LIABILITY COVERAGE FOR

HIGH-LEVEL NUCLEAR WASTE MANAGEMENT FACILITIES

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ABSTRACT

A key issue that is being debated in developing high-level nuclear waste management facilities is the extent of liability exposure associated with such activities and the Federal Government indemnity or other coverage for that exposure. This paper will concentrate on liability coverage for fixed facilities. It will explore current liability issues and the scope of financial protection now available under the Price-Anderson Act as well as some of the options available to Congress as it begins to determine whether that statute should be extended beyond its present 1987 expiration date.

INTRODUCTION AND BACKGROUND

The Nuclear Waste Policy Act of 1982 establishes a comprehensive Federal program for the siting, construction and operation of facilities for the management of high-level nuclear waste. However, the NWPA itself does not establish any system of financial protection for tort liability that might arise from the nuclear hazards associated with waste management. 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".

Since there is no specific authority in the NWPA to provide coverage for liability arising from activities under that Act, DOE must look to other statutory authority, if any, for such. Thus, when the issue of liability recently 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 to extend endemnity for nuclear hazards. I will describe Price-Anderson coverage at some length, but first let me say a few words about the scope of liability that might arise in connection with a fixed waste management facility.

SCOPE OF LIABILITY

High-level nuclear waste management facilities developed under the NWPA will be licensed by the U.S. Nuclear Regulatory Commission (NRC) and will be subject to stringent regulations, which presumably should make any off-site injuries to persons or property very remote. Nevertheless, this risk cannot be totally eliminated.

As I indicated in my paper on liability coverage for low-level radioactive waste disposal facilities last year at this Symposium, any liability in terms of money damages to make a person injured off-site "whole" or to recover clean-up costs ordinarily would be based on the tort laws of the State where the disposal facility is located. These laws can vary considerably from State to State. Tort laws, except in States that have enacted superceding statutes, remain within the purview of the "common law", i.e., their principles are derived from judicial decisions and precedents, rather than enacted through the legislative process. Yet, because courts tend to pattern decisions on those made elsewhere, it is possible to describe some general principles and trends in the law on a national basis.

The two principal standards for determining liability in tort are negligence and strict liability irrespective of fault. If the negligence standard is applied, an entity can be found liable if it fails to act with the care expected of a "reasonable and prudent" person under the circumstances. Under the standard of strict liability, which States are applying increasingly to activities that are "abnormally dangerous" or "ultrahazardous", an entity may be liable without regard to the degree of care it has exercised. Recovery for injuries caused by a high-level waste management facility or clean-up costs also might be pursued on a theory of either "trespass", which at common law is defined as an "unauthorized entry" onto another's land, or of "nuisance", which requires only a showing of a substantial or unreasonable interference with the use and enjoyment of land or life.

With respect to a high-level waste management facility, the most likely defendants in any lawsuit would be DOE and/or the government contractors hired by DOE to design, construct and operate the facility. (DOE waste management facilities most likely will be operated by contractors, as government-owned facilities in the atomic energy program have been since the days of the Manhattan Engineer District in the early 1940's). In the absence of some insurance or indemnity arrangement and if contractors as agents of the Federal Government can themselves be held liable, their liability of course would be limited to their assets. DOE's own liability, if any, now would be governed by the Federal Tort Claims Act, which is a limited waiver of sovereign immunity.

APPLICABILITY OF THE PRICE-ANDERSON ACT

Liability coverage for DOE high-level nuclear waste management facilities can or already is being provided under existing provisions of the Price-Anderson Act. The Act now gives discretionary authority to either 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 also are applicable.

In 1957, when the Price-Anderson Act initially was passed, Congress admittedly was concerned primarily with providing financial protection for "production and utilization facilities" (as those terms are defined in the Atomic Energy Act of 1954, as amended). In fact, Congress specifically made application of the Price-Anderson system a mandatory condition of each license under Sections 103 and 104 and each construction permit under Section 195. At the same time, however, Congress recognized that there may be instances in which other Commission licensees may have such large quantities of nuclear materials as to warrant the imposition of the provisions of the Act. For these instances, the commission was given discretion under Section 170a to apply the Act. This means that the NRC has discretion to apply the provisions of the Price-Anderson system, if it also has authority to license the facility involved. Thus, the NRC has authority to require liability coverage and to provide indemnity for a nuclear incident at any licensed waste management facility. Since all waste facilities under the NWPA will be licensed, NRC coverage under Section 170c could be used for any or all of them. This coverage now can amount to $560 million per incident.

