

Appendix A

**Notice of Inquiry: Preparation of Report to Congress
on Price-Anderson Act**

62 Federal Register 68,272 (December 31, 1997)

DEPARTMENT OF ENERGY

Office of General Counsel

Preparation of Report to Congress on Price-Anderson Act

AGENCY: Office of General Counsel, DOE.

ACTION: Notice of Inquiry concerning preparation of report to Congress on the Price-Anderson Act.

SUMMARY: The Department of Energy (the “Department” or “DOE”) is requesting public comments concerning the continuation or modification of the provisions of the Price-Anderson Act (the “Act”). These comments will assist the Department in the preparation of a report on the Act to be submitted to Congress by August 1, 1998 as required by the Atomic Energy Act (AEA).

DATES: Public comments must be received by January 30, 1998. Reply comments must be received by February 13, 1998.

ADDRESSES: Send 5 written copies of public comments or reply comments to: U.S. Department of Energy, Office of General Counsel, GC-52, 1000 Independence Ave. S.W., Washington, DC 20585. If possible, a copy should also be e-mailed to PAA.notice@hq.doe.gov. This Notice, the comments submitted to DOE, and other relevant information will be available on the internet at “www.gc.doe.gov.” The comments also may be examined between 9 a.m. and 4 p.m. at the U.S. Department of Energy, Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, S.W., Washington, DC 20585, (202) 586-6020.

FOR FURTHER INFORMATION CONTACT: Ben McRae or Jeanette Helfrich, U.S. Department of Energy, Office of General Counsel, GC-52, 1000 Independence Ave. S.W., Washington, DC 20585, (202) 586-6975.

SUPPLEMENTARY INFORMATION:

I. Background

Section 170p.¹ of the AEA requires DOE² to submit to the Congress by August 1, 1998 a report on the need to continue or modify provisions of the Act (section 170 of the AEA). DOE believes it is important to provide an early opportunity for public participation in the development of this report in a manner consistent with its public participation policy set forth in DOE P 1210.1.³ Thus, DOE is issuing this Notice of Inquiry to seek views from members of the public to assist DOE in development of its recommendations as to whether provisions of the Act should be continued, modified, or eliminated. In order to assist in the preparation of comments, the Department is including in this Notice: (1) a summary of the Act and (2) a list of questions concerning potential issues that might be addressed in the report to Congress. In order to promote public participation, the Department has established a website at which the public comments will be available. To promote a dialogue, additional comments may be filed to reply (reply comments) to the positions set forth in the original comments. These reply comments also will be available at the website.

II. Summary of the Act

A. Introduction

¹Section 170p. of the AEA requires that the Secretary of Energy and the NRC “submit to the Congress by August 1, 1998, detailed reports concerning the need for continuation or modification of the provisions of [the Act], taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors and shall include recommendations as to the repeal or modification of any of the provisions of [the Act].”

²References to DOE also include its predecessor organizations, Energy Research and Development Administration (ERDA) and the Atomic Energy Commission (AEC). The AEC was established in 1946 by the AEA. In 1974, the AEC was abolished and all its functions were transferred to the Nuclear Regulatory Commission (NRC) and ERDA by the Energy Reorganization Act of 1974, Pub. L. No. 93-438. In 1977, ERDA was abolished and its functions transferred to DOE by the DOE Organization Act, Pub. L. No. 95-91. It should be noted that section 11f. of the AEA defines “Commission” as the AEC. Accordingly, references in the AEA to the Commission should be read as DOE or NRC or both DOE and NRC depending on the statutory context.

³DOE P 1210.1 provides: “Public participation provides a means for the Department to gather the most diverse collection of opinions, perspectives, and values from the broadest spectrum of the public, enabling the Department to make better, more informed decisions. Public participation benefits stakeholders by creating an opportunity to provide input and influence decisions Stakeholders are defined as those individuals and groups in the public and private sectors who are interested in and/or affected by the Department’s activities and decisions.” This includes contractors, subcontractors, suppliers, workers, and neighbors.

