

UNITED STATES DEPARTMENT OF ENERGY

ENTERED

OPINION OF THE GENERAL COUNSEL  
ON  
APPLICATION OF THE PRICE-ANDERSON ACT  
TO THE  
WASTE ISOLATION PILOT PLANT PROJECT

Under the terms of a Stipulated Agreement filed on July 1, 1981, in State of New Mexico ex rel. Jeff Bingaman, Attorney General v. U.S. Department of Energy, et al., (U.S. Dist. Ct. N.M. Civil No. 81-0363 JB), the Department of Energy (DOE) agreed to assist the State of New Mexico (State) in resolving certain State concerns relating to the Waste Isolation Pilot Plant (WIPP) which DOE has proposed to construct and operate in southeastern New Mexico. The first of these "off-site state governmental concerns" enumerated in paragraph 7 of the Stipulated Agreement was that of the potential liability of the State for injuries and property damage which might arise from accidents occurring in the course of WIPP operations, including the transportation of nuclear waste to and from the WIPP site. Pursuant to the Stipulated Agreement, meetings on the State liability issue were held between representatives of DOE's Albuquerque Operations Office (ALO) and the State on November 12, 1981, and January 19, 1982. Copies of the joint record of these meetings are attached as Exhibits 1 and 2. As a result of these meetings it was agreed that a formal opinion of the DOE General Counsel should be issued which would address a number of questions raised by the State concerning the liability issue and, particularly, the application of Section 170 of the Atomic Energy Act of 1954, as amended, commonly called the

"Price-Anderson Act" to the WIPP. This formal opinion has been prepared in accordance with the agreement reached at the January 19, 1982, meeting.

I. The WIPP Project

Under the provisions of Section 213 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980: "the Waste Isolation Pilot Plant is authorized as a defense activity of the Department of Energy ... for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission."<sup>1</sup>

On October 24, 1981, in compliance with the National Environmental Policy Act, DOE issued its Final Environmental Impact Statement on WIPP, DOE/EIS-0026, October, 1981 (FEIS) (45 Fed. Reg. 70539). In its record of decision issued on January 28, 1981 (46 Fed. Reg. 9162) DOE announced its decision to proceed with construction and operation of WIPP on a phased basis. Construction is currently underway for the Site and Preliminary Design Validation (SPDV) phase of the project.

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<sup>1</sup>Act of December 29, 1979, Pub. L. No. 96-164, § 213, 93 Stat. 1259.

II. Application of the Price-Anderson Act to WIPP and Related Transportation

Under Section 170d., added to the Atomic Energy Act of 1954, as amended, 42 U.S.C. § <sup>2210</sup>2011 et. seq. (the Act), by the Price-Anderson Act of 1957<sup>2</sup> (the Act) DOE is authorized:

"to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the [DOE] may require its contractor to provide and maintain financial protection ... to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of financial protection required, in the amount of \$500,000, ..."<sup>3</sup>

DOE and its predecessor agencies<sup>4</sup> have implemented this authority in regulations now appearing as Subpart 9-10.50 of the DOE Procurement Regulations (41 C.F.R. Subpart 9-10.50). A copy

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<sup>2</sup>Act of September 2, 1957, Pub. L. No. 85-256, § 4, 71 Stat. 576.

<sup>3</sup>42 U.S.C. § 2210(d) (1957) emphasis added.

<sup>4</sup>The authority to enter into indemnification agreements with contractors under Section 170d. of the Atomic Energy Act was originally conferred upon the Atomic Energy Commission. This authority passed to the Energy Research and Development Administration under the provisions of the Energy Reorganization Act of 1974 (42 U.S.C. §§ 5814(c), 5841(f)) and, thereafter, to DOE under the provisions of the Department of Energy Organization Act (42 U.S.C. § 7151).

of this Subpart is attached hereto as Exhibit 3. The applicable indemnity article, "Nuclear hazards indemnity," also prescribed by the DOE Procurement Regulations (41 C.F.R. §§ 9-10.5006 and 9-50.704-6) is attached as Exhibit 4.

WIPP is not a "production or utilization facility" as those terms are defined in the Atomic Energy Act.<sup>5</sup> However, the Manager, AL, as the Head of Procuring Activity, has determined that the contract involves "activities under the risk of public liability for a substantial nuclear incident."<sup>6</sup> Accordingly, he has entered into a statutory indemnity agreement with Westinghouse Electric Corporation, the current technical support contractor for WIPP and a potential operating contractor for the completed facility, under § 9-10.5004 of DOE's implementing regulations (Exhibit 3). Copies of the pertinent portions of the DOE-Westinghouse contract are attached hereto as Exhibit 5. Although the WIPP operating contractor has not yet been selected, the determination that the contract for WIPP operations should include a nuclear hazards indemnity provision would apply regardless of which contractor is selected.

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<sup>5</sup>42 U.S.C. § 2014(v) and (cc); 41 C.F.R. § 9-10.5002(e) and (h).

<sup>6</sup>42 U.S.C. § 2210(d).

Under the Price-Anderson Act and the indemnity article prescribed for the operating contract for WIPP (Exhibits 4 and 5), indemnity coverage would be extended, up to the statutory limit on aggregate liability for a single nuclear incident of \$500 million,<sup>7</sup> for all claims of "public liability" occasioned by "nuclear incidents" "arising out of or in connection with contractual activity."<sup>8</sup>

Therefore, coverage is dependent upon the definition of "public liability" and "nuclear incident," as well as the meaning of "arising out of or in connection with the contractual activity." The definition of "public liability" as applicable to DOE agreements, is "any legal liability arising out of or resulting from a nuclear incident except [those imposed by workmen's compensation laws or resulting from an act of war]." 42 U.S.C. § 2014(w).

