforcement program began in 1996, the total civil penalties assessed against a non-profit contractor during

any given year were considerably less than the incentive fee available in the contract. Specifically, between 1996 and August 2001, 12 civil penalties were assessed against, but not collected from, non-profit contractors. These penalties ranged from $37,500 to $605,000, with an average of about $163,000.

In the case of for-profit contractors, their total fee (base and incentive) and assets are available to pay civil penalties. Similar to the situation that exists for the non-profit contractors, the civil penalties assessed against a for-profit contractor in any given year were always less than the total available fees for that year. Between 1996 and August 2001, there were a total of 34 civil penalties assessed against for-profit contractors for nuclear safety violations. The civil penalty amounts ranged from a low of $5,000 to the highest of $1,045,000 assessed in August of 2000, with an average of about $127,000. For fiscal year 2000, the total fees available to for-profit contractors range from $4.6 million for Lockheed Martin Energy Systems at the Oak Ridge site to $61.5 million for Westinghouse at the Savannah River site.

Penalties and Compliance

Q2. The University of California referenced their recent violations in their testimony. What is the overall record of nuclear safety compliance among various types of DOE contractors? Is there any clear indication that compliance is different between contractors who are subject to civil penalties and those who are exempt?

Page 125 PREV PAGE TOP OF DOC

A2. Data on violations of nuclear safety requirements is only one measure of nuclear safety compliance. Although these violations are one indicator of nuclear safety problems at a facility, the record of violations alone is not sufficient to make a clear determination as to the relative compliance of contractors subject to and exempt from civil penalties. Nevertheless, some of the non-profit contractors that are exempt from civil penalties have had significant violations of nuclear safety requirements. For example, during the five years of the Price-Anderson enforcement program, there have been only three severity level I violations of nuclear safety rules (the most significant category which represents violations that involve actual or high potential for an adverse impact on the safety of the public or workers at DOE facilities). Two of the three severity level I violations occurred at DOE laboratories operated by non-profit contractors, including one in January 2001 which was identified as one of the 10 worst radiological intake events in the United States in over 40 years.

Source of Funds for Penalty Payments

Q3. From what source would non-profit contractors find the funds to pay civil penalties assessed by DOE? Would the contractor otherwise have spent such funds on the mission of the DOE facility it was operating?

A3. DOE pays a fee, in addition to reimbursing allowable costs, to virtually all of its major contractors, including the non-profit contractors. This fee is used by the non-profit contractors to cover certain non-reimbursable contract costs such as lobbying and entertainment expenses and to conduct other laboratory research at the discretion of the laboratory director. If a portion of the fee was used to pay civil penalties assessed by DOE, less of the fee would be available for this laboratory-directed research.

Penalty Payments by Non-Profit Entities

Q4. DOE's Report to Congress on the Price-Anderson Act *contends that contractual provisions, such as reduction of discretionary fees, "are a better mechanism than civil penalties for making non-profit contractors more accountable for safety". However, the House Commerce Committee's report on H.R. 3383 in the 106th Congress noted that the subcommittee hearings had "provided several examples of instances where poor safety performance by non-profit contractors was tolerated without reduction in the contractor's performance fee."*

Q4.1. Is DOE likely to be more willing to impose civil penalties, than it has been to reduce fees to punish nuclear safety violations?

A4.1. DOE may have more flexibility to impose civil penalties than to reduce fees because of nuclear safety violations. In its *Report to Congress on the Price-Anderson Act*, DOE stated that its authority to impose civil penalties had proven to be a valuable tool for increasing the emphasis on nuclear safety and enhancing the accountability of its contractors. We agree that the use of civil penalties provides an additional independent mechanism to encourage contractor compliance with nuclear safety rules. Also, the enforcement actions and imposition of civil penalties can be taken without waiting for the annual evaluation of the contractor's overall performance.

DOE has also reduced incentive fees paid to a contractor for unacceptable safety performance, including nuclear safety violations. However, the performance incentives and associated fees in DOE's contracts for operating its facilities tend to be heavily weighted towards accomplishing a scope of work to meet DOE's objectives. Usually a small portion of the fee is associated with environment, safety, and health objectives. Therefore, any fee reductions for poor safety performance usually represent a small percentage of the total fee available.

Q4.2. Are DOE's decisions on civil penalties made independently (by the Office of Environment, Safety, and Health) from decisions on performance fees made by program offices?

A4.2. Yes, enforcement actions taken under the Price-Anderson Amendments Act and the assessment of civil penalties are made by DOE's Office of Price-Anderson Enforcement under the Assistant Secretary for Environment, Safety, and Health (ES&H). The Assistant Secretary for ES&H reports directly to the Deputy Secretary through a line of authority separate from DOE's program offices. The program offices, such as Environmental Management and Science, make the decisions on performance fees paid to the contractors. The performance fee decisions reflect how the contractor has done over the entire year rather than a specific incident.

Q4.3. How are decisions on civil penalties and performance fees made within the new National Nuclear Security Administration (NNSA), which independently administers DOE's defense programs?

A4.3. Similar to the situation within the rest of DOE, decisions on civil penalties within NNSA are made independently from decisions on performance fees. Under a January 2001 Memorandum of Understanding, between DOE and NNSA, DOE's Office of Price-Anderson Enforcement continues to be the primary office for conducting investigations and identifying potential violations of nuclear safety requirements at NNSA facilities. When a potential violation is identified, DOE's Office of Price-Anderson Enforcement provides a recommendation to the NNSA Administrator regarding an enforcement action and associated civil penalties. The NNSA Administrator makes the final determination of the violation and approves the enforcement action.

Page 128 PREV PAGE TOP OF DOC

As in DOE, decisions on performance fees within NNSA are made by the program offices, such as Defense Programs or Defense Nuclear Nonproliferation. Program office personnel in Headquarters and field offices evaluate the contractor's performance for the year and determine the extent to which the contractor met performance goals. This evaluation is used to determine the amount of performance fee earned.

Civil Penalties

Q5. The current non-profit contractor for Brookhaven National Laboratory, Brookhaven Science Associates, is fully subject to civil penalties for nuclear safety violations because it is not on the statutory exemption list nor is it an educational institution with automatic penalty remission. Is this situation an indicator that non-profit institutions would be willing to operate DOE facilities without special limits on civil penalties?

A5. Yes, non-profit institutions are likely to be willing to accept the risk of civil penalties in order to operate DOE facilities. In addition to the Brookhaven National Laboratory example, UT-Battelle began operating the Oak Ridge National Laboratory for DOE in April 2000. Battelle Memorial Institute, which is a partner in both Brookhaven Science Associates and UT-Battelle, is currently exempt from civil penalties at Pacific Northwest National Laboratory under the Price-Anderson Amendments Act of 1988. Though exempt from civil penalties at one laboratory, Battelle was willing to enter into two other contracts with DOE, which make Battelle subject to civil penalties. This seems to indicate that at least some non-profit institutions would be willing to operate DOE facilities while being subject to civil penalties for violation of nuclear safety requirements. As with any potential contract, the non-profit institutions would take into account the allocation of risks between the contractor and DOE and factor those risks into any contract negotiations.