The Act was enacted in 1957 as an amendment to the AEA to establish a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident.⁴ In the case of most DOE activities, the system of financial protection currently takes the form of an indemnification by DOE (“DOE Price-Anderson indemnification”) for legal liability for a nuclear incident or a precautionary evacuation⁵ arising from activity under a DOE contract. The DOE Price-Anderson indemnification: (1) provides omnibus coverage of all persons who might be legally liable;⁶ (2) indemnifies fully all legal liability up to the statutory limit on such liability (approximately \$8.96 billion for a nuclear incident in the US);⁷ (3) covers all DOE contractual activity that might result in a nuclear incident in the US;⁸ (4) is not subject to the availability of funds;⁹ and (5) is mandatory¹⁰ and exclusive.¹¹

⁴The original two-fold purpose of the Act was: (1) to encourage growth and development of the nuclear industry through the increased participation of private industry; and (2) to protect the public by assuring that funds were available to compensate for damages and injuries sustained in the event of a nuclear incident. S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1816.

⁵The 1988 amendments extended coverage of the DOE Price-Anderson indemnification to precautionary evacuations. *See infra* Part II.D.

⁶*See infra* Part II.B.

⁷*See infra* Parts II.C, II.E.

⁸*See infra* Part II.D.

⁹The Anti-Deficiency Act, 31 U.S.C. section 1341 *et seq.*, prohibits federal agencies from incurring obligations or expenditures in advance of, or in excess of, appropriations. Section 170j. of the AEA waives the provisions of the Anti-Deficiency Act with respect to indemnity agreements entered into under the Act and thus, in advance of appropriations, permits an obligation to be incurred to provide whatever funds are needed to satisfy a DOE Price-Anderson indemnification.

¹⁰*See infra* Part II.B.

¹¹Section 170d.(1)(B)(I)(I) makes the DOE Price-Anderson indemnification "the exclusive means of indemnification for public liability arising from [DOE] activities" undertaken pursuant to a contract to which the DOE Price-Anderson indemnification is applicable. In the absence of this section, several other indemnification mechanisms might be available to cover liability for nuclear incidents resulting from activity under a DOE contract. For example, both Pub. L. No. 85-804 and section 162 of the AEA provide for the waiver of certain statutory provisions (such as the Anti-Deficiency Act) relating to contracts under certain conditions. Certain DOE activities would qualify for the use of these provisions to provide DOE contractors with an indemnification similar to the DOE

The Price-Anderson system has been extended and amended approximately every ten years. The most recent amendment occurred in 1988 with the enactment of the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, (“1988 Amendments”), which extended the authority to grant the DOE Price-Anderson indemnification until August 1, 2002.¹²

B. Who Is Entitled to Indemnification?

Originally, the availability of the DOE Price-Anderson indemnification with respect to individual contractors was subject to agency discretion.¹³ The 1988 Amendments modified the Price-Anderson system to make the DOE Price-Anderson indemnification mandatory. The 1988 Amendments require DOE to enter into agreements to indemnify its contractors and other persons to the extent the contractor or other person is legally liable for damage resulting from a nuclear incident or precautionary evacuation arising out of or in connection with contractual activities.¹⁴

Price-Anderson indemnification. Indemnification under either Pub. L. No. 85-804 or section 162 is not the same, however, as the DOE Price-Anderson indemnification because, among other things, the Act provides for public protection features as well as indemnification. Another indemnification mechanism is the general contract authority indemnity, described at 48 CFR Subpart 950.71, which DOE may provide in certain limited circumstances to protect a DOE contractor against liability for uninsured losses. The general contract authority indemnity is "expressly subject to the availability of funds." 48 CFR section 950.7101(a).

¹²For a general description of the NRC’s Price-Anderson system, see *The Price-Anderson System*, Office of Nuclear Reactor Regulation, NRC, NUREG/BR-0079, Revision 1. *See also* 10 CFR section 140.11, 58 FR 42852 (Aug. 12, 1993) (latest inflation adjustment by NRC pursuant to section 170t. that changed the per reactor contribution to the retrospective pool from \$63,000,000 to \$75,500,000).

¹³Prior to the enactment of the 1988 Amendments, section 170d. of the AEA provided that DOE “may . . . enter into agreements of indemnification . . . with its contractors . . . under contracts . . . involving activities under the risk of public liability for a substantial nuclear incident.” DOE used this discretionary authority to include the DOE Price-Anderson indemnification in contracts for which it made a finding that an activity under the contract involved the risk of a substantial nuclear incident. Thus, prior to the enactment of the 1988 Amendments, the extension of the DOE Price-Anderson indemnification was a matter of contract negotiation and required an explicit provision in the contract between DOE and a contractor.

