

RECENT DEVELOPMENTS IN THE AREA OF INSURANCE AND INDEMNITY COVERAGE FOR TRANSPORTATION OF RADIOACTIVE MATERIALS IN THE UNITED STATES OF AMERICA

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Abstract

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A continuing concern surrounding the packaging and transportation of radioactive materials is the availability of adequate compensation in the unlikely event of a serious accident. The paper will discuss recent developments in the area of insurance and indemnity coverage for such in the United States of America. At two earlier PATRAM symposia, held in 1980 and 1983, descriptions of the US Price-Anderson insurance-indemnity system were presented. Since then, there have been several developments of interest. Foremost among these is the fact that the United States Congress is considering whether to again extend Price-Anderson Act authority. Thus, 1986 is a pivotal year in terms of whether Congress will re-authorize this legislation before it expires on 1 August 1987.

Introduction

The Price-Anderson Act of 1957 established a comprehensive and unique system of private insurance and Federal Government indemnity for public liability that might arise from the use of radioactive materials in the United States. This system, which provides broad coverage for public liability associated with fixed nuclear facilities and associated transportation, expires on August 1, 1987. The United States Congress now is considering whether to extend the Act again. What expires on August 1, 1987 is only the authority to extend nuclear hazards liability coverage to new power plants licensed by the U.S. Nuclear Regulatory Commission (NRC) and new U.S. Department of Energy (DOE) contracts. Thus, with no new nuclear power plants now being ordered in the United States, the expiration date is of more immediate concern to DOE contractors than electric utilities whose existing plants would continue

to be covered if Congress fails to act. In fact, four important DOE prime contracts expire on September 30, 1987 (i.e., those for Hanford, Los Alamos, Lawrence Berkeley and Lawrence Livermore). Entities considering bidding on these contracts already are concerned that Price-Anderson may not be extended by the date the new contracts will be entered into. Without Price-Anderson coverage (or its equivalent), DOE contractors and especially subcontractors would be very reluctant to furnish transportation services and packaging materials or otherwise do nuclear business with DOE.

Scope of Risk From Nuclear Transportation Activities

Before examining liability coverage, it is useful to review the scope of risk from nuclear transportation activities. Even with the stringent transport safety requirements applicable to nuclear materials, there is a definite -and increasing- risk of liability for anyone involved with their transportation in the United States. This is not to suggest that the risk of a transportation accident is increasing, but only that the risk of liability in the unlikely event of an accident is increasing. Compensatory damage awards and environmental clean-up costs associated with the hazardous properties of various materials have been increasing dramatically in the United States over the last several years. The number of radiation injury claims likewise has been increasing. With the application of new latent toxic tort concepts that make damage recoveries easier, such as probability of causation, even more are expected. The January 1984 Supreme Court of the United States ruling in Silkwood v. Kerr-McGee Corp. portends an exposure to even greater punitive damages. (The U.S. Supreme Court's 5-to-4 decision in Silkwood allows juries of laymen to impose punitive damages -in effect, fines- even where an entity has been operating in full compliance with applicable Federal safety regulations.)

Price-Anderson Act

The Price-Anderson Act provides for coverage for public liability associated with nuclear material while at a covered nuclear facility or in the course of transportation to or from such a facility. Substantive tort law is left to the States (except when an incident rises to the level of an "extraordinary nuclear occurrence"). The United States Congress originally enacted the Price-Anderson Act for the dual purpose of (1) assuring that funds would be available in the unlikely

event of a serious nuclear incident, and (2) encouraging private industry to participate in the nuclear field. The Price-Anderson Act has been re-enacted twice since 1957 and amended several other times. The most recent re-enactment was at the end of 1975.

"Omnibus" Feature

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 United States Government) for "any legal liability arising out of or resulting from a nuclear incident".- This so-called "omnibus" feature is similar to the channeling of all liability to the power plant operator in Western European countries. The 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 (as has been demonstrated by the litigation arising from the Three Mile Island accident). There is coverage regardless of how liability of particular defendants (any one of whom might have very limited assets) is allocated by U.S. tort law, a system unique to nuclear applications.

Limitation on Liability

Additionally, the Price-Anderson Act now provides that the liability of all entities covered by it is limited to the amount of coverage provided by the system. This limitation-on-liability provision was upheld unanimously by the U.S. Supreme Court in 1978 in Duke Power Co. v. Carolina Environmental Study Group.

Section 170c Licensee Coverage

Historically, most attention in the United States has focused on Price-Anderson Act coverage for commercial nuclear facility licensees, especially nuclear power plant operators. That portion of the Act (principally Section 170c licensee coverage) is administered by the NRC. The total liability coverage for power plants and their associated shipments of nuclear materials is \$665 million. (This is the amount as of June 1986; and, as described below, increases by \$5 million each time a new power plant is licensed to operate.)