Page 129 PREV PAGE TOP OF DOC

Q6. The statutory exemption for certain DOE contractors also applies to their subcontractors, whether they are for-profit or non-profit. Would elimination of the exemption make it more difficult for the currently exempt contractors to retain their for-profit subcontractors or hire new ones under future contracts with DOE?

A6. It seems unlikely that eliminating the exemption would make it more difficult for the currently exempt contractors to retain or replace their for-profit subcontractors. Many of the companies that are currently exempt from paying penalties as subcontractors to the exempt non-profit contractors are already subject to civil penalties for their work at other DOE sites across the complex. Moreover, enforcement actions are generally taken and civil penalties assessed against the prime contractor, not the subcontractors. For example, of the 61 total enforcement actions taken by DOE's Office of Price-Anderson Enforcement between April 1996 and August 2001, only four of those involved civil penalties assessed against subcontractors.

Discretionary Fee and Civil Penalties Under Price-Anderson

Q7. Exempt DOE contractors already risk losing discretionary fees, which are based on performance. If civil penalties are limited to the level of discretionary fees, how much additional safety incentive is being provided?

For example, if a non-profit contractor performed extremely poorly and lost all of its discretionary fees during a particular evaluation period, would no civil penalties then be possible? Or could civil penalties be assessed up to the level of all past and future discretionary fees awarded under the contract?

Page 130 PREV PAGE TOP OF DOC

A7. Generally, the potential for receiving a civil penalty for violating a nuclear safety rule should provide an added safety incentive for DOE's non-profit contractors. It would be a rare situation for a DOE contractor to be unable to pay a civil penalty because it lost all of its incentive fee due to poor performance. In the five years since the Price-Anderson Enforcement program began in 1996, there have been no instances where a contractor lost its entire performance incentive fee.

An even greater incentive for safety would exist if the limit on civil penalties applied to total fee rather than just the incentive portion. Under those circumstances, a contractor who performed extremely poorly and lost all of the incentive fee, would still have fee at risk-its base fee. Setting the limit for penalties at total fees earned would be consistent with that provided for violations of security requirements established in the National Defense Authorization Act for Fiscal Year 2000.

H.R. 723 is not explicit regarding the time period for fees earned against which civil penalties could be applied. One approach could be to mirror the provisions on security requirements established in the National Defense Authorization Act for Fiscal Year 2000. That Act limited the amount of any penalty payment for violations of security requirements to the fees paid to the contractor in that fiscal year.

ANSWERS TO POST-HEARING QUESTIONS

Responses by Mr. Guy H. Cunningham, Associate General Counsel, Battelle Memorial Institute

Page 131 PREV PAGE TOP OF DOC

REPUBLICAN MEMBER QUESTIONS

Appropriateness of Exemption for Civil Penalties on Non-Profit Entities

Q1. You stated that neither Brookhaven Science Associates, which operates Brookhaven National Laboratory, or UT-Battelle, which operates Oak Ridge National Laboratory, is exempt from civil penalties. Would the change you suggested to the text of H.R. 723 have the effect of capping the amount of civil penalties that could be imposed on these two entities?

A1. Yes. Brookhaven Science Associates and UT-Battelle are limited liability companies structured as partnerships for federal income tax purposes. Both have been determined by the Department of Energy to be "non-profit organizations" within the meaning of the Bayh-Dole legislation (35 U.S.C. Sec. 200 *et seq*). Use of the Bayh-Dole definition of "non-profit organization" (35 U.S.C. Sec. 201(i)) in H.R. 723, as we have suggested, would assure that *all* non-profit contractors, including Brookhaven Science Associates and UT-Battelle, would have a cap on the amount of civil penalties that could be imposed upon them. That is because this definition includes, in addition to those organizations exempt from federal income taxation, *"any non-profit scientific or educational organization qualified under a State non-profit organization statute."*

Q2. Your testimony did not explicitly state that you favor eliminating the exemption for which you now qualify. Would you please state for the record your position on whether the exemption should be eliminated?

Page 132 PREV PAGE TOP OF DOC

A2. Battelle does not favor complete elimination of the exemption from civil penalties which now applies to certain non-profit contractors, including Battelle at the Pacific Northwest National Laboratory. However, it does support replacement of that exemption with a reasonable cap on the amount of civil penalties that may be imposed upon a non-profit contractor, as proposed by H.R. 723.

Treatment of Non-Profits Under H.R. 723

Q3. Your testimony illustrates an interesting feature of the proposed legislation. For example, Battelle Memorial Institute, currently exempted from paying civil penalties for its activities at the Pacific Northwest National Laboratory (PNNL), would be liable for paying penalties for violations of nuclear safety requirements at PNNL under H.R. 723. Furthermore, Battelle's liability at PNNL would not be limited by the amount of its annual fees earned. According to your testimony, this situation occurs because Battelle Memorial Institute, although a non-profit organization, is not tax-exempt under 501(c)(3) of the Internal Revenue Code. Would you elaborate on the possible inequities created by this proposed legislation?

A3. The inequity created by H.R. 723 as proposed is that some of the Department of Energy's non-profit contractors will be subjected to potentially unlimited civil fines and penalties while others will have that exposure capped at a ceiling determined by their fee. The differentiation is made solely on the basis of their tax status despite the fact that an organization can be non-profit without being tax exempt. Although Battelle, a non-profit charitable corporation chartered under the law of Ohio, was previously determined by the Congress to be exempt from civil penalties at the Pacific Northwest National Laboratory, it would lose that exemption (and the benefit of the proposed cap) because of its current lack of tax-exempt status.

Moreover, two other non-profit laboratory contractors, Brookhaven Science Associates and UT-Battelle, both composed entirely of non-profit members, would fail to qualify for the proposed cap because they are characterized as partnerships for federal income tax purposes.

Page 133 PREV PAGE TOP OF DOC

ANSWERS TO POST-HEARING QUESTIONS

Responses by Mr. Robert L. Van Ness, Assistant Vice President for Laboratory Administration, University of California

REPUBLICAN MEMBER QUESTIONS

Bayh-Dole Definition of "Non-Profit"

Q1. Mr. Cunningham suggested using the Bayh-Dole legislation definition of a non-profit organization. What is your reaction to his suggestion?

A1. Mr. Cunningham's suggestion has the effect of adding a small number of organizations, including Battelle Memorial Institute, that are non-profit entities under state, but not federal, law. The purpose of the limitation of fines and penalties in the proposed legislation is to continue to make it possible for non-profit organizations to operate federally funded research and development centers (FFRDCs) for the Department of Energy. The Bayh-Dole legislation similarly is intended to make it more desirable for non-profit organizations to engage in research. Accordingly it appears that these two objectives are consistent and the use of a common definition would be appropriate.

University of California Contract Structure

Q2. We understand that during recent negotiations to extend the contract with DOE for the Lawrence Livermore and Los Alamos National Laboratories, the University of California negotiated for a shift in its fees to include more of the total available fee as a guaranteed minimum fee and less of the fee in the incentive or at-risk portion of the fee. Please explain the logic behind this shift and what the University of California expects to achieve by having less of its total fee subject to a performance assessment.