¹⁴Section 170d.(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" Consistent with this statutory mandate, DOE includes the DOE Price-Anderson indemnification in all contracts that involve any risk

In addition to the contractor that is party to the indemnification agreement, indemnity coverage is available to all "persons indemnified" under the Act. The term "person" is broadly defined to include every possible individual or entity, except the Nuclear Regulatory Commission or DOE.¹⁵ The term "person indemnified" is defined as the person with whom an indemnity agreement is executed, e.g., a DOE contractor, "and any other person who may be liable for public liability" for a nuclear incident.¹⁶ This provision extends the protection of the DOE Price-Anderson indemnification to any person, including those persons who have no legal relationship to DOE or the indemnified contractor, who may be liable for a nuclear incident within the United States arising under a DOE contract.¹⁷ Thus, a subcontractor, a supplier, a shipper, or other third party is covered even if it is not party to the indemnity agreement between DOE and the contractor.¹⁸

of public liability, even though such a contractual provision is no longer a condition precedent to indemnification by DOE of its contractors and any other person indemnified with respect to legal liability for a nuclear incident resulting from activity pursuant to a DOE contract. 56 FR 57824, 57825 (Nov. 14, 1991) (final rule amending DOE Acquisition Regulations (DEAR) relating to the DOE Price-Anderson indemnification codified at 48 CFR Parts 950, 952 and 970). *See also infra* n.19 on treatment of DOE contractors covered by NRC Price-Anderson system.

¹⁵Section 11s. defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than [DOE or NRC], any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing."

¹⁶Section 11t.

¹⁷With respect to a nuclear incident outside the United States arising under a DOE contract, section 11t. requires a legal relationship by restricting "person indemnified" to the contractor and "any other person who may be liable . . . by reason of his activities under any contract . . . or any project to which indemnification . . . has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project."

¹⁸The coverage was intentionally broad and extended to any person who may be liable for public liability. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962), U.S. Code Cong. & Ad. News 2207, 2215-16. In the hearings on the original Act, "the question of protecting the public was raised where some unusual incident, such as negligence in maintaining an airplane motor, should cause an airplane to crash into a reactor and thereby cause damage to the public. Under this bill, the public is protected and the airplane company can also take advantage of the indemnification and other proceedings." S. Rep. No. 296, 85th Cong., 1st. Sess. (1957), U.S. Code Cong. & Ad. News 1803,1818.

DOE is not authorized to indemnify activities undertaken pursuant to a NRC license that extends NRC Price-Anderson coverage to such activities.¹⁹ Thus, if a nuclear incident resulted from an activity undertaken pursuant to a NRC license and the NRC license provided for Price-Anderson coverage, the NRC license would govern legal liability resulting from the incident, including the limit on the aggregate amount of liability and the source of funds to compensate the liability. If, however, the NRC decided not to provide for Price-Anderson coverage in the license, the DOE Price-Anderson indemnification would apply to the incident.

C. What Liabilities Are Covered by the Indemnification?

Section 170d. of the AEA requires DOE to indemnify the contractor, and any other person who may be liable, for "public liability . . . arising out of or in connection with the contractual activities." The intended scope of this coverage can be derived from the statutory definitions of public liability and other related terms.

Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation"²⁰ Legal liability is not defined in the Act, but the legislative history indicates clearly that state tort law determines what legal liabilities are covered.²¹ The 1988 amendments confirmed the substantive role of state tort law.²²

¹⁹Section 170d.(1)(A) provides that DOE shall not provide the DOE Price-Anderson indemnification for activities "subject to the financial protection requirements under subsection b. or agreements of indemnification under subsection c. or k." Section 170a. requires the NRC to include Price-Anderson coverage in all licenses for reactors, regardless of size. Section 170a. grants NRC discretionary authority to include Price-Anderson coverage in non-reactor licenses. NRC has not exercised this discretionary authority with respect to any NRC-licensed facility currently in operation.

