LIABILITY COVERAGE FOR HIGH-LEVEL RADIOACTIVE WASTE MANAGEMENT ACTIVITIES: AN UPDATE

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ABSTRACT

A continuing concern surrounding development of facilities for management of high-level radioactive waste is the scope of liability coverage that might have to be called upon to compensate the public. The Price-Anderson Act, which now establishes an exemplary system of private insurance or government indemnity for various nuclear activities, expires on August 1, 1987. Thus, Congress has been considering whether to extend the Act; and, if so, what provisions it should contain and whether it should be amended to apply more explicitly to waste management activities. Additional Congressional activities are expected in the coming months. This paper explores the current status of Congressional consideration of this important matter, which is taking place at the same time growing attention is being devoted to the overall liability crisis in this country.

INTRODUCTION AND BACKGROUND

By way of background, the Nuclear Waste Policy Act (NWPA) by itself does not establish any system of financial protection for tort liability that might arise from the nuclear hazards associated with waste management[a]. Since there is no specific authority in the NWPA to provide coverage for liability arising from activities under the Act, DOE must look to other statutory authority, if any, for such. Thus, when the issue of liability arose during DOE's negotiations for a C&C agreement with the State of Washington (as it had a few years earlier in connection with the Waste Isolation Pilot Plant (WIPP) in New Mexico), DOE pointed to its already existing authority under the Price-Anderson Act. Just last month in response to a question from the House Science Committee, DOE again indicated that there are no peculiarities in the waste program that would argue for a separate scheme of protection.

APPLICABILITY OF THE PRICE-ANDERSON ACT

A review will not be made describing all the arcane intricacies of the present Price-Anderson insurance-indemnity system and its applicability to DOE waste management activities. For a more complete description of the Price-Anderson system, refer to the paper presented at Waste Management '85 Symposium last year.[b] Suffice it to say the regulatory scheme for management of nuclear waste materials is especially comprehensive, not only as a result of adherence to the strict safety standards, but also because of the existing system of liability coverage. (In fact, liability coverage for other hazardous materials is hardly as comprehensive.)

"OMNIBUS" FEATURE OF PRICE-ANDERSON COVERAGE

The unique feature of the Price-Anderson system that makes coverage under it most desirable is that, when it applies, it covers "anyone liable" (except the Federal Government) for "any legal liability arising out of or resulting from a nuclear incident". This so-called "omnibus" feature would facilitate the handling of lawsuits and reduce costs by allowing for consolidation of the defense and avoiding cross-claims among defendants. This would be of great advantage to claimants. There is coverage regardless of how liability of particular defendants (any one of whom might have very limited assets) is allocated by tort law, a system unique to nuclear applications.

EXPIRATION OF PRICE-ANDERSON AUTHORITY IN 1987

Authority for new Price-Anderson Act coverage now expires on August 1, 1987. This expiration date applies to both Section 170c NRC licensee coverage and Section 170d government contractor coverage. Significantly, with no new nuclear power plants now being ordered, the 1987 date is of more immediate concern with respect to contractor coverage for activities such as waste management. This is because it is clear that DOE will be entering into or renewing contracts for waste management and other nuclear activities after August 1, 1987. In fact, DOE recently pointed out to the House Science Committee that three major DOE operating contracts (for operation of the Los Alamos National Laboratory, Lawrence Berkeley and Lawrence Livermore National Laboratories, and the Hanford, Washington site) will expire on September 30, 1987. If Price-Anderson is not renewed before that

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[a] About as far as the NWPA goes in this direction is a cryptic reference to liability in Section 117. Section 117 of the NWPA, which authorizes the Secretary of Energy to enter into written consultation and cooperation (C&C) agreements with affected States and Indian tribes, indicates that such C&C agreements should include, among other things, procedures by which the U.S. Department of Energy (DOE) shall assist the state in resolving the State's concern over "State liability arising from accidents".

