

COMMENTS ON 62 CFR 68272

Re: Department of Energy, Office of General Counsel; Preparation of Report to Congress on Price-Anderson Act

JANUARY 30, 1998

TO: U.S. Department of Energy  
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RE: DEPARTMENT OF ENERGY, OFFICE OF GENERAL COUNSEL;  
PREPARATION OF REPORT TO CONGRESS ON PRICE-ANDERSON ACT  
(62 FR 68272): PUBLIC COMMENT

I. INTRODUCTION

The Atomic Energy Act requires the Department of Energy ("DOE") to submit a detailed report to Congress by August 1, 1998, concerning the need to continue or modify the Price-Anderson Act ("Act"). The DOE is requesting public comments to assist the DOE in the preparation of the report on the Act to be submitted to Congress.

OHM Remediation Services Corp. ("OHM") is a diversified services firm for government and private sector clients and provides a broad range of outsourced services including environmental remediation and project, program and construction management services. OHM is submitting comments, questions and requests for clarification to the DOE because the continued viability of the Act is crucial to OHM's core business. However, the Act needs to be modified to reflect the current state of the nuclear industry which currently has a stronger focus on decommissioning and low-level radioactive waste than it did at the time the Act was initially contemplated.

The following was developed for submission to the Department of Energy ("DOE") with several goals in mind: First, to identify OHM's comments and concerns regarding the "List of Questions" presented by the DOE; Second, to propose additional questions and

issues that should be addressed in the DOE's report to Congress; and, Third, to request clarification regarding certain provisions of the Price-Anderson Act ("Act").

To the extent possible, OHM will cite to relevant portions of the Act and/or the "List of Questions."

## II. OHM'S COMMENTS RE: DOE'S "LIST OF QUESTIONS"

### A. GENERAL COMMENT

Congress passed the Price-Anderson Act in 1957 as an amendment to the Atomic Energy Act of 1954.

The Act's purpose is to promote the private nuclear industry by:

- (i) indemnifying all liable persons for liability arising from nuclear incidents; and
- (ii) compensating the public for damages arising from nuclear incidents.

The Act requires Nuclear Regulatory Commission ("NRC") licensees and DOE contractors to maintain financial assurance in the event of a nuclear disaster.

The Act stops short of imposing strict liability. The Act only operates as a strict liability statute in certain extremely limited circumstances referred to as "extraordinary nuclear occurrences." For practical purposes, potential plaintiffs would still be required to prove liability pursuant to applicable state law to the extent state law is consistent with the Act.

In practical terms, the Act is cold comfort to contractors and subcontractors who work in the nuclear industry. The exact scope of indemnification for liability and legal fees is uncertain and the courts have not had many opportunities to thoroughly examine the numerous issues concerning how the Act would actually operate in a world that is quite different from the world of 1957. In fact, the stated purpose of the Act has remained unchanged for over forty years despite fundamental changes in the nuclear industry.

OHM respectfully requests that the DOE address the concerns raised below in an attempt to maintain the overall viability of the Act while updating the Act to address the current realities of the nuclear industry.

### B. DOE QUESTION 1: Should the DOE Price-Anderson indemnification be continued without modification?

FIRST COMMENT TO QUESTION 1: The Act should be modified to expressly indemnify both NRC licensees and DOE contractors during decommissioning activities.

The Price-Anderson Act was initially enacted during the height of the public's enthusiasm for nuclear power to encourage the participation of private industry in the nuclear industry by providing indemnification coverage. Today, private industry is more likely to be involved in the decommissioning of a nuclear facility than building or maintaining one. Although the Price-Anderson Act addressed its indemnification protections in the context of a growing nuclear industry, the risks of a nuclear disaster are as inherent in the decommissioning of a nuclear reactor as they are in the development of a nuclear reactor.