Page 134 PREV PAGE TOP OF DOC

A2. The question oversimplifies the fee negotiations between the University of California and DOE. The University has taken on additional financial risk under the new contract and actual fees paid under the new contract may be lower than under the prior contract when applying historical performance ratings to the new fee schedule. Given this additional level of risk, the University asked and received a slightly higher amount of base fee. In the absence of base fee, the University could be put in a position where it had to transfer costs incurred on behalf of the United States from DOE to University students, donors and California state taxpayers.

Enforcement Actions Against the University of California

Q3. Under DOE's nuclear safety enforcement program, the University of California has received more enforcement actions for violations of nuclear safety requirements than the other DOE research laboratories. Why is the University of California the worst performer, and what are you doing to correct these problems?

A3. The question is an oversimplification of the facts. The University operates three national laboratories. Two of these facilities have been the subject of Price-Anderson nuclear safety enforcement actions. The operations that can involve Price-Anderson nuclear safety requirements are broader and more diverse at these facilities than those involving any other DOE contractor. Therefore, the total number of actions does not in and of itself provide a basis for concluding that the University is the worst performer in nuclear safety.

No single enforcement action was the most significant in DOE or among DOE research facilities. Since the roll-out of the DOE PAAA enforcement program in 1996, the University has embraced and proactively implemented the fundamental concept of voluntary reporting that is at the core of the DOE's program. In doing so, we have submitted reports with the full understanding that they may result in enforcement actions and we have taken corrective actions in advance of any reaction from DOE. We realize that the integrity of the PAAA program relies on this kind of proactive approach. The number of reported incidents demonstrates our commitment to safety.

Page 135 PREV PAGE TOP OF DOC

This University is correcting reported problems in a systematic way through implementation of Integrated Safety Management Systems at our Laboratories that have been reviewed and validated by the DOE. As part of these systems, the Laboratories conduct routine self assessments and other internal reviews, revise inadequate or outdated procedures, and make ongoing adjustments to operations to ensure that we are operating within the bounds established by 10 CFR 830 Nuclear Safety Management, and other applicable laws and regulations. We are revising the Quality Assurance program at our two Defense Laboratories and updating the safety analysis reports at our nuclear facilities to ensure that we are in compliance with the nuclear safety rule. We have an ongoing process to systematically review and accept applicable standards to ensure that we are operating to the standards that are necessary and sufficient for conducting our work. These and numerous other elements of our Integrated Safety Management systems have resulted in safety and environmental compliance records that rival the best private sector companies in the United States.

University of California Support for Repeal of Exemption From Civil Penalties

Q4. In your testimony, you stated that the University of California supports H.R. 723, which eliminates the exemption from paying civil penalties that you now enjoy. Please state for the record why the University of California believes that it should now begin to pay the civil penalties that it has for so long been exempt from paying.

A4. The University of California supports H.R. 723 as an alternative to eliminating the exemption from civil fines and penalties without limitation. The University continues to believe, as a general rule, that federal policy should avoid heavy reliance on financial rewards and penalties with respect to non-profit contractors. However, should the Congress decide to eliminate the current statutory exemption for non-profit

contractors, the University believes that, as proposed in H.R. 723, limiting the total amount of fines to be paid to the amount of discretionary fee paid to the contractor could afford the minimal necessary protection to non-profits to enable them to continue to be FFRDC operators.

Page 136 PREV PAGE TOP OF DOC

Self-Reported Incidents Under Price-Anderson

Q5. You stated in your testimony that "[n]early all" of the seven Price-Anderson Amendments Act enforcement incidents "were self-reported by the laboratories." Which were not?

A5. The one incident that was not self-reported concerned modification of a tritium monitor in a manner that was inconsistent with the quality assurance procedures of the organization that was responsible for the room where the monitors were located. This condition was identified by DOE during the fact gathering process related to a serious injury which occurred in 1996. The corrective actions related to this modification were merged with those implemented as a result of the serious injury incident.

DEMOCRATIC MEMBER QUESTIONS

Civil Penalties

Q1. The current non-profit contractor for Brookhaven National Laboratory, Brookhaven Science Associates, is fully subject to civil penalties for nuclear safety violations because it is not on the statutory exemption list nor is it an educational institution with automatic penalty remission. Is this situation an indicator that non-profit institutions would be willing to operate DOE facilities with out special limits on civil penalties?

A1. It is an indicator that BSA was willing to be an FFRDC operator without the exemption from or limitation on civil fines and penalties. However, one of the founding entities in BSA, Battelle Memorial Institute, is seeking to be included in the limitation proposed in H.R. 723.

Page 137 PREV PAGE TOP OF DOC

Q2. The statutory exemption for certain DOE contractors also applies to their subcontractors, whether they are for-profit or non-profit. Would elimination of the exemption make it more difficult for the currently exempt contractors to retain their for-profit subcontractors or hire new ones under future contracts with DOE?

A2. It might not affect the number of for-profit contractors interested in becoming subcontractors, but it would increase the price at which those services would be obtained.

Discretionary Fees and Civil Penalties Under Price-Anderson

Q3. Exempt DOE contractors already risk losing discretionary fees, which are based on performance. If

civil penalties are limited to the level of discretionary fees, how much additional safety incentive is being provided?

For example, if a non-profit contractor performed extremely poorly and lost all of its discretionary fees during a particular evaluation period, would no civil penalties then be possible? Or could civil penalties be assessed up to the level of all past and future discretionary fees awarded under the contract?

A3. The question illustrates why the University generally does not believe that the government should rely heavily on financial incentives and penalties in contracts with non-profit contractors. There comes a point at which, if money is the only reason you are doing something, you will stop doing it. The University's position is very simple—if we receive fee we can pay fines until it's all used up. If we must pay fines in excess of the fee we receive The Regents will have to decide whether continued public service to the nation is consistent with the fiduciary obligation of the institution to the students, donors and citizens of the State of California.

Page 138 PREV PAGE TOP OF DOC

Appendix 2:

Additional Material for the Record

PREPARED STATEMENT OF THE HONORABLE JOE BARTON

Today's hearing concerns bipartisan legislation I introduced to correct a long-standing problem in the management of Department of Energy facilities. H.R. 723 was reported by the full Energy and Commerce Committee on February 28. I am the Chairman of the subcommittee of primary jurisdiction, the Energy & Air Quality jurisdiction. This same language was reported last Congress by the then Commerce Committee and by House Armed Services.

Current law provides special treatment for DOE's non-profit contractors. When these non-profit contractors violate DOE's nuclear safety regulations, they are exempt from paying any fines. This exemption means that we now have two different sets of rules for DOE contractors—one for the conventional for-profit contractors, who are subject to fines for safety violations, and another for the non-profit contractors, who pay no penalty whatsoever for safety violations.

Because there are no adverse financial consequences when these non-profit contractors violate safety rules, we have unintentionally created a system in which there is little incentive for the non-profit contractors to take their nuclear safety responsibilities seriously.

Page 139 PREV PAGE TOP OF DOC

The 1988 Price-Anderson Amendments to the Atomic Energy Act specifically exempted seven contractors, including non-profit institutions such as universities, from civil penalties. In a 1993 rule, the Secretary of Energy provided an automatic exemption from civil penalties for all non-profit educational institutions. H.R. 723 would amend the Atomic Energy Act to eliminate the statutory exemption for specific

non-profit contractors and also eliminate the authority of the Secretary of Energy to provide, by regulation, an automatic exemption for all non-profit educational institutions.