[b] O. F. Brown, Liability Coverage for High-Level Nuclear Waste Management, Proceedings of Waste Management '85 Symposium, University of Arizona, Tucson, Arizona (March 24-28, 1985), vol. 3 at 87. Liability coverage for DOE high-level nuclear waste management facilities and associated transportation can or already is being provided under existing provisions of the Price-Anderson Act. The Act now gives discretionary authority to either the U.S. Nuclear Regulatory Commission (NRC) under the Section 170c licensee provision or DOE under the Section 170d contractor provision to apply coverage to waste management facilities. When such coverage is provided, the limitation-on-liability provisions of Section 170e (whose constitutionality the U.S. Supreme Court upheld unanimously in 1978) also are applicable.

date, DOE would not be authorized to include Price-Anderson indemnity provisions in those newly executed operating contracts.[c]

1986 LEGISLATIVE OUTLOOK

Price-Anderson extension continues to be considered actively by Congress where as many as seven committees have jurisdiction over such legislation. (This is almost as many as had to act on the NWPA.) Price-Anderson is perhaps the single most important and controversial nuclear energy issue facing the 99th Congress, which convened its Second Session on January 24th. The principal issue is the limitation-on-liability feature that has been a part of the Price-Anderson system since 1957. Consideration also is being given to adding some subrogation provision, to applying the "extraordinary nuclear occurrence"[d] feature to waste management facilities, and to the actual source of funds for indemnity (i.e., whether they should come out of the Federal Treasury or the Nuclear Waste Fund, as DOE has suggested).

1985 was a record-building year, with Congressional Committees holding several hearings (or, in the case of the House Science Committee, a "legislative inquiry" in the form of written statements and answers to questions). 1986 is a pivotal year in terms of whether Congress will reauthorize the legislation before its provisions for new coverage expire. However, the 1986 Congressional schedule now includes a number of recesses and the early adjournment target typical of election years. Furthermore, the Federal budget will be occupying most of the Members' attention this year.

PENDING BILLS

Eight different Price-Anderson bills have been introduced in this Congress: H.R. 51 (the Price bill), H.R. 445 (the Seiberling bill), S. 445 (the Hart bill), S. 1225 (the Simpson-McClure bill), H.R. 2524 (the Morrison bill), H.R. 2665 (the Weiss bill), H.R. 3653 (the Udall bill), S. 1761 (the Stafford bill), and S. 2072 (the Metzenbaum bill). H.R. 445 and S. 445 are identical. While not all of the bills directly address waste management activities, each would modify existing coverage at least as to the amount of funds available.

H.R. 51 (the Price Bill)

Congressman Price, one of the original sponsors of the Price-Anderson Act, has introduced a bill (H.R. 51) that would increase DOE contractor coverage from $500 million to $1 billion and provide over $1 billion of coverage for power plants by increasing the retrospective premium each would have to pay in the event of a major accident from $5 million to $10 million. This bill would retain a limitation on liability at that level.

H.R. 445 and S. 445 (the Seiberling and Hart Bills)

Congressman Seiberling and Senator Hart have reintroduced identical bills (coincidentally H.R. 445 and S. 445) that would eliminate the Act's limitation on liability but without increasing the amount of coverage. These two bills also would apply the waivers of many usual tort law defenses now applicable only to "extraordinary nuclear occurrences" to all "nuclear incidents".

S. 1225 (the Simpson-McClure Bill)

Senators Simpson and McClure have introduced S. 1225. For DOE waste management activities, the Simpson-McClure bill would make four major changes in existing coverage: first, it would make contractor coverage the same amount as coverage for power plants (i.e., about $2.4 billion). Second, it would "clarify" the application of Price-Anderson coverage for activities under the NWPA and draw funds for incidents attributable to commercial waste from the Nuclear Waste Fund. Third, it would establish a more definite procedure for the President and Congress to follow in the event the limitation on liability is reached (for either commercial or contractor activities). Fourth, it would extend the Act for 25 years to August 1, 2012. The bill would apply the "extraordinary nuclear occurrences" provision to DOE waste management activities. It also would apply DOE, instead of utility, coverage to NWPA shipments from power plants (but the money would come from the Nuclear Waste Fund).

H.R. 2524 (the Morrison Bill)

Congressman Morrison has introduced a bill (H.R. 2524) that addresses coverage only for activities under the NWPA. His bill would impose unlimited liability on such activities, with the first $5 billion coming from the Nuclear Waste Fund and the rest from Federal revenues.