Nuclear Insurance Pools

NRC indemnity agreements (under Section 170c) or DOE indemnity agreements (under Section 170d), as discussed below, may be the sole source of funds for public liability for nuclear risks where there is not insurance from private sources. Private insurance, when applicable, can furnish either underlying or exclusive coverage. It is provided by either the two nuclear insurance pools (American Nuclear Insurers, the pool of stock companies, and the Mutual Atomic Energy Reinsurance Pool, the pool of mutual companies) or the conventional insurance market. As a general rule, the pools cover nuclear fuel cycle activities, while non-fuel cycle activities (which are not considered to involve a level of risk requiring a pooling arrangement) are covered by the conventional insurance market. The pools issue two principal types of nuclear energy liability policies both in amounts presently up to \$160 million: the Facility Form, and the Supplier's and Transporter's Form (which is not part of the Price-Anderson system). A large portion of this insurance capacity is provided by reinsurers worldwide.

Utility Industry Retrospective Premium

In the case of liability associated with NRC licensed power plants, if the primary level of financial protection afforded by the plant's Facility Form (\$160 million) were insufficient to pay all claims, power plant operators would be assessed up to \$5 million per incident retrospectively for each reactor. This Industry Retrospective Premium provision (a form of enterprise liability) was added to the Price-Anderson Act in 1975 at the utilities' suggestion for the purpose of substantially increasing the amount of financial protection (for power plants only) afforded by private sources. The amount of power plant coverage now is \$160 million under the Facility Form plus \$505 million under the Retrospective Plan (i.e., 101 nuclear power plants operating as of June 1986 times \$5 million each) for a total of \$665 million.

Section 170d Contractor Coverage

The other principal kind of Price-Anderson coverage is that issued by DOE under the Section 170d contractor provision. That subsection expressly authorizes DOE to indemnify its contractors against public liability in the event of a "substantial" nuclear incident. The Section 170d indemnity can be for

up to \$500 million for each nuclear incident occurring inside the United States and up to \$100 million for each incident occurring outside the United States, and, when extended, brings into play the limitation-on-liability provisions of Section 170e of the Price-Anderson Act. Coverage under a DOE nuclear hazards indemnity agreement is substantially the same as that afforded under the pools' Facility Form policy.

Incidents Outside the United States

Indemnification of DOE contractors for a nuclear incident occurring outside the United States specifically is authorized by Section 170d, but, as noted above, the maximum amount of Federal Government indemnity under Price-Anderson for such an incident now is \$100 million. There also are other differences about coverage under Section 170d (not all of which are applicable to Section 170c licensee coverage) for incidents outside the United States: The class of persons eligible for indemnity coverage is smaller. There is not omnibus coverage for "anyone liable". Coverage for incidents outside the United States extends only to the prime DOE contractor with the indemnity agreement, subcontractors, suppliers of any tier, and others whose liability arises by reason of activities connected with such contract or subcontracts. The special features of the "extraordinary nuclear occurrence" provision (discussed below) do not apply to a nuclear incident occurring outside the United States.

"Extraordinary Nuclear Occurrence" Provision

An often misunderstood feature of the Price-Anderson system is the "extraordinary nuclear occurrence" (ENO) provision. 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 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. (The only case in which an ENO determination previously has been made was the Three Mile Island accident. NRC determined that, while that event was "extraordinary" in ordinary parlance, it was not an ENO.) It is not necessary that

an ENO determination be made for coverage under the Price-Anderson system to apply.

Current Congressional Activities

Price-Anderson extension now is being considered actively by the United States Congress where at least seven committees have jurisdiction over such legislation. Price-Anderson is probably the single most important and controversial nuclear energy issue facing the 99th Congress. 1985 was a record-building year, with Congressional committees holding several hearings. 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 includes a number of recesses and the early adjournment target typical of election years. The Federal Government budget still is occupying much of the Members' attention. Additionally, there now is a new factor that may have important effects on Price-Anderson extension, i.e. the Chernobyl power reactor accident. At this point, however, it is not possible to predict precisely what impacts the recent Soviet accident will have on public perceptions in the United States or on American Congressional actions.

Most of the Price-Anderson bills before Congress do not address transportation coverage directly (except, in certain cases, with respect to DOE waste management activities), but all would affect such coverage. In the hearings and bill markup sessions to date, the key issues have been the limitation on liability, subrogation (e.g., a right of action back against an entity whose "gross negligence" or "willful and wanton misconduct" contributed to a loss), punitive damages, coverage for DOE waste management activities and use for the latter of the Nuclear Waste Fund (paid by utilities to DOE for spent fuel disposal).