In the past, the decision by NRC to extend coverage has been based in important part on an assessment of the consequences of hypothetical severe accidents at the licensed activity and the ability of the licensee to obtain liability insurace or other wise respond to liability claims. In the case of a DOE facility, the United States Government can self-insure and presumably has the ability to respond to high liability claims. However, whether a hypothetical accident at a waste management facility would be severe enough to warrant action by the NRC requiring extensive coverage arguably is more of an open question. This is a policy decision to be made by the NRC. Heretofore, the Commission has prescribed financial protection requirements for reprocessing plants, and plutonium processing and fuel fabrication facilities, but not, for example, for independent spent fuel storage installations or any other high- or low-level waste management facility.

Even if NRC does not exercise its discretionary authority to extend coverage for some reason or if a particular DOE facility is not operated under the NWPA and thus not licensed by NRC (in which case Section 170c would not apply), Price-Anderson coverage still could be afforded. DOE has independent authority under Section 170d of the Act (until August 1, 1987) to enter into nuclear hazards indemnity agreements with its contractors (or to require them to maintain financial protection in such amounts DOE determines to be appropriate). DOE indemnity agreements now can provide $500 million of coverage per incident.

"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" (not just the entity names in the government indemnity agreement) for "any legal liability arising out 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.

The Price-Anderson system, furthermore, covers from the first dollar of loss third-party bodily injury and property damage to off-site property arising from the hazardous properties of nuclear material. The only exception to this coverage is for the United States Government or any of its agencies (whose liability is governed by the Federal Tort Claims Act). Thus, Price-Anderson coverage extends to all tiers of sub-contractors and suppliers, and even to persons not in "privity" with the covered entity. Congress viewed, as the "trade-off" for this extensive coverage, the Price-Anderson Act's limitation on liability (which was upheld unanimously by the U.S. Supreme Court in 1978).

There also is a provision in Price-Anderson for interim emergency assistance without requiring claimants to sign releases or otherwise compromise their claims. There is another provision for consolidation of all cases in a single federal district court. The various features of the Price-Anderson system make it the most comprehensive liability coverage scheme for any hazardous material.

"EXTRAORDINARY NUCLEAR OCCURRENCE" PROVISION

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, but first let me explain how it operates: The ENO provision was added to the Price-Anderson Act in 1966 for the purpose of further assuring prompt compensation to the public for serious nuclear incidents without at the same time totally displacing state laws by the creation of a "federal tort". The 1966 amendment (now mainly Section 170n) provides that, in the event of an ENO, certain ordinarily available state law defenses are waived. Congress did not wish to make these provisions applicable to all nuclear incidents for fear of encouraging nuisance suits. Determination as to whether an incident was an ENO is made by NRC or DOE on the basis of predetermined criteria.

As a result of the defenses that would be waived, a person suffering nuclear injury as a result of an ENO need show only a casual connection between his or her injury or damage and the nuclear incident in order to recover. In other words, when there is an ENO, there essentially is a "no-fault" recovery scheme. At the same time, it is not necessary that an ENO determination be made for coverage under the Price-Anderson system to apply. Use of the ENO provision simply would make it easier for plaintiffs.

The only case in which an ENO determination previously has been made was the Three Mile Island accident. NRC determined in 1980 that, while that event was "extraordinary" in usual parlance, it was not an ENO. DOE recently was called upon to make its first ENO determination in a lawsuit filed in January 1985 alleging certain damages arising from releases at DOE's Fernald, Ohio uranium processing facility.

At the present time, the ENO provision and its resulting waivers of defenses would not be applicable to a nuclear incident at a waste repository. This is because, under the present wording of Section 170n, the ENO feature applies 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 over WIPP and was addressed in the DOE-State of New Mexico agreement discussed below. 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.

DOE AGREEMENT WITH NEW MEXICO CONCERNING WIPP

The contract DOE has entered into with Westinghouse Electric Corporation, the technical support contractor and potential operator of the Waste Isolation Pilot Plant Project is evidence that DOE is prepared to exercise its Price-Anderson Act Section 170d authority with respect to a Federal waste facility. In connection with the WIPP facility, the State of New Mexico raised concerns about its own possible liability in the event of a nuclear incident. In an effort to accommodate those concerns, DOE and the State of New Mexico entered into an agreement in late December 1982. DOE therein reiterated its obligations under the Price-Anderson Act as they relate to WIPP and nuclear shipments to or from it.