Last Congress, the General Accounting Office conducted a review of DOE's enforcement of nuclear safety rules, documenting DOE safety violations at DOE facilities. Of the total penalties assessed from 1996 through 1998 for safety violations, one-third of those penalties were assessed against non-profit contractors —and because of the exemptions in statute and in regulation, these fines were never paid. Most recently, the University of California had three major nuclear safety violations totaling $900,000 in fines. A recent violation at Los Alamos resulted in a remitted fine of $605,000, one of the largest fines ever at a DOE facility.

GAO concluded that the exemption for non-profit contractors should be eliminated. It made that recommendation in its report to Congress, and it testified to that effect before the Commerce Committee in a hearing on DOE Worker Safety on June 29, 1999. Problems in agency performance, in this case recurrent safety problems at DOE facilities, prompted a closer look by the Oversight and Investigations Subcommittee, with the assistance of the GAO. This led to the legislation we are introducing today to solve those problems.

I understand there are technical changes that need to be made to the bill. Contracts which are renewed, rather than renegotiated, may not be covered by the change in this law. Non-profit contractors which are not tax-exempt should be subject to the same liability as the other non-profit contractors. I am confident that both provisions can easily be fixed.

Page 140 PREV PAGE TOP OF DOC

PREPARED STATEMENT OF ROBERT ZIMMER

Mr. Chairman and members of the Subcommittee, I am Robert Zimmer, Vice President of the University of Chicago for Argonne National Laboratory. I appreciate this opportunity to address the important issue of retaining the exemption for non-profit contractors of the Department of Energy (DOE) such as the University, from of civil penalties for nuclear safety violations.

The University of Chicago has been the management and operating contractor of Argonne National Laboratory from its inception in 1946 and prior to that was the contractor with the Manhattan District for the project at the University campus during World War II that included the Fermi experiment, conducted under the stands of our football field, that ushered in the nuclear age. Today Argonne is a multiprogram basic research and development laboratory, with locations near Chicago, Illinois and Idaho Falls, Idaho, employing approximately 4500 people. Argonne's mission includes research and development activities in the field of nuclear energy. The University, a not-for-profit educational institution, is directly responsible and liable under the contract with the United States Government, through the Department of Energy, for our performance in managing and operating Argonne. Throughout the period of its operation of Argonne, the University has acted in the belief that its stewardship of Argonne is a public service. The Laboratory has made, and continues to make, outstanding contributions to the nation's programs in countless areas of science and technology.

Because the contract to operate Argonne contains a Price-Anderson Act indemnification against nuclear public liability, the University's conduct of its nuclear energy activities is subject to the comprehensive program of nuclear safety requirements that Congress directed be developed and implemented by DOE pursuant to the Price-Anderson Amendments Act, to govern operations at DOE facilities. The Price-Anderson Act indemnification allows Argonne to fulfill its mission involving nuclear activities, and allows the University to continue to serve as the steward for Argonne. In addition to protecting the public from nuclear risks, the University, as a non-profit educational institution whose assets are dedicated to its mission of education and research, is thus able to protect its endowment and other assets from the special and distinct risks of working in the nuclear field. Indeed, such indemnification has been a fundamental condition for the University undertaking nuclear activities at Argonne because the University's Trustees have a fiduciary obligation to protect the University's endowment and to use the endowment for the support of the education and research missions of the University. The contractual obligations the University, as contactor for Argonne, undertakes with DOE are obligations for which the University may not put its endowment at risk.

Page 141 PREV PAGE TOP OF DOC

When Congress enacted the Price-Anderson Amendments Act in 1988, it recognized that DOE's ability to attract and retain high-quality non-profit educational institutions to serve as contractors for its research laboratories is fundamental to DOE's ability to fulfill its mission. It did this by exempting named non-profit educational institutions, including the University as operator of Argonne, from civil penalties (but not criminal penalties) for violations of DOE nuclear safety requirements, for as long as these entities served as contractors of these facilities. Congress recognized that such entities do not undertake to manage DOE facilities for profit, do not receive fees on the basis of risk-taking analysis, and cannot risk their endowments for undertaking the special risks inherent in the nuclear field.

The University understands that with the exemption from civil penalties comes a corresponding responsibility. The current performance-based contract to operate Argonne requires the University to meet numerous detailed environmental, health, and safety standards, specifically including the DOE nuclear safety requirements and establishment of an approved integrated safety management system. That contract, unlike its predecessors, incorporates specific mechanisms for reducing or eliminating the University's performance fee. In sum, failure to meet the applicable contractual standards can result in a range of adverse consequences to the University, including loss of reputation in the event of an incident and/or an enforcement action, the costs of defending against an enforcement action, the loss of any or all of the performance fee provided for in the contract, and even the University's removal as the contractor for Argonne. H.R. 723 would eliminate the University's exemption from civil penalties for violations of nuclear safety requirements at Argonne to the amount of the "discretionary fee," which we take to mean our performance fee, but cannot provide the University with any greater incentives to comply with the nuclear safety requirements than those that already exist in our contract.

Page 142 PREV PAGE TOP OF DOC

A cornerstone of the University's stewardship of Argonne always has been to fulfill Argonne's scientific

mission in a manner that preserves and enhances the environmental safety and health for the benefit of Argonne's employees and the public. The University has long been committed to being directly accountable for this important responsibility. To this end, the University has an established record of implementing detailed policies and procedures (including those related to self-reporting of deficiencies or incidents), and undertaking independent oversight, audit and governance mechanisms, to minimize risk of harm from nuclear and other activities and to identify and remedy errors or potential faults in our safety system. The University's Board of Governors for Argonne, through its Safety and Environment Committee, performs special responsibilities in this regard. The Board's official policy statement proclaims that "worker and public safety is given the highest priority in the conduct of Laboratory activities including the safety of nuclear operation, and the protection of the environment." We believe that the contract's terms and the University's record of running Argonne demonstrate that adequate and appropriate mechanisms are in place to ensure the highest possible level of worker and public safety, and to minimize risks, with respect to nuclear and other activities carried out at Argonne.

The University's commitment to Argonne is a commitment to the national laboratory system and the importance of research-university involvement in this vital segment of the national science infrastructure. The University believes that it is important that the major non-profit research institutions of this country remain linked to the national laboratories. We bring to the laboratories the research and educational values of our institutions. We assist the laboratories in recruiting some of the best scientists and engineers to work there. We, therefore, are part of the national laboratory system because we believe that is a part of the public service mission of the University. The University believes that the Nation's vital science and technology mission continues to benefit from having non-profit educational institutions such as the University serve as stewards of its national laboratories.

Page 143 PREV PAGE TOP OF DOC

As a non-profit, the University does not undertake to manage the Argonne facility for profit and currently does not fully cover its operating costs. Our current contract already has increased significantly the financial risk facing the University due to the imposition of certain statutory, regulatory, and contractual liability provisions. The performance fee structure in the contract assumes the continuation of the Price-Anderson indemnification and the continuation of an exemption from civil penalties. The removal of the civil penalty exemption can be expected to increase the University's operating costs, and providing for recovery of these costs would, in turn, result in additional costs to the DOE in carrying out its important mission.

In summary, the elimination of the civil penalty exemption being proposed in H.R. 723 is not necessary to improve non-profit contract performance, risks discouraging non-profits such as the University from serving this vital national interest, and likely would result in additional costs to DOE.