²⁰Section 11w. defines "public liability" as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation, (including all reasonable additional costs incurred by a State or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (I) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; (iii) . . . claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs"

²¹S. Rep. No. 1605, 89th Cong., 2d Sess. (1966), U.S. Code Cong. & Ad. News 3201, 3206.

²²The 1988 amendments added section 11hh. which defines "public liability action" as "any suit asserting public liability." The definition contains an explicit statement that "the substantive rules for

In a limited number of situations, the Act provides that certain provisions of state law may be superseded by uniform rules prescribed by the Act such as the limitation on the awarding of punitive damages.²³ In addition, with respect to an extraordinary nuclear occurrence, the Act provides for the waiver of certain defenses. Such waivers would result, in effect, in strict liability,²⁴ the elimination of charitable and governmental immunities,²⁵ and the substitution of a three-year discovery rule in place of statutes of limitations that would normally bar all suits after a specified number of years.²⁶ Moreover, the Act provides that the U.S. District Court for the district in which a nuclear incident occurs shall have original jurisdiction “with respect to any [suit asserting] public liability . . . without regard to the citizenship of any party or the amount in controversy”²⁷ and provides for special procedures to expedite the legal proceedings and the distribution of compensation.²⁸

D. What is a nuclear Incident?

decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [] section [170].” The legislative history indicates that the purpose of this language was to reemphasize that the substantive law of the state in which a nuclear incident occurs would apply unless inconsistent with the provisions of the Act. H.R. Rep. No. 104, 100th Cong., 1st Sess. Part I at 29 (1987).

²³Section 170s. prohibits a court from awarding “punitive damages . . . against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification” *See also* section 170q. (limitation on the awarding of precautionary evacuation costs as defined in section 11gg.) and section 170r. (limitation on liability of lessors).

²⁴Section 170n.(1) waives “(I) any issue or defense as to the conduct of the claimant or fault of the persons indemnified.”

²⁵Section 170n.(1) waives “(ii) any issue or defense as to charitable or governmental immunity.” *See also* section 170d.(1)(B)(I)(II) that permits DOE to require a similar waiver with respect to “any nuclear incident arising out of nuclear waste activities subject to” a DOE contract.

²⁶Section 170n.(1) waives “(iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof.”

²⁷Section 170n.(2).

²⁸Sections 170n.(3) and 170o.

"Nuclear incident" is defined in section 11q. of the Act, in pertinent part, as "any occurrence, . . . within the United States²⁹ causing, within or outside the United States, [damage or injury] arising out of or resulting from the . . . hazardous properties of source,³⁰ special nuclear,³¹ or byproduct material³²" (footnotes added). Congress intended to give a broad rather than restrictive meaning to the words and designed the definition of nuclear incident to protect the public against any form of damage arising from the special dangerous properties of the materials used in the atomic energy program.³³ Furthermore, a contractor is fully indemnified for public liability even if the public liability was caused by acts of gross negligence or willful misconduct.³⁴

Nuclear incident is defined also to include the following occurrences outside the United States:
(1) activities pursuant to a DOE contract that involves nuclear material "owned by, and used by or

²⁹Section 11bb. defines the United States "when used in a geographical sense [to] include[] all Territories and possessions of the United States, the Canal Zone and Puerto Rico." Territories include the United States territorial sea, which Presidential Proclamation No. 5928 (Dec. 27, 1988, 54 FR 777) defines as the maritime area that extends twelve miles offshore. Prior to the issuance of this Proclamation, the United States territorial sea was defined as the maritime area that extended three miles offshore. Territories do not include the United States exclusive economic zone ("EEZ"), which is the maritime area between twelve miles offshore and two hundred miles offshore.

³⁰Section 11z. defines "source material" as "(1) uranium, thorium, or any other material which is determined . . . to be source material; or (2) ores containing one or more of the foregoing materials,"

³¹Section 11aa. defines "special nuclear material" as (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material . . . determine[d] to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material."

³²Section 11e. defines "byproduct material" as "(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." For purposes of this Notice, source material, special nuclear material and byproduct material are referred to collectively as "nuclear material."

³³S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1803, 1817.