Therefore, although the growth and development of the nuclear industry may no longer be on top of the government's agenda, the government needs to stand by the private nuclear industry even in this phase of decline by maintaining the indemnification protections throughout the active life of the reactor as well as during its decommissioning.

- C. DOE QUESTION 2: Should the DOE Price-Anderson indemnification be eliminated or made discretionary with respect to all or specific DOE activities? If discretionary, what procedures and criteria should be used to determine which activities or categories of activities should receive indemnification?

FIRST COMMENT TO QUESTION 2: Material modifications to the Act may adversely affect current and future contracts concerning nuclear facilities.

If the United States withdraws its indemnification protection, it will expose a whole industry to fundamental changes that may adversely impact future and existing contracts. The uncertainty of whether contractors may continue to rely on the Act's indemnification will stymie current contract negotiations and place companies in the difficult business position of deciding whether to "bet the farm" by entering into a contract on a nuclear facility only to find that their reliance on the Act's indemnification provisions were misplaced.

SECOND COMMENT TO QUESTION 2: The Act should be expanded to expressly indemnify activities regarding low-level nuclear waste.

It is unclear whether the Act contemplates indemnification coverage for liability incurred during low-level nuclear waste decommissioning. Clarification of the scope of the Act in the age of decommissioning would provide much needed peace of mind to contractors and subcontractors who are engaging in uncertain liability situations with questionable indemnification coverage.

THIRD COMMENT TO QUESTION 2: If indemnification is made discretionary, activities pursuant to contracts entered into prior to modifications to the Act should continue to receive indemnification.

The Act was originally to be reviewed in the year 2002. Contractors and subcontractors have relied on the current state of the Act when bidding for and entering into contracts to engage in work at nuclear facilities. Contracts that have been entered into prior to the effective date of any modifications should in all fairness be "grandfathered" to receive the current level of indemnification protection.

- D. DOE QUESTION 23: Should the reliance of the Act on state tort law continue in its current form? Should uniform rules already established by the Act be modified, or should there be additional uniform rules on specific topics such as causation and damage? Describe any modifications or additional uniform rule that would be desirable and explain the rationale.

FIRST COMMENT TO QUESTION 23: DOE should clarify whether nuclear liability torts should be heard in federal courts or tribal courts in disputes on Indian land. In *Kerr-McGee Corporation v. Cyrus Foote Minerals Corp*<sup>1</sup>, the Tenth Circuit affirmed the lower court's stay of further action in federal court until the tribal court ruled on jurisdiction.

The policy of the Act is to streamline tort claims arising from nuclear incidents in federal, rather than state, courts. If the Act fails to address the issue of tribal sovereignty, jurisdictional disputes between federal and tribal courts will result in time consuming and costly removal actions as well as uncertainty for potentially liable parties.

SECOND COMMENT TO QUESTION 23: Congress should consider adopting an express statute of limitations. Such a statute would define when a claim accrues, and would discourage forum shopping.<sup>2</sup> The geographical scope of radiation injury from a nuclear incident is difficult to ascertain and leaves potentially liable persons open to the statutes of limitation of all fifty-states and beyond.

III. ADDITIONAL QUESTIONS AND ISSUES THAT SHOULD BE ADDRESSED IN THE DOE'S REPORT TO CONGRESS

- A. PROPOSED ISSUE 1: How will any proposed modifications affect the Act's exposure to future Constitutional attack?

In June 1978, Chief Justice Warren Burger upheld the Constitutionality of the Price-Anderson Act as neither arbitrary nor irrational because the liability limit was created to

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115 F.3d 1498 (June 25, 1997)

*LuJan v. Regents of the University of California*, 69 F.3d 1511 (November 8, 1995).

encourage private-sector construction of nuclear power plants.<sup>3</sup> Now that the focus has moved from the encouragement of construction to the encouragement of decommissioning, is the constitutionality of the Act threatened?