If, nevertheless, the civil penalty exemption were to be eliminated, the University has two comments:

First, in the event that civil penalties are imposed on the University, it would be inequitable if the University's performance could be subjected to double penalties, once by the imposition of civil penalties and then by reducing or eliminating the performance fee under the current contract. In other words, a failure of performance or fineable incident should only be considered by the DOE once for purposes of adjusting

contractor's earned fee (e.g., either an imposition of a fine or a reduction in performance fee).

Page 144 PREV PAGE TOP OF DOC

Secondly, as presently drafted, H.R. 723 does not tie the imposition of a civil penalty to the year in which the incident occurred. The University suggests a clarification that the non-profit entities "shall not be subject to a civil penalty for a violation under subsection a. in excess of the amount of any discretionary fee paid *during the fiscal year in which such violation occurs* to such contractor. . ."

BIOGRAPHY FOR ROBERT J. ZIMMER

Office of the Vice President for Research and for Argonne National Laboratory, University of Chicago, 5801 South Ellis Avenue, Chicago, Illinois 60637; 773–702–1383; 773–702–9595 (fax)

Department of Mathematics, University of Chicago, 5734 University Avenue, Chicago, Illinois 60637; 773–702–7340

E-mail: r-zimmer@uchicago.edu

EDUCATION

Harvard University, Ph.D. Mathematics 1975
Harvard University, A.M. Mathematics 1971
Brandeis University, A.B. Summa cum laude 1968

POSITIONS

Page 145 PREV PAGE TOP OF DOC

Academic:

Max Mason Distinguished Service Professor of Mathematics, University of Chicago, 1996–present
Professor of Mathematics, University of Chicago, 1980–1996
Professor of Mathematics, University of California, Berkeley, 1981–1983
Associate Professor of Mathematics, University of Chicago, 1979–1980
L.E. Dickson Instructor of Mathematics, University of Chicago, 1977–1979
Assistant Professor of Mathematics, U.S. Naval Academy, 1975–1977

Administrative:

Vice President for Research and for Argonne National Laboratory, University of Chicago, 2000–present
Deputy Provost, University of Chicago, 2000–2001
Deputy Provost for Research, University of Chicago, 1998–2000
Associate Provost for Research and Education, University of Chicago, 1995–1998
Chairman, Department of Mathematics, University of Chicago, 1991–1995

Visiting positions (long-term):

Technion, Israel Institute of Technology, summer 1998.
Hebrew University of Jerusalem, summers 1999, 1995, 1990, 1980, January 1988.
Universite de Paris-Sud, Orsay, summers 1996, 1994.
University of New South Wales, Australian National University, summers 1997, 1989, 1987.
ETH, Zurich, spring 1986.

Page 146 PREV PAGE TOP OF DOC

Harvard University, fall 1985.
Scuola Normale Superiore of Pisa, summer 1983.
Institut des Hautes Etudes Scientifiques, summer 1992, spring 1980.

Selected professional service:

Argonne National Laboratory, Board of Governors, 1999–present.
Illinois Science and Technology Advisory Committee (advisory to Governor of Illinois), 1998–1999.
Illinois Coalition Science Priority Committee, 1999.
ARCH Development Corporation, Board of Directors, 1997–present.
Board of Mathematical Sciences, National Research Council, 1992–1995; Executive Committee, 1993–1995.
Chairman of Organizing Committee, special year on Lie Groups and Ergodic Theory, Mathematical Sciences Research Institute, Berkeley, 1991–1992.
Series Editor, Chicago Lectures in Mathematics Series, University of Chicago Press, 1988–present.
Editorial boards of: *Ergodic Theory and Dynamical Systems, Transactions of the American Mathematical Society, Geometriae Dedicata, Journal of Geometric Analysis.*
Council of American Mathematical Society, 1994–1996.
American Mathematical Society, Committee on Federal Policy Agenda, 1992–1994.

SPECIALIZED MATHEMATICAL INTERESTS

Ergodic theory, Lie groups, discrete subgroups, differential geometry, transformation groups, group representations, foliations, related questions of geometry, group theory, and analysis.

Page 147 PREV PAGE TOP OF DOC

PUBLICATIONS

Two books and more than eighty published mathematical research articles.

DOCTORAL STUDENTS

Supervised sixteen completed doctoral dissertations in Mathematics at the University of Chicago.

MONOGRAPHS

1. *Ergodic Theory and Semisimple Groups*, Birkhauser, Boston, 1984.

2. *Essential Results of Functional Analysis*, University of Chicago Press, 1990.

RESEARCH ARTICLES

1. Extensions of ergodic actions and generalized discrete spectrum, *Bulletin Amer. Math. Soc.*, 81 (1975), 633–636.

2. Distal transformation groups and fiber bundles, *Bulletin Amer. Math. Soc.*, 81 (1975), 959–960.

3. Extensions of ergodic group actions, *Illinois J. Math.*, 20 (1976), 373–409.

Page 148 PREV PAGE TOP OF DOC

4. Ergodic actions with generalized discrete spectrum, *Illinois J. Math.*, 20 (1976), 555–588.

5. Compact nilmanifold extensions of ergodic actions, *Transactions Amer. Math. Soc.*, 223 (1976), 397–406.

6. Random walks on compact groups and the existence of cocycles, *Israel J. Math.*, 26 (1977), 84–90.

7. Cocycles and the structure of ergodic group actions, *Israel J. Math.*, 26 (1977), 214–220.

8. Compactness conditions of cocycles of ergodic transformation groups, *J. London Math. Soc.*, 15 (1977), 155–163.

9. Amenable ergodic actions, hyperfinite factors, and Poincare flows, *Bulletin Amer. Math. Soc.*, 83 (1977), 1078–1080.

10. Normal ergodic actions, *J. Functional Anal.*, 25 (1977), 286–305.

11. Amenable ergodic group actions and an application to Poisson boundaries of random walks, *J. Functional Anal.*, 27 (1978), 350–372.

12. On the von Neumann algebra of an ergodic group action, *Proc. Amer. Math. Soc.*, 66 (1977), 289–293.

Page 149 PREV PAGE TOP OF DOC

13. Hyperfinite factors and amenable ergodic actions, *Invent. Math.*, 41 (1977), 23–31.

14. Orbit spaces of unitary representations, ergodic theory, and simple Lie groups, *Annals of Math.*, 106 (1977), 573–588.

15. Continuous ergodic extensions and fiber bundles, *Can. J. Math.*, 30 (1978), 373–391.

16. Induced and amenable ergodic actions of Lie groups, *Annales Sci. Ec. Norm. Sup.*, 11 (1978), 407–428.

17. Amenable pairs of groups and ergodic actions and the associated von Neumann algebras, *Transactions Amer. Math. Soc.*, 243 (1978), 271–286.

18. Ergodic actions and stochastic processes on groups and homogeneous spaces, in Lecture Notes in Mathematics, No. 668, Springer Verlag, 1977.

19. Uniform subgroups and ergodic actions of exponential Lie groups, *Pacific J. Math.*, 78 (1978), 267–272.

20. Groups admitting ergodic actions with generalized discrete spectrum, (with C.C. Moore), *Invent. Math.*, 51 (1979), 171–188.