H.R. 2665 (the Weiss Bill)

Congressman Weiss has introduced H.R. 2665. It does not specifically address waste management

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[c] While DOE may have other authority to indemnify its contractors for nuclear hazards, such indemnity would not be as comprehensive as that available under the present Price-Anderson system. For example, prior to 1957 when the Price-Anderson Act was adopted, the then Atomic Energy Commission extended indemnities to some of its contractors. However, these indemnities were of necessity made subject to the availability of appropriated funds and were not uniform. And, perhaps most significantly, these indemnity agreements had to be negotiated at each tier of subcontractors. Price-Anderson indemnity agreements (now for $500 million) can be entered into without regard to the vagaries of the appropriations process. Price-Anderson coverage is omnibus (i.e., as discussed above, it covers "anyone liable"), and Congress already has said it will review the amount of coverage if the limits are exceeded.

[d] An often misunderstood feature of the Price-Anderson System, which would not now apply to waste repositories, is the "extraordinary nuclear occurrence" (ENO) provision. Suggestions have been made to amend the ENO provision to cover repositories. That would be a good idea, and does not appear to be controversial. At the present time, the ENO provision and its resulting waivers of defenses would not be applicable to a nuclear incident involving only a "production or utilization facility" or a "device" (i.e., an atomic weapon). This was pointed out during negotiations between DOE and the State of New Mexico agreement concerning WIPP. Most entities, including DOE, the State of New Mexico, and others, agree that the Price-Anderson Act should be amended to make the ENO feature applicable to waste repositories. What many oppose is any proposal that would eliminate the "extraordinary nuclear occurrence" feature added to the Act in 1966 and require licensees and contractors to agree in advance to waive certain ordinarily available legal defenses for all "nuclear incidents". Congress considered and rejected this idea in 1966 on grounds that it would encourage nuisance suits.

coverage, but would have significant impacts on such coverage if enacted. It would eliminate the limitation on liability for both NRC power plant licensees and DOE contractors. It would permit persons to recover from suppliers, and require unlimited retrospective premiums from all nuclear power plant operators. This bill even includes a provision that purports to apply its provisions to existing power plants and DOE contracts retroactively. It also would apply the waivers-of-defenses provision to all "nuclear incidents", not just "extraordinary nuclear occurrences" as is now the case.

S. 1761 (the Stafford Bill)

S. 1761, which was introduced by Senator Stafford, Chairman of the Senate Environment Committee, last October goes far beyond other pending bills. For DOE high-level waste management activities, S. 1761 would provide for "complete indemnification" paid from the Nuclear Waste Fund.

H.R. 3653 (the Udall Bill)

H.R. 3653, which also was introduced last October by Rep. Udall, Chairman of both the House Interior Committee and its Subcommittee on Energy and the Environment, was intended by him to serve primarily as a markup behicle. However, even as such a starting point for his Subcommittee, it is significant that H.R. 3653 (as introduced) departed in a number of important respects from the existing Price-Anderson Act. For example, it contained a subrogation provision applicable to both contractors and utillities,[e] and provided for the establishment of a Presidential Compensation Commission to resolve claims above the coverage thresholds provided for in the bill (i.e., about $10 billion for power plants, but still $500 million for DOE contractors).

S. 2072 (the Metzenbaum Bill)

On February 18, Senator Metzenbaum introduced S. 2072, which addresses nuclear liability coverage only for DOE activities. This bill, among other things, would remove any dollar limitation from DOE's authority to enter into nuclear hazards indemnity agreements with its contractors, and require that such agreements be entered into with respect to all the DOE waste management programs (with claims being paid from the Nuclear Waste Fund). It would require DOE to recover its expenses if a contractor, subcontractor or supplier is found to have caused the accident due to "gross negligence or willful misconduct". It also would apply the "extraordinary nuclear occurrence" waivers-of-defenses provision to all "nuclear incidents". This bill even includes a provision that purports to apply its provisions to existing DOE contracts retroactively.

