Felix M. Killar, Jr.
DIRECTOR,
Material Licensees & Nuclear Insurance
Direct Line 202.739.8126
Internet fmk@nei.org

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U.S. Department of Energy
Office of General Council, GC-52
1000 Independence Avenue, S.W.
Washington, DC 20585

REFERENCE: Notice of Inquiry Concerning Preparation of a Report to Congress on the Price-Anderson Act, (62 Fed. Reg. 68272) dated December 31, 1997

Dear Mr. McRae and Ms. Helfrich:

The Nuclear Energy Institute (NEI),[1] is submitting the attached responses to the 34 questions that the U. S. Department of Energy (DOE) identified in the December 31, 1997 Federal Register notice. We understand that DOE is attempting to identify potential issues that might arise in responding to the Section 170p. mandated report concerning the need for continuation or modification of the provisions of the Price-Anderson Act taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at the time, among other relevant factors.

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

NEI supports the continuation of Price-Anderson indemnification as it is in the best interest of the public, the United States Government, and the entities that provide services to the government. Price-Anderson indemnification should continue in effect with some clarifications as identified in the responses to a few of the questions.

We would be pleased to discuss these responses and to respond to any questions the DOE may have.

Sincerely,

Felix M. Killar, Jr.

Attachment

Nuclear Energy Institute
Responses to DOE Questions
on the
Price-Anderson Act

1. Should the DOE Price-Anderson indemnification be continued without modification?

We believe that DOE's Price-Anderson indemnification has been an effective and absolutely necessary for accomplishing government projects and activities while providing the public with an extremely effective method for compensation in the event of public liability claims. Therefore, we believe the indemnification should be continued. However, as discussed in later responses there may be a need for minor modifications or clarifications to the Act.

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?

We do not believe that the DOE Price-Anderson indemnification should be eliminated or made discretionary. The 1988 amendments to the Price-Anderson Act established that DOE should extend DOE Price-Anderson indemnification to all DOE activities and contractors. We believe it would be detrimental to the public interest if this indemnification were to be withdrawn or made discretionary at this time.

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 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.

There should be no difference between "privatized arrangements" and traditional "management and operating" contracts. In either case the contractor is undertaking projects that are benefiting the United States government and the nation and in both

cases the public should receive the same liability processes and compensation arrangements. From a business perspective it is highly likely that without Price-Anderson indemnification for "privatized arrangements" the government will find it difficult if not impossible to obtain a sufficient number of private sector bidders for such services.

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?

The current system is working satisfactorily and should not be changed. The NRC has to date limited its indemnification to the production facilities it licenses, therefore, it would not normally indemnify a facility that is under contract to DOE. However, for reasons already offered in the preceding answer, it is in the public's interest to always have Price-Anderson coverage available for DOE facilities, whether licensed by the NRC or not.

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?

The DOE Price-Anderson indemnification has been and should continue to provide omnibus coverage. Therefore, it should provide the coverage with no restrictions and should be applicable to both for-profit and not-for-profit entities. It should apply to all parties, be them: contractors, subcontractors, for-profit or not-for-profit organizations performing the work.

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.

The coverage under Price-Anderson is omnibus, while the other indemnities that are discussed are not as extensive as Price-Anderson in coverage and would not

provide the level of protection for the public and/or DOE contractors that has been available. The current Price-Anderson indemnification provisions are the result of extensive Congressional discussion during the 1988 renewal process and reflect the conclusion that the alternative indemnification methods referred to in the question were not as effective compared to the omnibus protection provided by Price-Anderson indemnification. Therefore, all of the alternatives represent a dimension of public liability protection compared to the existing Price-Anderson indemnification.

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?

Price-Anderson indemnification was initiated to provide for rapid compensation to members of the public who are adversely affected by a nuclear incident. It is intended to essentially provide no-fault coverage and rapid payment of claims. If DOE Price-Anderson indemnification was eliminated it would affect the ability of DOE to perform its missions, it would increase the cost of litigation and settlements as there would no longer be the economic channeling. It would diminish public trust in the availability of public liability compensation in the event of a nuclear incident and, relevant to this question, it would significantly diminish DOE's ability to get private sector contractors to support its various missions because DOE contractors are not likely to assume this liability.