Page 150 PREV PAGE TOP OF DOC

21. On the cohomology of ergodic group actions, *Israel J. Math.*, 35 (1980), 289–300.

22. Algebraic topology of ergodic Lie group actions and measurable foliations, manuscript, 1979.

23. An analogue of the Mostow-Margulis rigidity theorems for ergodic actions of semisimple Lie groups, *Bull. Amer. Math. Soc.*, 2 (1980), 168–170.

24. Strong rigidity for ergodic actions of semisimple Lie groups, *Annals of Math.*, 112 (1980), 511–529.

25. An algebraic group associated to an ergodic diffeomorphism, *Comp. Math.*, 43 (1981), 59–69.

26. On the Mostow rigidity theorem and measurable foliations by hyperbolic space, *Israel J. Math*, 43 (1982), 281–290.

27. On the cohomology of ergodic actions of semisimple groups and discrete subgroups, *Amer. J. Math.*, 103 (1981), 937–950.

28. Orbit equivalence and rigidity of ergodic actions of Lie groups, *Erg. Th. Dyn. Sys.*, 1 (1981), 237–253.

29. Ergodic theory, group representations, and rigidity, C.I.M.E. lectures on harmonic analysis and group representations, Cortona, Italy, 1980, *Bulletin Amer. Math. Soc.*, 6 (1982), 383–416.

Page 151 PREV PAGE TOP OF DOC

30. Ergodic theory, semisimple Lie groups, and foliations by manifolds of negative curvature, *Publ. Math. I. H.E.S.*, 55 (1982), 37–62.

31. Curvature of leaves in amenable foliations, *Amer. J. Math.*, 105 (1983), 1011–1022.

32. Equivariant images of projective space under the action of SL(n,Z), *Erg. Th. Dyn. Sys.*, 1 (1981) 519–

522.

33. Ergodic actions of semisimple groups and product relations, *Annals of Math,* 118 (1983), 9–19.

34. Arithmetic groups acting on compact manifolds, *Bull. Amer. Math. Soc.,* 8 (1983), 90–92.

35. Ergodic actions of arithmetic groups and the Kakutani-Markov fixed point theorem, *Contemp. Math., A. M.S.,* 26 (1984), 427–432.

36. Volume preserving actions of lattices in semisimple groups on compact manifolds, *Publ. Math. I.H.E.S.,* 59 (1984), 5–33.

37. Actions of lattices in semisimple groups preserving a G-structure of finite type, *Erg. Th. Dyn. Sys.,* 5 (1985), 301–306.

Page 152 PREV PAGE TOP OF DOC

38. Semisimple automorphism groups of G-structures, *J. Diff. Geom.,* 19 (1984).

39. Kazhdan groups acting on compact manifolds, *Invent. Math.,* 75 (1984), 425–436.

40. On discrete subgroups of Lie groups and elliptic geometric structures, *Rev. Math. IberoAmericana,* Vol. 1, 1985.

41. Lattices in semisimple groups and distal geometric structures, *Invent. Math.,* 80 (1985), 123–137.

42. On the automorphism group of compact Lorentz manifolds and other geometric manifolds, *Invent. Math.,* 83 (1986), 411–424.

43. Lattices in semisimple groups and invariant geometric structures on compact manifolds, in Discrete groups in geometry and analysis, in Proceedings of a conference in honor of G.D. Mostow, ed. R. Howe, Birkhauser-Boston, 1987.

44. Ergodic theory and the automorphism group of a G-structure, in Group representations, ergodic theory, operator algebras, and mathematical physics, in Proceedings of a conference in honor of G.W. Mackey, ed. C.C. Moore, SpringerVerlag, 1987.

45. Amenable actions and dense subgroups of Lie groups, *J. Func. Anal.,* 72 (1987), 58–64.

Page 153 PREV PAGE TOP OF DOC

46. On connection preserving actions of discrete linear groups, *Erg. Th. Dyn. Syst.,* 6 (1986), 639–644.

47. Split rank and semisimple automorphism groups of G-structures, *J. Diff. Geom.,* 26 (1987), 169–173.

48. Rigidity of locally homogeneous metrics of negative curvature on the leaves of a foliation, (with P. Pansu), *Israel J. Math,* 68 (1989), 56–62.

49. Actions of semisimple groups and discrete subgroups, Proc. Int. Congress of Math. (Berkeley, CA), Amer. Math. Soc., Providence, RI, 1986.

50. Arithmeticity of holonomy groups of Lie foliations, *Journal of A.M.S.*, Vol. 1 (1988), 3558.

51. Infinitesimal rigidity of smooth actions of discrete subgroups of Lie groups, *J. Diff. Geom.*, 31 (1990), 301–322.

52. Positive curvature along the leaves of a foliation, appendix to "Global analysis on foliated spaces" by C. C. Moore and C. Schochet, MSRI Publications, Springer, New York, 1988.

53. L2-harmonic forms on non-compact manifolds, (with C.C. Moore and C. Schochet), appendix to "Global analysis on foliated spaces" by C.C. Moore and C. Schochet, MSRI Publications, Springer, New York, 1988.

Page 154 PREV PAGE TOP OF DOC

54. Orbit equivalence, Lie groups, and foliations, Proceedings of the Center for Mathematical Analysis, Australian National University, Canberra, 16 (1988), 341–349.

55. Actions of lattices in Sp(1,n), (with M. Cowling), *Erg. Th. Dyn. Syst.*, 9 (1989), 221–237.

56. Manifolds with infinitely many actions of a higher rank arithmetic group, (with R. Lashof), *Ill. J. Math.*, 34 (1990), 765–768.

57. Normal subrelations of ergodic equivalence relations, (with J. Feldman and C. Sutherland), Proceedings of the Center for Mathematical Analysis, Australian National University, Canberra, 16 (1988), 95–102.

58. Subrelations of ergodic equivalence relations, with J. Feldman and C. Sutherland), *Erg. Th. Dyn. Syst.*, 9 (1989), 239–269.

59. Variants of Kazhdan's property for subgroups of semisimple groups, (with A. Lubotzky), *Israel J. Math.*, 66 (1989), 289–299.

60. Representations of fundamental groups of manifolds with a semisimple transformation group, *J. Amer. Math. Soc.*, 2 (1989), 201–213.

61. On the algebraic hull of an automorphism group of a principal bundle, *Comm. Math. Helv.*, 65 (1990), 375–387.

Page 155 PREV PAGE TOP OF DOC

62. Unitary spectrum and the fundamental group for actions of semisimple groups, *Math. Ann.*, 287 (1990), 697–701.

63. Fundamental groups of negatively curved manifolds and actions of semisimple groups (with R.

Spatzier), *Topology*, 30 (1991), 591–601.

64. Spectrum, entropy, and geometric structures for smooth actions of Kazhdan groups, *Israel J. Math.*, 75 (1991), 65–80.

65. Groups generating transversals to semisimple Lie group actions, *Israel J. Math.*, 73 (1991), 151–159.

66. Superrigidity, Ratner's theorem, and fundamental groups, *Israel J. Math.*, 74 (1991), 199–207.

67. Automorphism groups and fundamental groups of geometric manifolds, *Proc. Symp. Pure Math.*, 54 (1993), part 3, 693–710.