In the Senate, most attention has focused on S.1225, which was introduced by Senators Alan K. Simpson of Wyoming, Majority Whip and Chairman of the Nuclear Regulation Subcommittee of the Senate Environment and Public Works Committee, and James A. McClure of Idaho, Chairman of the Senate Energy and Natural Resources Committee. The Simpson-McClure bill would retain the basic features of the present system, but increase the limitation on liability to over \$2 billion. On April 24th, the Senate Energy Committee reported out a modified version of S.1225. The bill as reported by the Energy Committee would provide coverage of about \$2.4 billion for both NRC power plant licen-

sees (up from the present figure of \$665 million) and DOE contractors (up from \$500 million). For power plants, the bill would require a retrospective premium of up to \$20 million, with an annual adjustment for inflation. It would make coverage for DOE contractors mandatory for all "nuclear incidents", whether or not the risk is "substantial". The bill also contains an amendment that creates a new discretionary civil penalty of up to \$10 million for DOE contractors, if an incident is the result of "gross negligence or willful misconduct". The bill would make more explicit DOE's authority to cover waste management activities (specifically including transportation) under the Nuclear Waste Policy Act of 1982 and the Waste Isolation Pilot Plant authorizing legislation. The Nuclear Waste Fund would be used for incidents involving DOE waste management activities (including transportation of spent fuel from power plants). The Energy Committee bill also includes an amendment that would bar awarding punitive damages "under State law" in actions against persons indemnified by the Federal Government (i.e., DOE contractors, indemnified NRC licensees required to maintain less than the maximum amount of financial protection (now only plutonium fuel fabricators), and nonprofit educational institutions). There is a new provision requiring coverage for "precautionary evacuations", but only if certain conditions are met. (Whether there would be coverage in the event the conditions were not met is an open question.) The "extraordinary nuclear occurrence" provisions are made applicable to DOE waste management contracts. The Senate Environment Committee now must complete its action by August 21st or lose jurisdiction over the bill.

In the House of Representatives, the Interior and Insular Affairs Committee on May 21st reported out a modified version of a bill (H.R.3653) introduced by its Chairman, Morris K. Udall of Arizona. H.R.3653 as reported would increase coverage and the liability limitation to about \$6.5 billion. This "compromise" figure would be raised by increasing the first layer of private insurance to \$200 million and then by assessments of \$63 million per plant per incident (with no more than \$10 million payable in any one year). The reported bill provides for unlimited liability for various DOE nuclear waste activities, with the first \$6.5 billion coming from the Nuclear Waste Fund. Other House Committees, such as Energy and Commerce, and Science and Technology, probably will receive sequential referrals of this legislation. In this regard, note that nuclear power plant operators have been strongly opposing any new Price-Anderson limit much

above \$2 billion. Thus, with the legislative focus now shifting to Committees generally less sympathetic to nuclear issues, strong efforts will be needed for Congress to adopt a favorable Price-Anderson bill this year.

A possible schedule for further Congressional action on Price-Anderson extension this year is as follows: Depending upon whether other House of Representatives Committees (including the Energy and Commerce Committee, and perhaps the Science and Technology Committee, the Armed Services Committee, and the Ways and Means Committee) each seek sequential referrals of the House Interior Committee bill (presumably with time limits), House floor action and passage could take place this Summer. The Senate Energy Committee reported its bill on April 24th, so the Senate Environment Committee now has until about August 22d to complete any action on a Price-Anderson bill. As a practical matter, this means it must complete its action by August 15th, the day on which the Labor Day recess now is scheduled to begin. Following its second hearing in mid-May, the Environment Committee's Nuclear Regulation Subcommittee has been planning to begin to markup a bill this month. Action by the full Senate Environment Committee and the full House this Summer could allow for final Congressional action before both Houses of Congress rush to adjourn in October. (Or, if there is a "lame-duck" session after the November elections for the new Congress, there will be more time for action this year.) The President could sign the bill (which would enact it into law) shortly thereafter. If this schedule slips, extension of Price-Anderson could be in serious jeopardy. Next year's Congress would not have to begin over, but might not be disposed to act quickly enough to have an extension in place by August 1, 1987.

Conclusions

The changes in the Price-Anderson Act being considered by Congress could have significant impacts on nuclear transportation activities in the United States. In addition to contentious issues of coverage for DOE nuclear waste management activities, punitive damages and subrogation, renewed consideration by the Congressional committees yet to act is expected to be given to other controversial issues such as covering acts of sabotage, lowering the "extraordinary nuclear occurrence" threshold to make the waiver of defenses apply to all nuclear incidents, and extending the present 20-year statute of limitations applicable to

ENO's. Efforts to increase the liability limitation beyond even the \$6.5 billion figure recently passed by the House Interior Committee are expected. This could cause utilities to withdraw support for any extension. Potential impacts of the Chernobyl accident on Congressional actions also must be considered. It thus is important to remember, in evaluating present and future nuclear transportation programs in the United States, that major modifications actively are being promoted and extension of the Price-Anderson Act is not assured (even for government contractors).