³⁴S. Rep. No. 296, 85th Cong., 1st Sess. (1957), U.S. Code Cong. & Ad. News 1803, 1819. The Senate Report indicates that Congress rejected the suggestion that willful damage be excluded because "the damage to the public is the same, whether caused by any means--willful or nonwillful."

under contract with, the United States,³⁵ or (2) an NRC-licensed reactor located on an offshore stationary platform,³⁶ or (3) a shipment of nuclear material from one NRC licensee to another NRC licensee.³⁷

The 1988 amendments added indemnity for a precautionary evacuation resulting from an event that is not a nuclear incident but poses an imminent danger of injury or damage from radiological properties of nuclear material, or high-level radioactive waste or spent nuclear fuel, or transuranic waste, and is initiated by an authorized State or local official to protect the public health and safety.³⁸

E. What Is the Amount of Indemnification and Compensation Provided?

Section 170d.(2) provides that agreements of indemnification shall require the Secretary to "indemnify the persons indemnified against [public liability] . . . to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by its Secretary." Section 170e. establishes specific limits on the aggregate amount of public liability for any one nuclear incident. For a nuclear incident resulting from DOE contractual activity within the United States, public liability is limited by a formula that results in a current limit of approximately \$8.96 billion.³⁹ This limitation on aggregate public liability has the effect of limiting the

³⁵Section 11q. provides that "when used in section 170d., [nuclear incident] shall include any occurrence outside the United States if such occurrence involves [nuclear] material owned by, and used by or under contract with, the United States." See also section 170d.(5) that limits the DOE Price-Anderson indemnification for such occurrences to \$100,000,000 and section 170e. that limits the aggregate "public liability" for such occurrences to a corresponding amount.

³⁶Section 11q. provides that "when used in section 170c., [nuclear incident] shall include any such occurrence outside both the United States and any other nation if such occurrence . . . [involves nuclear] material licensed pursuant to chapters 6, 7, 8, and 10 of this Act, which is used in connection with the operation of a licensed stationary production or utilization facility"

³⁷Section 11q. provides that "when used in section 170c., [nuclear incident] shall include any such occurrence outside both the United States and any other nation if such occurrence . . . [involves nuclear] material licensed pursuant to chapters 6, 7, 8, and 10 of this Act, . . . which moves outside the territorial limits of the United States in transit from one person licensed by the [NRC] to another person licensed by the [NRC]."

³⁸Sections 11gg. and 170d.(1).

³⁹Section 170e. establishes the limitations on aggregate public liability for various types of nuclear incidents. Specifically, section 170e.(1)(B) establishes the limit for a nuclear incident resulting from DOE contractual activities within the United States on the basis of the formula set forth in section

amount of legal liability for damage that courts in the United States can assess under applicable state tort law.

Section 170e.(2) provides that Congress will “take whatever action is deemed necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims” if damage from a nuclear incident exceeds the statutory limit on aggregate public liability. Moreover, section 170i. requires the President to submit a compensation plan to Congress that “provide[s] for full and prompt compensation for all valid claims” no later than 90 days after the determination by a court that the liability limit may be exceeded.

F. To what extent are indemnified contractors, subcontractors and suppliers accountable for their actions?

The 1988 Amendments added a new section 234A to the AEA that establishes a system of civil penalties for violation of DOE nuclear safety requirements by contractors, subcontractors, and suppliers covered by the DOE Price-Anderson indemnification.⁴⁰ The section 234A civil penalties were intended to improve the accountability of indemnified contractors, subcontractors and suppliers for nuclear safety during the conduct of DOE activities without affecting the operation of the Price-Anderson system. Thus, the actual or potential imposition of a section 234A civil penalty does not affect the coverage by the DOE Price-Anderson indemnification of a contractor or any other person indemnified.

170b. for calculating the financial protection required for commercial power plants with a rated capacity of 100,000 electrical kilowatts or more. In general, the section 170b. formula is a combination of the maximum amount of private insurance available (currently approximately \$200 million) plus a retrospective premium pool that would result from contributions after a nuclear incident of up to \$75,500,000 for each licensed commercial power plant, but not more than \$10,000,000 in any one year. *See also* section 170d.(3)(A) and (B) under which the DOE Price-Anderson indemnification “shall at all times remain equal to or greater than the maximum amount of financial protection required of” commercial powerplants and “shall not, at any time, be reduced in the event that the maximum amount of financial protection required of [commercial powerplants] is reduced.” Section 170e.(4) establishes \$100,000,000 as the limit for a nuclear incident resulting from DOE contractual activities outside the United States.