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?

As discussed above a contractor would not likely be willing to take on the activities DOE needs performed, because of their potential liability if the DOE Price-Anderson indemnification was eliminated. Again, the position of the private sector was extensively aired during the 1988 renewal process and both the constraints to private sector indemnity absent Price-Anderson indemnification and the benefits to the public and DOE of Price-Anderson indemnification were reflected in the law as it was enacted at that time.

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?

The ability of contractors to obtain goods and services from suppliers would be adversely affected if there is no Price-Anderson indemnification. Suppliers may not be willing to supply goods and/or products if Price-Anderson indemnity is not provided. Subcontractors are even more likely to be concerned if Price-Anderson indemnity were not extended because many of these entities are smaller businesses that could not financially accept the risk associated with either litigation or actual compensation associated with potential public liability claims. Clearly, the absence of the Price-Anderson indemnification process would lessen competition and as such likely increase the cost to the government to fulfill its mission.

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?

Price-Anderson protection principles are: to provide economic channeling of the liability to owner/operator (indemnified by DOE); limited information needed to validate claim; and provide a rapid means for payment of claims. If DOE Price-Anderson indemnification was eliminated claimants will likely file against the government and all contractor, subcontractors, and suppliers that worked at or on the facility from which the claim originated. This would result in considerable delay in making any payments as each defendant would be litigating the claim. Also, the amount of money available to pay claims would be limited to commercially available liability insurance and the assets available of the companies willing to provide the services. Finally, it is not possible that nothing would be paid to the claimant until all of the litigation has been completed. Therefore, it could take years and years to resolve the claims before any payments are made. All of this would have a very negative impact on legitimate claimants.

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?

Currently there is $200 million available in the commercial sector for nuclear liability protection. While it is possible that some quantity of additional liability insurance

may come available in the future, clearly the amount of commercial insurance will not come close to the almost $9 billion available under Price-Anderson indemnification. DOE could only require contractors to purchase insurance if it were available, an unlikely situation at levels desired and under such circumstances the cost of such insurance would increase the cost to the government for performing the activities. Additionally, the commercial underwriters may not be willing to provide coverage for some DOE facilities due to the adverse reports on the safety and past practices at those facilities.

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?

Based on experience to date the current amount of compensation available under Price-Anderson, $9 billion, is adequate. Also, since Congress has already, as part of Price-Anderson, reserved the right to take whatever actions are necessary and appropriate to protect the public in the event of an nuclear incident where the statutory limitation on liability is exceeded, no need exists to change the current level of protection.

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?

The amount of Price-Anderson indemnification for nuclear incidents outside of the U.S. should be increased from the existing $100 million limit. A reasonable basis for determining the new limit is the new IAEA Convention on Supplementary Compensation for Nuclear Damage. Under this convention the countries that participate must have 150 million Special Drawing Rights now (approximately $210 million) and increase to 300 million Special Drawing Rights by 2007 (approximately $420 million). Since the convention represents the consensus of the international nuclear community represented through the IAEA and was determined only after extensive discussions and assessments it would seem to be a reasonable basis for setting a limit for DOE's coverage outside of the United States. Therefore, based on both the IAEA Convention results and the existing NRC indemnification of $500 million within the United States, we would suggest the current limit be increased from $100 million to $500 million.

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?

The limit on aggregate public liability should not be eliminated and there should be no difference whether the incident results from an NRC licensee or DOE activity. As stated previously, Congress has explicitly reserved the right and responsibility to take action if appropriate in the event the limit was exceeded. Given this ability of Congress and the fact that over 40 years of experience with Price-Anderson indemnification has never approached the limit on liability, there is no need to change the existing limit on public liability in Price-Anderson.

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?