STATE POSITIONS ON COVERAGE FOR DOE WASTE ACTIVITIES

Whatever action Congress takes in the coming weeks, various States and organizations (such as the National Conference of State Legislatures) can be expected to continue to suggest that "full indemnification" should be available for waste disposal and transportation activities under the NWPA. They want strict and "unlimited" liability paid for by the Federal Government. At the October 22, 1985 Senate Environment Committee hearing, the Attorney General of Idaho even indicated he wants States themselves to be held harmless for their own negligence. Yet, since Price-Anderson coverage is not subject to normal appropriation requirements, such as those of the Anti-Deficiency Act, it appears unlikely Congress, if it extends Price-Anderson, would approve unlimited access to the Federal Treasury (i.e., a "blank check"). At the same time, States apparently also would not be satisfied with application of the Federal Tort Claims Act to DOE contractor activities.[f] Thus, it is more likely that some middle ground will have to be found that both preserves the many features of Price-Anderson beneficial to the public and places some limitations on liability. Just what that might be remains to be seen, but this problem could delay passage of an act extending Price-Anderson.

Many, including DOE itself, have opposed eliminating the limitation-on-liability provision that has been a fundamental feature of the Price-Anderson system since 1957. It is submitted that, instead of eliminating the limitation entirely, Congress should consider increasing the $500 million indemnity and limitation for DOE contractors to some appropriate figure. The utilities have endorsed a retrospective premium of $15 million per power plant, which, when added to the underlying private pool insurance of $160 million, would provide about $2 billion of coverage for their activites. DOE contractors have not been prepared to suggest a number, but have testified they believe Congress should give careful consideration to developing an increased figure that would protect all parties by providing a readily

[e] DOE contractors are very much opposed to adding any subrogation provision to the Price-Anderson Act for a number of reasons: for example, Price-Anderson is the only substitute for unavailable private nuclear liability insurance, which, if it existed, would not permit subrogation. Subrogation would undermine the fundamental "omnibus" feature of Price-Anderson discussed above, and foster an adversarial relationship among and down the chain of contractors and subcontractors. It would drive out more qualified contractors and suppliers. It also would increase costs to the government, because contractors and suppliers would have to add some charge to cover this new and *uninsurable risk*. A subrogation provision would ensure protracted litigation, because it is no easier in today's tort law to define "willful misconduct" that "gross negligence" and there is a trend toward applying vicarious liability. Criminal laws provide adequate penalties to punish egregious actions by contractors or suppliers; and, other sanctions, such as debarment, also are available. In fact, DOE last month informed the House Science Committee that, based on past experience, the lack of direct financial liability has not made a contractor less concerned about the safety of nuclear facilities.

[f] While there is no monetary limitation on the liability of the Federal Government under the Federal Tort Claims Act, it creates a number of significant legal obstacles to recovery of damages. For example, the Tort Claims Act does not apply to any claim based upon the exercise of a "discretionary function" whether or not the discretion involved was abused. Thus, accidents that can be said to be the natural consequence of carrying out a program are excluded. The Federal Tort Claims Act does not provide for strict liability, jury trials or punitive damages. It also would make it difficult to bring a class action on behalf of victims, *because each person* injured first would have to file an administrative claim, which DOE could take up to six months to act upon.

available source of funds, without eliminating the Congressional pledge embodied in the present Act that, in the event of an incident involving damages in excess of the statutory limit, Congress will take whatever action is deemed necessary to protect the public.

HOUSE SUBCOMMITTEE MARKUP SESSIONS

The House Subcommittee on Energy and the Environment held markup sessions on November 19 and December 3 and 10, 1985 and reported out H.R. 3653 (the Udall Bill), as amended, for action by the full Interior Committee in 1986. The markup sessions resulted in a number of important amendments: the Subcommittee rejected a waste coverage amendment to H.R. 3653 endorsed by the Governors of three States (Nevada, Washington and Texas) and offered by Rep. Vucanovich of Nevada. That amendment, which overall was confusing and incomplete, apparently would have made the United States liable without limit for both nuclear and nonnuclear incidents arising out of the DOE nuclear waste program (with the first $5 billion coming out of the Nuclear Waste Fund). It also would have established an optional administrative remedy, whose relationship to the Price-Anderson Act, which it presumed would be extended, was completely unclear. Instead, the Subcommittee adopted another amendment that treats coverage for DOE waste management activities similar to that for other DOE contractor activities. However, it makes such coverage mandatory for DOE waste management activities involving spent nuclear fuel, high-level waste and transuranic waste (specifically including transportation of such materials to a storage or disposal site or facility), and increases the amount of contractor coverage to be equivalent to that applicable to power plants, i.e., over $2 billion). It would pay for claims involving commercial waste by retroactively assessing utilities up to $20 million per power plant.