68. Cocycle superrigidity and rigidity for lattice actions on tori, (with A. Katok and J. Lewis), *Topology*, 35 (1996), No. 1, 27–38.

69. Stabilizers for ergodic actions of higher rank semisimple groups, (with G. Stuck), *Annals of Math.*, 139 (1994), 723–747.

70. Discrete subgroups and non-Riemannian homogeneous spaces, *J. Amer. Math. Soc.*, 7 (1994), 159–168.

Page 156 PREV PAGE TOP OF DOC

71. Superrigidity for the commensurability group of tree lattices, (with A. Lubotzky and S. Mozes), *Comm. Math. Helv.*, 69 (1994), 523–548.

72. Superrigidity for cocycles and hyperbolic geometry (with K. Corlette), *Int. J. Math.*, 5 (1994), 273–290.

73. Entropy rigidity for semisimple group actions, (with N. Qian), *Israel J. Math.*, 99 (1997), 55–67.

74. On manifolds locally modelled on non-Riemannian homogeneous spaces (with F. Labourie and S. Mozes), *Geom. Funct. Anal.*, 5 (1995), No. 6, 955–965.

75. On cocompact lattices in SL(n)/SL(m), (with F. Labourie), *Math. Res. Lett.*, 2 (1995), No. 1, 75–77.

76. A canonical arithmetic quotient for actions of simple Lie groups (with A. Lubotzky), to appear Topology. *Lie groups and ergodic theory*, S. Dani, ed., Tata Inst. Fund. Res. Stud. Math., 14 (1998) 131–142.

77. Arithmetic structure of fundamental groups and actions of semisimple Lie groups (with A. Lubotzky), *Topology*, 40 (2001), 851–869.

78. Homogeneous projective quotients for actions of semisimple Lie groups (with A. Nevo), *Invent. Math.*, 138 (1999), No. 2, 229–252.

Page 157 PREV PAGE TOP OF DOC

79. Rigidity of Furstenberg entropy for actions of semisimple Lie groups, (with A. Nevo), *Ann. Sci. Ecole Norm. Sup.*, (4) 33 (2000), No. 3, 321–343.

80. A structure theorem for actions of semisimple algebraic groups with stationary measure, (with A. Nevo), to appear, *Annals of Math.*

81. The intermediate factor theorem, (with A. Nevo), to appear, *J. d'Anal. Math.*

82. Actions of semisimple groups on circle bundles, (with D. Witte), *Geom. Ded.*, 87 (2001), 91–121.

83. Rational points of algebraic groups acting on smooth manifolds, preprint.

84. Stationary measures and invariant rigid geometric structures for semisimple Lie group actions, (with A. Nevo) preprint.

85. Leafwise de Rham cohomology and the structure of semisimple Lie group actions, (with A. Nevo) preprint.

86. Entropy and arithmetic quotients for simple automorphism groups of geometric manifolds, to appear, *Geom. Ded.*

87. Geometric lattice actions and fundamental groups, (with D. Fisher), to appear, *Comm. Math. Helv.*

Page 158 PREV PAGE TOP OF DOC

PREPARED STATEMENT OF MR. WILLIAM A. SCHMIDT

Universities Research Association (URA) appreciates the invitation of the Chairman to submit our comments on H.R. 723. As you may know, URA is Management and Operating (M&O) contractor on behalf of the U.S. Department of Energy (DOE) for the Fermi National Accelerator Laboratory (Fermilab), near Batavia, Illinois.

URA is a non-profit 501(c)(3) corporation comprising 89 major research universities primarily located in the United States, with members also in Canada, Japan, and Italy. URA designed, constructed, and has operated Fermilab since its inception by the National Academy of Sciences in 1967, under a broad charter for the management of research facilities and and for educational activities in the natural sciences. URA does not manage the Laboratory to obtain a profit, but rather, as a public service and to obtain the benefit for the public of needed university involvement in this major element of the nation's basic research infrastructure.

URA receives a modest management fee to cover monetary obligations and risks, for both planned enhancements for the good of the Laboratory, and for unanticipated unallowable costs (e.g., fines and penalties). University-based non-profit contractors recognize and respond to a very real obligation to our laboratories to contain the amount of such fees and other costs related to our oversight function—the smaller the fees the more funds are available for performance of scientific research. Indeed, fees paid by DOE to 501

(c)(3) non-profit laboratory contractors average less than 1% of contract budgets, as compared to some 5 or 6% for profit-making contractors at DOE facilities.

Page 159 PREV PAGE TOP OF DOC

URA operates Fermilab under a performance-based M&O contract. URA is committed to, and accountable for, performing its DOE contract obligations in a safe and environmentally prudent and responsible manner. In particular, we are committed to Integrated Safety Management (ISM) as a methodology for line management to incorporate ES&H practices into the work place. We take these obligations very seriously, and our record of strong performance in ES&H at Fermilab has shown continuing improvement over the last several years. DOE's statutory, regulatory, and contractual mechanisms are supplemented by the strong culture of excellence that has maintained Fermilab as one of the preeminent scientific research facilities in the world.

URA is currently indemnified against public liability under the Price-Anderson Amendments Act, and as such, is subject to the distinctive Price-Anderson DOE rules and regulations. Our Association is also one of the entities currently exempt from civil penalties under the Act. Nonetheless, URA is subject to other applicable environment, safety, and health requirements of federal, state, and local governments by way of statute, regulation, and contract.

For reasons we will now outline, URA strongly supports the continuation of the exemption from civil penalties under the Price-Anderson Act for the named non-profits operating DOE national laboratories. At the outset, it should be clear that if a non-profit laboratory contractor permits an egregiously unsafe condition or situation to develop, DOE has demonstrated that it has more than adequate statutory, regulatory, and contractual means to remedy the matter, whether through its mechanisms for fee reduction and unallowed costs, or ultimately by removal of the contractor under either the Termination for Default or the Termination for the Convenience clauses of the contract.

In the case of URA, because we operate an *accelerator* facility (there are no nuclear reactors on the Fermilab site), only a relatively small amount of low level radioactive material exists at Fermilab at any one time. Indeed, as an "accelerator" facility, Fermilab is not a "nuclear" facility at all, as that term is generally understood and contemplated. But the low amount of radioactive material present at such accelerator facilities does not necessarily imply that low civil penalties would be imposed under the Act. Moreover, coverage by the Price-Anderson Act remains helpful to URA in its role on behalf of DOE when, for example, we solicit bids from contractors and suppliers who expect Price-Anderson protection to "flow down" to them, and who otherwise would not contract with the Laboratory.

Page 160 PREV PAGE TOP OF DOC

We believe that the continued involvement of university-based non-profit organizations such as URA in the operation of large national research facilities is a vital national interest. Should non-profits lose their current Price-Anderson protections, at the very least additional research dollars would have to be diverted to compensate for their new business risks. But the erosion of management fees paid under DOE laboratory contracts, and the shift of risks from DOE even to its non-profit contractors, if it continues will inevitably

bring into serious question the business-risk calculus that permits university-based institutions to serve as DOE contractors. Quite apart from any change in Price-Anderson, the fees offered to non-profits by DOE must be cognizant of existing financial exposures. Such exposures include fines and penalties under federal, state, and local environmental and worker safety laws and regulations; unallowed proceedings costs under the Major Fraud Act (a law not requiring criminal intent or conduct as its name might seem to imply); performance-fee reductions under performance measure provisions; and fee reductions under a relatively new DOE "Conditional Payment of Fee" contract provision.