In the 1982 DOE-New Mexico agreement, DOE confirmed that the State of New Mexico and its political subdivisions and municipalities would be covered as a "person indemnified" under the nuclear hazards indemnity article in the WIPP operating contract or other applicable DOE contracts, such as those for operation of the facilities from which the waste will be shipped. For example, DOE confirmed that, in the content of the WIPP Project, New Mexico's own financial protection available through its own liability insurance or legislative appropriations would not have to be exhausted or applied to pay for its public liability before it would be indemnified under the Price-Anderson Act. DOE also said the $500 million indemnity agreement fund would not be first depleted by costs of investigating or settling claims. The agreement further provided that DOE would pay the costs of clean-up and decontamination in relation to a WIPP transportation accident, whether or not the accident resulted in a release of any radioactive material into the biosphere.

FEDERAL TORT CLAIMS ACT

As indicated above and although it is unlikely to happen, if DOE were to operate its waste management facilities with Federal Government, instead of contractor, employees (and if NRC did not extend Price-Anderson licensee coverage), damage recoveries, if any, would have to be made under the Federal Tort Claims Act. While there is no monetary limitation on the liability of the Federal Government under the 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 most famous example of the use of this exception to deny coverage was the Texas City disaster. In that case, the U.S. Supreme Court after years of litigation said the Federal Government was not liable for damages. (Congress under special legislation eventually paid a few cents on the dollar.) 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.

EXPIRATION OF PRICE-ANDERSON AUTHORITY IN 1987

What I have said thus far has been about the Price-Anderson Act as it applies to existing coverage or authority to extend coverage. Unless again extended by Congress, authority for any new Price-Anderson coverage will expire 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 be 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 activities after August 1, 1987.

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, were not uniform, and sometimes were inapplicable in the case of gross negligence and other circumstances. And, perhaps most significantly, these indemnity agreements had to be negotiated at each tier of subcontractors. 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.

1985 LEGISLATIVE OUTLOOK

Both DOE and NRC have submitted reports to Congress urging extension of the Price-Anderson Act beyond 1987 with certain modifications (major ones in the case of NRC's suggestions). Certain other suggestions have been considered by the National Conference of State Legislatures, the National Governors' Association, and the Coordinating Committee of the Price-Anderson Contractors Policy Issues Study. (The latter is an independent activity of the American Nuclear Energy Counsel sponsored by a number of DOE contractors with existing Section 170d DOE indemnity agreements and for which I am counsel). The DOE contractors have recommended, among other things, that the ENO provision be extended to waste management facilities.

During 1985, Price-Anderson legislation may be considered by as may as seven Congressional committees. (This is almost as many as had to act on the NWPA.) The principal issue is expected to be the limitation-on-liability feature that has been a part of the Price-Anderson system since 1957. Consideration also is expected to be given to applying the ENO feature to waste management facilities, but that does not appear to be controversial. There also may be consideration given to the actual source of funds for indemnity (e.g., whether they should come out of the Federal Treasury or the Nuclear Waste Fund).

Three bills already have been introduced in this Congress (as of the end of February): H.R. 51 (the Price bill), H.R. 445 (the Seiberling bill) and S. 445 (the Hart bill). The Seiberling and Hart bills are identical. H.R. 51 would increase coverage to about $1 billion and retain a limitation-on-liability feature for licensees and contractors. H.R. 445 and S. 445 would eliminate the Price-Anderson limitation-

on-liability feature without increasing the amount of indemnity available for government contractors.

The National Conference of State Legislatures and others have suggested that "full indemnification" should be available for disposal and transportation activities under the NWPA. However, since Price-Anderson coverage is not subject to 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. No Congress is likely to write a blank check. 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 contractor or Federal Government liability.

CONCLUSIONS

Before too many suggestions are made about scraping the Price-Anderson system for high-level waste management activites, more careful consideration needs to be given to extending the Act in substantially its existing form. The present framework, though extremely complex, has worked well for the many nuclear activities it has covered since 1957. It provides the most comprehensive liability coverage applicable to any hazardous material. Its constitutionality has been upheld unanimously by the Supreme Court. In short, the Price-Anderson system has worked well for almost thirty years. It should not be quickly discarded.