The House Subcommittee also voted to remove the original bill's subrogation provision, which had been strongly opposed by industry. However, the Subcommittee added another troublesome amendment that would exclude coverage for punitive damages, which was offered by Rep. Seiberling. There was considerable confusion about this amendment, but the Subcommittee at its final markup session decided to defer further action on it until the full Interior Committee meets. Representative Seiberling had said at the December 3rd session that he intended to exclude the award of punitive damages in cases covered by Price-Anderson, but the actual effect of his amendment is to eliminate coverage for such.

Chairman Udall has said that he wants to work on Price-Anderson legislation "this Spring". Whenever the full Interior Committee takes up H.R. 3653, it is probable attempts will be made to revisit controversial issues that came up in the Subcommittee markup, such as subrogation and unlimited liability for DOE waste activities.

SENATE COMMITTEE MARKUP SESSIONS

The full Senate Energy and Natural Resources Committee held a Price-Anderson markup session on Wednesday, February 26, 1986 and has scheduled another for this Thursday, March 6, 1986. No votes were taken at this first Senate markup, but can be expected this week. Once the Energy Committee reports a bill, it will be referred to the Environment Committee, which will have 120 days to act upon it.

The Simpson-McClure Bill (S. 1225) was the focus of last week's discussion during which several Senators expressed their thoughts on Price-Anderson and raised questions to be addressed, including those involving DOE's waste management activities. Senator Evans of Washington (a potential repository State) indicated he thinks Price-Anderson should contain more explicit coverage for DOE waste management activities. Senator Hecht of Nevada (another potential repository State) said he too is considering offering an amendment to provide coverage for DOE waste management activities. Senator Domenici of New Mexico indicated he is concerned about coverage for the WIPP facility, but that overall he sees extension of Price-Anderson as an opportunity to make it "current", not one to fix something that is not broken.

POSSIBLE CONGRESSIONAL SCHEDULE

A possible schedule for Congressional consideration of Price-Anderson extension this year is as follows: the full House Interior Committee, beginning markup of H.R. 3653 in late March or early April, could report out a bill by late April. Depending upon whether other House Committees (including the Energy and Commerce Committee and perhaps the Science Committee and the Armed Services Committee) seek sequential referrals of the bill (presumably with time limits), House floor action could take place this summer. Meanwhile, the Senate Environment Committee will hold more hearings this spring. The Senate Energy Committee, which just has begun its markup, should report out a bill (probably similar to S. 1225, if a consensus can be reached on waste coverage issues) in late spring. Following action by the Senate Energy Committee should report a bill before the August recess. This would allow for final Congressional action before both Houses rush to adjourn in October. If this schedule slips, extension of Price-Anderson this year could be in serious jeopardy.

CONCLUSIONS

Before additional suggestions are made about scraping the Price-Anderson system for high-level waste management activities, more careful consideration needs to be given to extending the Act in substantially its existing form. Price-Anderson provides the most comprehensive liability coverage applicable to any hazardous material. Indeed, in our present nationwide liability crisis, it should be serving as model legislation. In remarks last June, Chairman Udall said whatever his Interior Committee does may well have an influence far beyond its immediate impact on nuclear utilities and contractors, noting that the disaster in Bhopal has made some ask whether a system like Price-Anderson might be a better way to compensate victims of mass disasters other than nuclear accidents. The Bhopal tragedy is the closest analogy to a possible catastrophic nuclear accident that has occurred. Without any Price-Anderson-type system applicable to it, what has been seen are a series of unbecoming rushes of plaintiffs' lawyers to numerous courthouses and the prospect of years of complex litigation.

The present Price-Anderson framework though extremely complex, has worked remarkably well for the many nuclear activities it has covered since 1957. During that entire time, the total amount in claims paid by the Federal Government was only about $270,000. The Act's constitutionality has been upheld unanimously by the U.S. Supreme Court. The Price-Anderson system has worked well for almost thirty years.