FEDERAL INDEMNIFICATION IN PROGRAMS UNDER THE NUCLEAR WASTE POLICY ACT OF 1982

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ABSTRACT

The Nuclear Waste Policy Act of 1982 does not address the issues of third party liability claims while the USDOE is carrying out its responsibilities under the Act. This paper argues that these issues can be addressed in the context of the Price-Anderson Act. Under this interpretation, $500 million would be available to claimants for any one accident. It is not clear where USDOE would get the money for this or the effect of exceeding the statutorily-defined limit in the event of a catastrophic accident.

INTRODUCTION

The purpose of this paper is to briefly address how the Price-Anderson system of financial protection could be used to provide for payment of claims in the event of an accident occurring under the Department of Energy's civilian nuclear HLW and spent fuel disposal program.

Congress decided in 1982 that the Federal Government, rather than the States or private industry, should be responsible for disposing of high-level radioactive waste (HLW) and spent nuclear fuel resulting from the operation of civilian nuclear powerplants. Specifically, as stated in the Nuclear Waste Policy Act of 1982, Congress found:

1) That a national problem had been created by the accumulation of spent fuel and radioactive waste,

2) that Federal efforts during the past 30 years to devise a permanent solution to the problem of civilian radioactive waste disposal had not been adequate,

3) that the Federal Government, that is the Department of Energy, has the responsibility to provide for the permanent disposal of HLW and spent fuel,

4) that the cost of such disposal should be the responsibility not of the Federal Government, i.e. the taxpayer, but of the generators and owners of such waste and spent fuel, the majority of which are civilian nuclear utilities, recognizing that these costs would be passed on to their customers-the ultimate beneficiaries of nuclear energy production. 42 U.S.C. §10131.

The Act, signed by President Reagan in January 1983, establishes a schedule for the Department of Energy (DOE) to site, construct, and operate a repository. It also provides procedures for States, Indian tribes and members of the public to participate in the planning and development of the repository. And, in order to "ensure that the costs of carrying out activities relating to the waste disposal will be borne by the persons responsible for generating such waste and spent fuel," the Act establishes a Nuclear Waste Fund to be composed of payments made by the generators and owners of the waste. 42 U.S.C. §10222.

The Act authorizes the Secretary to enter into contracts for the acceptance of title, subsequent transportation, and disposal of waste and spent fuel from civilian nuclear powerplants. 42 U.S.C. §10222. DOE has implemented this provision by promulgating a standard contract for disposal, 48 F.R. 16590, April 18, 1983, which has now been signed by over 70 owners and generators of HLW and spent fuel. That contract provides for title to the waste to pass to DOE at the reactor. It further provides that DOE shall be solely responsible for control of all material upon passage of title. Therefore, DOE will be responsible for ensuring proper shipping, receipt, handling, and emplacement of the waste and spent fuel as well as for construction, maintenance and monitoring of the disposal facility.

But determining that DOE is responsible for these activities does not determine who is liable for injury or damage to third parties, if an accident occurs while DOE is carrying out these responsibilities. Since these disposal contracts provide for full cost recovery to the Government for all costs associated with waste disposal, if the Nuclear Waste Fund established by the Act is insufficient to cover the cost of third party liability claims arising out of the operation of the repository, are the waste generators responsible for covering such costs? If the cause of the injury or damage can be traced to a person other than DOE, can DOE recover from such person? The Act does not address these issues.

However, these issues can be addressed in the context of a different statute, the Price-Anderson Act. The Department believes that these issues are best dealt with through the Price-Anderson system of financial protection which is the system the Department employs for resolving such issues regarding other DOE nuclear facilities. The DOE presently operates nuclear facilities for research and development purposes and for production of nuclear weapons. These DOE facilities are owned by the Federal Government but are operated by private companies under contract to DOE. Under the Price-Anderson system, DOE enters into indemnity agreements with its contractors if the DOE has determined that the activities under the contract involve "the risk of public liability for a substantial nuclear incident". 42 U.S.C. §2210(d).

The disposal contracts executed between DOE and the generators of HLW and spent fuel, which have just been described, provide that DOE will include a similar indemnity agreement based on the Price-Anderson Act in DOE's contract for the construction and operation of any DOE facility for the disposal of HLW and spent fuel. The indemnity agreement would apply to nuclear accidents at the location covered by the indemnity agreement or in the course of transportation to or from that location.

These indemnity agreements would provide that any person found liable for a nuclear accident arising

out of or in connection with the contract activity would be indemnified by the DOE. Therefore, indemnification is not limited to those parties who have entered into an indemnity agreement with the DOE but is available to suppliers, subcontractors, and transporters, to State, Indian tribes and local governments, to any person who may be found liable for a nuclear accident. Furthermore, $500 million would be readily available to claimants for any one accident.

However, if valid claims were to exceed this statutorily-defined limit, Congressional action would be necessary before the DOE would be obligated to pay those claims. Congress has stated its intention to act in the event of a nuclear accident causing damage to third parties that exceeds the statutorily-defined dollar limits. In the Price-Anderson Act, Congress promises that "it will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude". 42 U.S.C. 2210(e).

DOE authority to extend the Price-Anderson system to DOE contract activities is due to expire in August 1987. Several bills to renew the Price-Anderson Act are presently pending in Congress and there appears to be a consensus that the Act should be extended. Several of these pending bills specifically address the application of Price-Anderson to DOE nuclear waste activities and many recognize that the generators of the waste should bear responsibility for the cost of claims that may arise due to a nuclear accident during the conduct of DOE's waste program.

CONCLUSION

It is not clear whether the drafters of the Nuclear Waste Policy Act intentionally omitted from the Act a means of resolving third party liability issues because they assumed such issues would be resolved pursuant to the Price-Anderson Act. But it is clear that by utilizing the Price-Anderson system of financial protection, the unanswered questions asked earlier are answered. Under a Price-Anderson indemnity agreement with the operator of a HLW and spent fuel repository, DOE would ultimately be responsible for payment of third party liability claims for a nuclear accident arising out of or in connection with the waste activity, even if the accident were caused by the activities of another person.

However, Congress is still addressing where DOE would get the funds to make such payments. The Department believes that the generators of the waste should bear the responsibility for such costs, which would in turn be reflected in the cost of providing nuclear energy to the consumer. However, we recognize that in the event of a catastrophic accident resulting in valid claims that may exceed the statutorily-defined limit, Congress may need to reassess its original determination in order to ensure full compensation to the public.