Were H.R. 723 to be enacted notwithstanding these considerations, we offer two technical observations: 1) The bill limits non-profit contractors' liability for civil penalties to "discretionary fee." If non-profits are made subject to civil penalties, this term should be clarified. We recommend that the Subcommittee consider replacing the term "discretionary fee" with "performance-based fee." 2) If a civil penalty is ultimately assessed under this legislation, the amount of the penalty should be reduced commensurate with the unallowable costs and fee reductions to which the contractor may already be subject as a consequence of the incident.

In sum, application of Price-Anderson civil penalties to university-based non-profit laboratory contractors as proposed under this bill would would achieve little or no new protection for the public, would provide no needed additional authorities for the DOE to carry out its responsibilities, would entail additional costs to the research enterprise, and ultimately would further erode the incentive for universities to continue their longstanding and vitally important contribution to the intellectual resources and technical infrastructure of our national laboratory system. We do not believe such an outcome to be in the public interest.

Page 161 PREV PAGE TOP OF DOC

We thank the Committee for the opportunity to present our views on this important matter.

81200r.eps

78
81200s.eps

81200k3.eps

81200x.eps

81200y.eps

81200z.eps

81200aa.eps

81200bb.eps

81200cc.eps

81200dd.eps

Page 162 PREV PAGE TOP OF DOC

81200t3.eps

81200ee.eps

81200ff.eps

81200gg.eps

81200hh.eps

81200ii.eps

81200jj.eps

81200kk.eps

81200ll.eps

81200mm.eps

81200nn.eps

81200oo.eps

81200pp.eps

Page 163 PREV PAGE TOP OF DOC

81200qq.eps

81200rr.eps

81200ss.eps

81200tt.eps

81200uu.eps

81200vv.eps

81200ww.eps

81200xx.eps

81200yy.eps

81200zz.eps

81200a3.eps

81200b3.eps

Page 164 PREV PAGE TOP OF DOC

81200c3.eps

81200d3.eps

81200e3.eps

81200f3.eps

81200g3.eps

81200h3.eps

81200i3.eps

81200j3.eps

81200l3.eps

81200m3.eps

81200n3.eps

81200o3.eps

81200p3.eps

Page 165 PREV PAGE TOP OF DOC

81200q3.eps

81200r3.eps

81200s3.eps

(Footnote 1 return)
Department of Energy: DOE's Nuclear Safety Enforcement Program Should Be Strengthened (GAO/RCED–99–146, Jun. 10, 1999).

(Footnote 2 return)
Stanford University operates the Stanford Linear Accelerator Center without receiving a fee.

(Footnote 3 return)
Major Management Challenges and Program Risks: Department of Energy (GAO–01–246, Jan. 2001).

(Footnote 4 return)
Management Challenges at the Department of Energy (DOE/IG–0491, Nov. 28, 2000).

(Footnote 5 return)
Although DOE does not collect payments from the exempted contractors, it does assess penalties in the same way as for the for-profit contractors.

(Footnote 6 return)
The term was also used in H.R. 3383, in the 106th Congress, and was defined in accompanying committee reports to refer to that portion of the contract fee which is paid, or not, at the discretion of the DOE contracting officer based on the contractor's performance.

(Footnote 7 return)
The institutions receiving the payment limitation included the University of Chicago; the University of California; American Telephone and Telegraph; Universities Research Associates, Inc.; Princeton University; Associated Universities, Inc.; and Battelle Memorial Institute. American Telephone and Telegraph and The Associated Universities, Inc. no longer have contracts to operate DOE laboratories.

(Footnote 8 return)
In fiscal years 1999 and 2000, DOE's contract with the University of California did not use the term base fee but instead identified an amount of fee that was not subject to reduction for poor performance.

(Footnote 9 return)

See 56 *Fed. Reg.* 64290, 64291 (Dec. 9, 1991).

(Footnote 10 return)

Chairman Bartlett requested the cumulative total contract prices for certain DOE contracts for the period 1996 through 2000. The total was to be displayed by for-profit and not-for-profit type of contractor. The total for for-profit contractors is approximately 38.6B. The total for not-for-profit contractors is approximately 25B. These totals represent the cumulative total contract prices from 1996 through 2000 for those site/facility management contractors who have the potential to incur PAA penalties (i.e., contract prices for the Strategic Petroleum Reserve and National Renewable Energy Laboratory are not included).

(Footnote 11 return)

See Comments of University of California, University of Chicago, Southern Universities Research Association, Universities Research Association, and Princeton University, available at *www.gc.doe.gov*.

(Footnote 12 return)

Testimony of Robert L. Van Ness, Assistant Vice President for Laboratory Administration, University of California; and Testimony of University of Chicago, June 29, 1999, Subcommittee on Oversight and Investigation, House Committee on Commerce; Testimony of Robert L. Van Ness, University of California, March 22, 2000, Hearing before the Subcommittee on Energy and Power, House Committee on Commerce, at 54–58.

(Footnote 13 return)

Testimony of Mary Anne Sullivan, March 22, 2000, Hearing before the Subcommittee on Energy and Power, House Committee on Commerce, at 14; Testimony of Francis Blake, September 6, 2001, Hearing before the House Committee on Commerce, Subcommittee on Energy and Air Quality; Testimony of Eric J. Fygi, March 22, 2001, Hearing before the House Committee on Science, Subcommittee on Energy.

SPEAKER INDEX CONTENTS INSERTS
BARTLETT 11 22 24 32 45 54 55 73 77
78 81 82 83 84 85 86 90 94
95 99 100 101 102 103 104 105
BIGGERT 95 96 97 98
CHARLES COOKE 5
CUNNINGHAM 45 54 55 84 94 98
FYGI 24 81 82 88 91 92 93 96 97

99 100 101 104 105
GRUCCI 91 93 94
HARLAN WATSON 4
JACKSON LEE 77 78
JONES 32 45 77 83 89 90 100 101 103
MATHESON 95
TOM HAMMOND 5
TOM VANEK, KAREN KIMBALL, JOHN DARNELL 4
VAN NESS 55 74 75 76 85 86 87 90 98
WOOLSEY 19 73 74 75 76 77 87 88 89
90

CONTENTS SPEAKERS INSERTS
STATEMENT OF ERIC J. FYGI, ACTING GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY
PAGE 24

STATEMENT OF MS. GARY L. JONES, ASSOCIATE DIRECTOR, ENERGY, RESOURCES, AND SCIENCE ISSUES, U.S.
GENERAL ACCOUNTING OFFICE
PAGE 32

STATEMENT OF GUY H. CUNNINGHAM, ASSOCIATE GENERAL COUNSEL, BATTELLE MEMORIAL INSTITUTE
PAGE 45

STATEMENT OF ROBERT L. VAN NESS, ASSISTANT VICE PRESIDENT FOR LABORATORY ADMINISTRATION,
UNIVERSITY OF CALIFORNIA
PAGE 55

INSERTS SPEAKERS CONTENTS
NO INSERTS IN THIS HEARING