⁴⁰Section 234A provides that any contractor, subcontractor or supplier covered by the DOE Price-Anderson indemnification “who violates . . . any applicable rule, regulation or order related to nuclear safety . . . shall be subject to a civil penalty of not to exceed \$100,000 for each such violation [and] . . . each day of such violation shall constitute a separate violation” The \$100,000 amount has been adjusted for inflation as required by subsequent legislation and now is \$110,000. 10 CFR section 820.80, 62 FR 46181 (Sept. 2, 1997).

The procedural rules for implementing the section 234A civil penalties are set forth in 10 CFR Part 820.⁴¹ Pursuant to mandatory language in section 234A.d., these procedural rules exempt specific non-profit DOE contractors operating specific DOE facilities from the imposition of civil penalties.⁴² In addition, pursuant to discretionary authority granted by section 234A.b.(2), DOE promulgated procedural rules to provide for the automatic remission of civil penalties imposed on other nonprofit educational institutions.⁴³

As a matter of policy, DOE has decided to impose the section 234A civil penalties only with respect to a DOE Nuclear Safety Requirement set forth in the Code of Federal Regulations, a Compliance Order, or any program, plan, or other provision required to implement such Requirement or Compliance Order.⁴⁴ DOE has set forth nuclear safety requirements in 10 CFR Part 830 (Nuclear Safety Management),⁴⁵ and 10 CFR Part 835 (Occupational Radiation Protection).⁴⁶

⁴¹10 CFR Part 820, Procedural Rules for DOE Nuclear Activities, Notice of inquiry and request for public comments, 54 FR 38865 (Sept. 21, 1989); Notice of proposed rulemaking, 56 FR 64290 (Dec. 9, 1991); Clarification, 57 FR 20796 (May 15, 1992); Final rule, 58 FR 43680 (Aug. 17, 1993); Interim rule and amendment of Appendix A - General Statement of Enforcement Policy, 62 FR 52479 (Oct. 8, 1997). *See also* Ruling 1995-1, 61 FR 4209 (Feb. 5, 1996) (interpreting scope of 10 CFR Parts 830 and 835).

⁴²10 CFR section 820.20(c).

⁴³10 CFR section 820.20(d).

⁴⁴10 CFR section 820.20(b); *see* 10 CFR section 820.2 which defines "DOE Nuclear Safety Requirements" and, for purposes of the assessment of civil penalties, limits the definition to those requirements identified in 820.20(b).

⁴⁵10 CFR Part 830, Notice of proposed rulemaking, 56 FR 64316 (Dec. 9, 1991); Final rule issued only for Quality Assurance and definitions, 59 FR 15843 (April 5, 1994); Notice of limited reopening of the comment period and availability of draft final rules, 60 FR 45381 (Aug. 31, 1995); corrected 60 FR 47498 (Sept. 13, 1995).

⁴⁶10 CFR Part 835, Notice of proposed rulemaking, 56 FR 64334 (Dec. 9, 1991); Final rule, 58 FR 65458 (Dec. 14, 1993); Notice of proposed rulemaking to amend, 61 FR 67600 (Dec. 23, 1996). In addition, DOE has proposed 10 CFR Part 834 (Radiological Protection of the Public and the Environment), Notice of proposed rulemaking, 58 FR 16268 (March 25, 1993); Notice of limited reopening of the comment period and availability of draft final rule, 60 FR 45381 (Aug. 31, 1995); corrected 60 FR 47498 (Sept. 13, 1995); Notice of limited reopening of the comment period, 61 FR 6799 (Feb. 22, 1996) (terrestrial biota).

The 1988 amendments also added section 223c which provides specific criminal penalty provisions for knowing and willful violations by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification without exceptions for nonprofit entities.

III. List of questions

The following list of questions represents a preliminary attempt to identify potential issues that might arise in responding to the section 170p. mandate that DOE report “concerning the need for continuation or modification of the provisions of [the Act] taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors.” The list of questions does not represent a determination of the actual topics to be addressed in the Report. The list has been included in this Notice solely to assist in the formulation of comments and is not intended to restrict the issues that might be addressed in the comments or in DOE’s report.