B. PROPOSED ISSUE 2: How will the 1997 Vienna Conference affect the Act?

Two nuclear liability agreements adopted at the 1997 Vienna Conference were protocol to amend the 1963 Vienna Convention. The agreements would raise the ceiling of civil liability against damage from nuclear accidents on an international level. There are issues regarding how these changes would affect the Act if they are entered into force? Would such a treaty affect who should pay the costs associated with the higher liability ceiling?

C. PROPOSED ISSUE 3: Congress should clearly articulate the current purpose of the Act "taking in account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety."

The purpose of the Act was initially to promote the nuclear industry by encouraging private industry to enter the nuclear field without fear of prohibitive liability exposure in the event of a nuclear disaster and to promote rapid and adequate compensation for persons and certain property damaged by a nuclear disaster.

Although, promoting private industry to enter the nuclear field to create new nuclear facilities is no longer a policy concern, promoting private industry to enter the nuclear industry to safely decommission existing nuclear facilities will be a continuing concern as will promotion of compensation for persons and property damaged by a nuclear disaster. Thus, the Act continues to serve viable policy interests.

IV. OHM REQUESTS CLARIFICATION REGARDING U.S.C. § 2210(d)

U.S.C. §2210(d)(1)(A) provides that the Secretary of Energy shall "enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section."

U.S.C. §2210(1)(B)(I) provides that "[b]eginning 60 days after August 20, 1988, agreements of indemnification under subsection (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph . . . ."

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*Duke Power Co. v. Carolina Environmental Study Group, Inc., et. al.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed 2d 595.

FIRST COMMENT: Subcontractors are often not privy to any agreements between the DOE and DOE contractors. The DOE should propose legislation to assist subcontractors wishing to identify and understand the scope of potentially available indemnification prior to engaging in activities that may involve the risk of public liability.

Subcontractors often engage in activities without full knowledge of the available indemnification agreements that may cover their liability or legal fees and whether or not there are any time limitations on these indemnification agreements. Proposed legislation may include requirements that subcontractors be made aware of key provisions of indemnification agreements entered into between the DOE and the contractor. Such legislation may also be extended to provide the public with accessible information regarding funds available in the event of a nuclear disaster.

SECOND COMMENT: The DOE should proscribe as against public policy attempts by contractors to avoid the Act's indemnification provisions by imposing contractual duties on subcontractors to indemnify contractors in contravention of the Act.

V. OHM REQUESTS CLARIFICATION REGARDING THE FEASIBILITY OF TRANSFER OF FORMALLY UTILIZED SITES REMEDIAL ACTION PROGRAM TO THE U.S. ARMY CORPS OF ENGINEERS.

Recently, there have been discussions regarding the transfer of the DOE's Formerly Utilized Sites Remedial Action Program ("FUSRAP") to the U.S. Army Corps of Engineers ("Corps"). Concerns have been raised by the DOE concerning anticipated delays of FUSRAP cleanups due to many unanswered questions about the scope of the Corps' authority and the applicability of the Act to provide indemnification to contractors.

The following are questions that have been raised regarding the implications of the Corps taking over FUSRAP that may have particular interest to contractors and subcontractors who do work with the Corps. OHM asks the DOE to pose these questions to Congress in an attempt to achieve more clarity for contractors and subcontractors who are considering the economic feasibility of work with the Corps on these sites and to ensure that potential delays are minimized with any transfer to the Corps.

FIRST QUESTION: What legal authority does the U.S. Army Corps of Engineers (the "Corps") have to handle nuclear materials, assure worker safety and set cleanup standards?

SECOND QUESTION: Will the Corps take over site liability, current cleanup contracts and environmental compliance agreements negotiated by DOE with state and federal regulators?

THIRD QUESTION: What authority does the Corps have to self-regulate nuclear cleanups, if any?

FOURTH QUESTION: Would the Corps have to obtain nuclear materials handling licenses from the NRC or states for each cleanup?

FIFTH QUESTION: Would the Corps have Price-Anderson nuclear accident indemnification for contractors?