During the 1988 renewal extensive discussion and assessment took place on the necessity for Price-Anderson indemnification to cover incidents that might result from gross negligence or willful misconduct. The decision of the Department which supported such coverage and of Congress which enacted the law are still valid today. From the public interest perspective the omnibus nature of Price-Anderson indemnification is and should be available under all circumstances. DOE, as the owner and contractor for services of the Operator, has the ultimate responsibility for the safety of the facility. DOE has the obligation to insure that gross negligence by its contractors does not occur and that its contractors have procedures and programs that minimize the likelihood of willful misconduct. This does not prohibit DOE from taking appropriate actions; fines, and/or enhanced criminal actions against the contractor, as currently permitted under Price-Anderson in the event of gross negligence or willful misconduct.

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

The 1988 amendments to the Price-Anderson Act provided that DOE should extend indemnification to all of DOE activities and contractors. DOE therefore should extend the coverage under cooperative agreements and/or grants.

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?

The Price-Anderson indemnification should continue to cover all transportation activities performed under a DOE contract. While it is highly unlikely that a transportation accident would result in significant radiation release to the public, the fact that DOE moves nuclear materials requires the continuation of Price-Anderson coverage for such activities.

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?

DOE Price-Anderson indemnification, as defined in the Atomic Energy Act, should apply to public liability at DOE clean-up sites, including those affected by the applicability of CERCLA. Furthermore, it would be useful as part of renewal of Price-Anderson to clarify that Price-Anderson is applicable to all DOE cleanup sites.

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?

DOE Price-Anderson indemnification should apply to mixed waste.

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?

It is in the public interest for DOE to extend Price-Anderson indemnification to all contractors working on DOE projects either within or outside of the United States.

Therefore, DOE should indemnify its contractors who are working on nuclear facilities and/or nuclear material offshore.

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?

Normally federal law would apply for any event that would occur in territorial sea, however there is no federal tort law. Currently, Price-Anderson applies the tort law of the state where the incident occurs. Since there is no state nor federal tort law for territorial sea, we recommend that the Price-Anderson be clarified such that existing State tort law would apply.

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?

Consistent with other comments made by NEI concerning the need for Price-Anderson indemnification to cover all DOE activities, we support that Price-Anderson coverage for nuclear incidents be extended to include the United States exclusive economic zone. We believe it would help with international commerce and provide appropriate public liability protection to those involved in the DOE activity and those potentially effected by it.

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.

While there may be merit to having uniform tort law for Price-Anderson, experience indicates that the system as currently designed works well. Therefore, Price-Anderson needs to remain as currently written relying upon State tort laws and appropriate uniform rules that already exist.

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?

We recommend no changes to the existing Price-Anderson approach of channeling economic liability and not legal liability. While there may be merit in having all legal liability for nuclear damage from a nuclear incident channeled exclusively to the operator/owner of a facility, Price-Anderson has been established with economic channeling which is supported by state tort law. Therefore, it would be extremely difficult and politically impractical to attempt to preempt the states at this time, particularly given the 40 year plus successful history with the Act the way it is. Therefore, we recommend that no changes be made.

25. Should the procedures in the Act for administrative and judicial proceedings be modified? If so, describe the modification and explain the rationale?

The procedures for administrative and judicial proceedings are working satisfactory. We see no need to modify them unless necessary to address implementation of clarifications to Price-Anderson indemnification as recommended to DOE's questions.

26. Should there be any modification in the types of claims covered by the Price-Anderson system?

In 1994, the U.S. Court of Appeals for the Seventh Circuit in the case O'Connor v. Commonwealth Edison Co. observed that the term "public liability action" in the Price-Anderson Act encompasses <u>any</u> legal liability of any person who may be liable on account of a nuclear incident, citing to a Third Circuit Court of Appeals decision in the TMI consolidated claims litigation. The court held that the Price-Anderson Act created an independent and exclusive cause of action for anyone claiming injury associated with the use of radioactive materials. After concluding that nuclear incident means <u>any</u> occurrence alleged to cause injury or damage to property associated with any of the properties of radioactive materials, the court concluded that "[a] claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Amendments Act or is not compensable at all.