Comments should identify the specific provision of the Act to which a position is expressed, and the policy and legal rationale for the position. Comments should identify whether a position applies to all DOE activities⁴⁷ or only to certain specified activities. If a position only applies to certain DOE activities, be specific, to the extent possible, as to the activities to which the position applies and the reasons for treating the identified DOE activities differently.

1. Should the DOE Price-Anderson indemnification be continued without modification?
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?
3. Should there be different treatment for “privatized arrangements” (that is, contractual arrangements that are closer to contracts in the private sector than the traditional “management and operating” contract utilized by DOE and its predecessors since the Manhattan Project in the 1940's)? Privatized arrangements can include but are not limited to fixed-priced contracts, contracts where activity is conducted at the contractor’s facility located off a DOE site, contracts where activity is conducted at

⁴⁷DOE performs a wide variety of activities, including but not limited to, operation of reactors, production and provision of reactor fuel, enrichment activities, weapons-related activities, defense research, non-defense research, operation of accelerators, management of low and high level radioactive waste, management of spent fuel, environmental remediation, transportation, non-proliferation and nuclear risk reduction activities.

the contractor's facility located on a DOE site, or contracts where a contractor performs the same activity for DOE as it does for commercial entities and on the same terms.

4. Should there be any change in the current system under which DOE activities conducted pursuant to an NRC license are covered by the DOE Price-Anderson indemnification, except in situations where the NRC extends Price-Anderson coverage under the NRC system? For example, (1) should the DOE Price-Anderson indemnification always apply to DOE activities conducted pursuant to an NRC license or (2) should the DOE Price-Anderson indemnification never apply to such activities, even if NRC decides not to extend Price-Anderson coverage under the NRC system?

5. Should the DOE Price-Anderson indemnification continue to provide omnibus coverage, or should it be restricted to DOE contractors or to DOE contractors, subcontractors, and suppliers? Should there be a distinction in coverage based on whether an entity is for-profit or not-for-profit?

6. If the DOE indemnification were not available for all or specified DOE activities, are there acceptable alternatives? Possible alternatives might include Pub. L. No. 85-804, section 162 of the AEA, general contract indemnity, no indemnity, or private insurance. To the extent possible in discussing alternatives, compare each alternative to the DOE Price-Anderson indemnification, including operation, cost, coverage, risk, and protection of potential claimants.

7. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE to perform its various missions? Explain your reasons for believing that performance of all or specific activities would or would not be affected?

8. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the willingness of existing or potential contractors to perform activities for DOE? Explain your reasons for believing that willingness to undertake all or specific activities would or would not be affected?

9. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE contractors to obtain goods and services from subcontractors and suppliers? Explain your reasons for believing that the availability of goods and services for all or specific DOE activities would or would not be affected?

10. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of claimants to receive compensation for nuclear damage resulting from a DOE activity? Explain your reasons for believing the ability of claimants to be compensated for nuclear damage resulting from all or specific DOE activities would or would not be affected?

11. What is the existing and the potential availability of private insurance to cover liability for nuclear damage resulting from DOE activities? What would be the cost and the coverage of such insurance? To what extent, if any, would the availability, cost and coverage be dependent on the type of activity

involved? To what extent, if any, would the availability, cost and coverage be dependent on whether the activity was a new activity or an existing activity? If DOE Price-Anderson indemnification were not available, should DOE require contractors to obtain private insurance?

12. Should the amount of the DOE Price-Anderson indemnification for all or specified DOE activities inside the United States (currently approximately \$8.96 billion) remain the same or be increased or decreased?

13. Should the amount of the DOE Price-Anderson indemnification for nuclear incidents outside the United States (currently \$100 million) remain the same or be increased or decreased?

14. Should the limit on aggregate public liability be eliminated? If so, how should the resulting unlimited liability be funded? Does the rationale for the limit on aggregate public liability differ depending on whether the nuclear incident results from a DOE activity or from an activity of a NRC licensee?

