

W. Green

U.S. DEPARTMENT OF ENERGY

memorandum

Marsh

DATE: AUG 08 1979

REPLY TO
ATTN OF: EV-21

SUBJECT: LEGAL BASIS FOR RADIATION EXPOSURE CRITERIA AND THEIR APPLICABILITY
OUTSIDE OF THE UNITED STATES

TO: Steve Greenleigh
Office of General Counsel

It is clear that Mr. Ted Mitchell, legal counsel to the Enewetak people, intends to challenge the basis for and the applicability of Federal radiation exposure criteria to the Enewetak people. The background is as follows:

1) The Federal Radiation Council (FRC) exposure criteria were published as Federal Guidance in the Federal Register in 1960 over the approval of President Eisenhower.

2) The FRC documents establish exposure guidance for the maximum exposed individual, for an average exposure level for critical subgroups of the population (when individual levels are not known), and for 30-year genetic exposure levels.

3) In addition, the FRC Guidance provides for exposure levels in excess of the guidance if the benefits outweigh the potential risk.

4) An Environmental Impact Statement (EIS) for the cleanup and resettlement of Enewetak included an AEC Task Group Report which recommended that, for planning purposes, values equal to 80% of the FRC guidance for 30-year genetic exposures and 50% of the maximum individual exposure be used because of the uncertainties involved in monitoring and in predicting life styles and exposure levels at Enewetak.

5) By letter of February 28, 1974, (copy attached), the Environmental Protection Agency (EPA) stated that the residents of the Trust Territory (i.e., the Marshall Islands) are entitled to protection of U.S. criteria.

6) By letter of December 12, 1974, (copy attached, see page 2, first paragraph), the EPA stated that they considered the recommendation in the EIS to be "upper limits," and that these limits should be re-assessed after the cleanup with the intent of lowering them.

7) DOE is advisor to the Department of Interior (DOI) and to the Defense Nuclear Agency on radiological matters.

8) One island, Enjebi, is likely to be of particular concern because it is the home island of one group of the Enewetak people, the dri-Enjebi, and it is likely to result in exposure levels in excess of the EIS recommendation, and possibly the FRC guidance, if the people return to live there.

9) It can be assumed that the Enewetak people have a strong desire to return to the island of Enjebi regardless of the exposure levels projected.

10) A dose assessment of the Enewetak situation currently is in progress.

11) DOE has been requested by Mr. Mitchell to discuss the dose assessment, together with the associated risk, with the people of Enewetak (and their legal and scientific consultants), so that the people, based upon "fully informed judgment" will decide for themselves whether or not to accept an exposure and risk greater than the EIS recommendation or U.S. criteria. This meeting is expected to occur within the next 2-3 months. (CBS's "60 Minutes" also will be present at this meeting, as will numerous other interested parties.)

12) The statement has been made repeatedly that we will provide dose estimates to the people and to Interior, but that other factors may enter the risk/benefit assessment in determining Interior's position with respect to the resettlement of Enjebi (e.g., comparative risks, the value to a people of their homeland).

13) As a Federal agency we have thus far felt constrained to compare our dose assessments to FRC guidance (now EPA guidance) and to the recommendation which EPA considers "upper limits."

14) Ted Mitchell is expected to argue that:

- a. U.S. criteria, much less the EIS recommendation, should not apply to this situation.
- b. Even if it does apply, the people should be free to accept a higher risk.
- c. Should the people return to Enjebi, even against the advice of the U.S., the U.S. must share the higher risk and be liable for any ensuing health consequences.
- d. If the people are denied access to Enjebi, the U.S. Government should compensate them for land deprivation and/or for imposing U.S. criteria.

Since the applicability and legal standing of the FRC and Federal guidance vis a vis this specific situation is likely to be challenged by Ted Mitchell both at the meeting at Enewetak and subsequently either before the Congress or in a Federal court, it is requested that OGC: a) provide legal counsel to EV in these matters, b) provide a person familiar with the legal background and intent of radiation exposure guidance/criteria, and c) provide a person to accompany DOE to the meeting prepared to respond to and address any legal issues of this nature that may be raised.

Steve Greenleigh

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Furthermore, it seems appropriate to involve the Director, Office of Radiation Programs, EPA, and EPA legal counsel in this matter since:

- a. EPA is the legislative successor to the FRC and as such promulgates Federal guidance.
- b. EPA has the ultimate responsibility for radiation protection of the public and the environment.
- c. EPA is on record stating that the residents of the Marshall Islands should be entitled to the same protection as are U.S. citizens.
- d. EPA is on record stating that EIS criteria should be considered "upper limits."

Similarly, perhaps DOI also should be brought into this with respect to the degree and type of authority which the U.S. may exercise in this matter, as well as the extent to which U.S. obligations and authority may exist following the demise of the Trust Territory Government.

It is requested that you or a member of your staff familiarize yourself with and be prepared to address the issues identified above, and that, if appropriate, a letter be prepared for transmittal to the EPA and/or to the DOI requesting their clarification of and participation in this situation.

Please contact Dr. Bruce Wachholz (353-4365) for further information as he is responsible for coordinating the overall EV effort in the Marshall Islands.

Original signed by
Ruth C. Clusen
Assistant Secretary for Environment
Ruth C. Clusen
Assistant Secretary for Environment

Attachments

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Wachholz's Reading File
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