Because the law is now clear that any claim for public liability resulting from the use of radioactive materials is covered by the Price-Anderson Act, no delineation of specific types of claims that are covered is necessary or appropriate. <u>Any</u> claim of public liability that is brought must be brought within the structures of the Price-Anderson Act and resolved in accordance with its terms.

27. What modifications in the Act or its implementation, if any, could facilitate the prompt payment and settlement of claims?

The provisions of the Act addressing the prompt payment and settlements of claims is working, therefore, we do not have any recommendations for change in this area.

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?

The establishment of civil penalties under Section 234A evolved as a result of substantive review and discussions during the 1988 renewal of Price-Anderson. The applicability of penalties under Section 234A is linked to the contractor indemnification requirements of Price-Anderson. As such the authority for DOE to levy such penalties should exist as long as Price-Anderson indemnification is provided to the contractors.

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?

It is not clear how helpful DOE's ability to issue civil penalties is in attaining safe or efficient management of DOE activities. Civil penalties may have a positive impact, but may also have a detrimental effect on the contractors work and cooperation in managing the environment, health, and safety of DOE facilities. The contractor may be reluctant to try improved methods or techniques for fear that if the results are poor it may be fined. Similarly, DOE may pay more for services as the contractor would not want to attempt new cost saving methods for fear of a fine if they don't perform. In fact civil penalties imposed inappropriately can be a deterrent to improved contractor performance. (See response to question 32 for further elaboration on this issue)

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?

Safety and efficiency should be of prime importance for DOE facilities and/or work performed under contract to DOE. Therefore, generally all contractors should be treated the same. As explained above, however, it has not been demonstrated what impact civil penalties have on performance.

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?

In general contractors should be treated equitably. Therefore, if such discretionary authority is to exist, DOE should consider having it available broadly for use with all contractors.

32. Should the maximum amount of civil penalties be modified? If so, how?

The purpose of any enforcement program, including the imposition of civil penalties, should be focused on ensuring the protection of public health and safety, including the safety of workers. DOE's enforcement program should be made to focus enforcement directly on matters of safety-significance, provide balance between punitive action and positive incentives to encourage and reward good practices, and make enforcement a more predictable and understandable process. Enforcement sanctions should be reserved for those relatively rare cases where a contractor was or should have been aware of a potential safety problem and did not identify, report (if required), or effectively correct the problem. DOE's enforcement policy properly should place more emphasis on the importance of identification and correction of potential problems by providing positive incentives (i.e., taking no enforcement sanction) where effective corrective action has been taken, negative incentives (i.e., imposing an enforcement sanction) for ineffective corrective actions, and increasing or decreasing the civil penalty based upon the safety significance and nature of the corrective action (or lack thereof). Issuance of a civil penalty should be reserved for those circumstances where it is deemed necessary to send a clear signal that the contractor's corrective actions have not been sufficient.

There is no evidence that the maximum amount of civil penalties that DOE may impose is inappropriate. Rather, the focus should be on ensuring that DOE imposes civil penalties when, as, and in an amount sufficient to deter future bad conduct, based upon noncompliance with clear and specific DOE requirements. The exercise of civil penalties should be disciplined so that no enforcement action is taken without a demonstration of a clear legal requirement that was violated, a delineation of the factual basis for the conclusion that such a violation occurred, and the actual safety significance of the noncompliance.

33. Should the provisions in section 234A.c. concerning administrative and judicial proceedings relating to civil penalties be modified? If so, how?

Section 234A.c. has not been tested to date, therefore, modifications may not be necessary. However, NEI believes that contractors should have the opportunity to discuss a proposed violation and DOE should have the ability to withdraw it prior to the final notice. Under Section 234A.c. once DOE issues the notice of a proposed violation the only avenue for discussion is before an administrative law judge. Section 234A.c. should include an interim step for the contractor and DOE to discuss the proposed violation and if appropriate the ability to withdraw the notice. If the discussion does not change DOE's position, the contractor and DOE would follow the balance of the provisions of Section 234A.c.

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?

There is no reason to modify the authority in Section 223.c. to impose criminal penalties.