15. Should the DOE Price-Anderson indemnification continue to cover DOE contractors and other persons when a nuclear incident results from their gross negligence or willful misconduct? If not, what would be the effects, if any, on: (1) the operation of the Price-Anderson system with respect to the nuclear incident, (2) other persons indemnified, (3) potential claimants, and (4) the cost of the nuclear incident to DOE? To what extent is it possible to minimize any detrimental effects on persons other than the person whose gross negligence or willful misconduct resulted in a nuclear incident? For example, what would be the effect if the United States government were given the right to seek reimbursement for the amount of the indemnification paid from a DOE contractor or other person whose gross negligence or willful misconduct causes a nuclear incident?

16. Should the DOE Price-Anderson indemnification be extended to activities undertaken pursuant to a cooperative agreement or grant?

17. Should the DOE Price-Anderson indemnification continue to cover transportation activities under a DOE contract? Should coverage vary depending on factors such as the type of nuclear material being transported, method of transportation, and jurisdictions through which the material is being transported?

18. To what extent, if any, should the DOE Price-Anderson indemnification apply to DOE clean-up sites? Should coverage be affected by the applicability of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other environmental statutes to a DOE clean-up site?

19. To what extent, if any, should the DOE Price-Anderson indemnification be available for liability resulting from mixed waste at a DOE clean-up site?

20. Should the definition of nuclear incident be expanded to include occurrences that result from DOE activity outside the United States where such activity does not involve nuclear material owned by, and used by or under contract with, the United States? For example, should the DOE Price-Anderson indemnification be available for activities of DOE contractors that are undertaken outside the United States for purposes such as non-proliferation, nuclear risk reduction or improvement of nuclear safety? If so, should the DOE Price-Anderson indemnification for these additional activities be mandatory or discretionary?
21. Is there a need to clarify what tort law applies with respect to a nuclear incident in the United States territorial sea? Should the applicable tort law be based on state tort law?
22. Should the definition of nuclear incident be modified to include all occurrences in the United States exclusive economic zone? What would be the effects, if any, on the shipment of nuclear material in the United States exclusive economic zone if such a modification were or were not made? What would be the effects, if any, on the response to an incident involving nuclear material in the United States exclusive economic zone if such a modification were or were not made?
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 modification or additional uniform rule that would be desirable and explain the rationale.
24. Should the Act be modified to be consistent with the legal approach in many other countries under which all legal liability for nuclear damage from a nuclear incident is channeled exclusively to the operator of a facility on the basis of strict liability? If so, what would be the effect, if any, on the system of financial protection, indemnification and compensation established by the Act?
25. Should the procedures in the Act for administrative and judicial proceedings be modified? If so, describe the modification and explain the rationale?
26. Should there be any modification in the types of claims covered by the Price-Anderson system?
27. What modifications in the Act or its implementation, if any, could facilitate the prompt payment and settlement of claims?
28. Should DOE continue to be authorized to issue civil penalties pursuant to section 234A of the AEA? Should section 234A be modified to make this authority available with respect to DOE activities that are not covered by the DOE Price-Anderson indemnification? Should DOE continue to have authority to issue civil penalties if the Act is modified to eliminate the DOE Price-Anderson indemnification with respect to nuclear incidents that results from the gross negligence or willful misconduct of a DOE contractor?

29. To what extent does the authority to issue civil penalties affect the ability of DOE to attain safe and efficient management of DOE activities? To what extent does this authority affect the ability of DOE and its contractors to cooperate in managing the environment, health, and safety of DOE activities through mechanisms such as integrated safety management? To what extent does this authority help contain operating costs including the costs of private insurance if it were to be required?
30. Should there continue to be a mandatory exemption from civil penalties for certain nonprofit contractors? Should the exemption apply to for-profit subcontractors and suppliers of a nonprofit contractor? Should the exemption apply to a for-profit partner of a nonprofit contractor?
31. Should DOE continue to have discretionary authority to provide educational nonprofit institutions with an automatic remission of civil penalties? If so, should the remission be available where the nonprofit entity has a for-profit partner, subcontractor, or supplier?
32. Should the maximum amount of civil penalties be modified? If so, how?
33. Should the provisions in section 234A.c. concerning administrative and judicial proceedings relating to civil penalties be modified? If so, how?
34. Should there be any modification in the authority in section 223.c. to impose criminal penalties for knowing and willful violations of nuclear safety requirements by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification? Should this authority be extended to cover violations by persons not indemnified?

Issued in Washington, D.C. on December 23, 1997

Eric J. Fygi,
Acting General Counsel