A "nuclear incident" is:

" ... any occurrence, ... within the United States causing ... bodily injury, sickness, disease or death, or loss of or

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<sup>7</sup>The statutory limit on aggregate liability of all persons indemnified is increased by the amount of any financial protection required by the Government up to a maximum of \$560 million. (42 U.S.C. § 2210(e)).

<sup>8</sup>42 U.S.C. § 2210(d).

damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material ...." 42 U.S.C. § 2014(q).

The phrase "arising out of or in connection with the contractual activity" is not defined in the Act but has been broadly interpreted by the Department of Energy in its procurement regulations to include any contractual activity whether or not the nuclear incident occurs at the contract location.<sup>9</sup> Nuclear incidents are covered if they take place at the contract location, if they take place in the course of the performance of contractual activity by any person for consequences of whose acts or omissions the contractor is liable, if they arise out of or in the course of transportation of source, special nuclear, or by-product materials

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<sup>9</sup>This interpretation is supported by the legislative history of the Price-Anderson Act, particularly the 1966 amendments, discussed supra. Those amendments provided for, inter alia, a waiver of defenses for extraordinary nuclear occurrences under specified circumstances, including in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,..." (42 USC 2201(n)(1)(b)). When adding this provision the Joint Committee on Atomic Energy stated: "This approach, moreover, cements the new system to the Price-Anderson Act without extending the new concepts to activities not covered by that act." [1966] U.S. Code Cong. Ad. News 3209.

to or from a contract location, or if they involve items produced or delivered under the contract.<sup>10</sup>

Therefore, any legal liability resulting from any damage caused by the hazardous properties of source, special nuclear, or byproduct material at the WIPP site, as well as those which might occur in the course of transportation of waste material to and from the site, are covered. Overlapping coverage for nuclear incidents occurring in the course of transportation of waste material to the WIPP site also exists under the nuclear hazards indemnity articles contained in each of the DOE contracts for operation of the facilities from which wastes will be shipped.<sup>11</sup>

### III. The State of New Mexico as a Person Indemnified

A major concern of State officials is whether the State of New Mexico would be covered as a "person indemnified" under the nuclear hazards indemnity article contained in the WIPP operating contract or other applicable DOE contracts, such as those for

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<sup>10</sup>41 C.F.R. § 9-50.704-6(c)(2) (Exhibit 4).

<sup>11</sup>These DOE facilities, listed on page 6-12 of the FEIS, include the Idaho National Engineering Laboratory, the Rocky Flats Plant, the Hanford complex, Los Alamos National Laboratory, and the Savannah River Plant. All of these facilities are operated under DOE contracts which now contain the nuclear hazards indemnity article prescribed by 41 C.F.R. § 9-50.704-6 (Exhibit 4). Transportation coverage is specified in § 9-50.704-6(c)(2)(C).

operation of the facilities from which the waste would be shipped. For example, the State has asked whether liability imposed upon the State for negligent maintenance of roads and bridges<sup>12</sup> causing a transportation accident and a release of radioactive material from a waste shipment to WIPP would be covered by the applicable indemnity articles.

It is clear from the plain meaning of the statute as well as the legislative history that the State would be covered as a person indemnified under such circumstances.

Perhaps the most important feature of the Price-Anderson Act is the granting of indemnity not only to persons with whom an indemnity agreement is executed but also "any other person who may be liable for public liability ..."<sup>13</sup> This broad coverage has been part of the statutory and contractual scheme from the inception of the Price-Anderson Act. Repeated references in the legislative history underscore the plain meaning of the statute. For example, in the legislative history of a 1962 amendment, it is noted:

"... Price-Anderson indemnity coverage has, from its inception extended to any person who may be liable

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<sup>12</sup>The State has been held liable under these circumstances. See, e.g., Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1976).

<sup>13</sup>42 U.S.C. § 2014(t) provides, inter alia; "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States ... the person with whom an indemnity agreement is executed ... and any other person who may be liable for public liability ...."

for public liability. This coverage was intentionally broad since the primary purpose of the legislation was to protect the public. As such, there was no reason to restrict coverage to those situations in which contractors or licensees of the Commission were the parties determined to be liable." [1962] U.S. Code Cong. & Ad. News 2215.

Similarly, in the legislative history of the original enactment of the Price-Anderson Act it is noted:

"In the hearings, 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." [1957] U.S. Code Cong. & Ad. News 1818.

Since the State is a "person" as defined in the statute,<sup>14</sup> it would be a "person indemnified" if subjected to public liability as the result of a nuclear incident arising out of or resulting from activities performed pursuant to the WIPP contract. The State has questioned whether the broad scope of persons indemnified was somehow limited by a 1975 amendment to the definition of "person indemnified," which inserted the phrase

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<sup>14</sup>"The term 'person' means ... any State or any political subdivision of, or any political entity within a State...."  
42 U.S.C. § 2014(s).

"as the term is used in Subsection 170c." into the first clause of the statutory definition of "person indemnified."<sup>15</sup>

The State has asked whether the qualifying phrase added in 1975 could be read to modify the entire phrase "nuclear incident occurring within the United States or outside the United States,"<sup>16</sup> an interpretation which would limit the broad coverage of "person indemnified" as discussed above to activities indemnified pursuant to licenses issued by the Nuclear Regulatory Commission (NRC) under the authority of Section 170c.<sup>17</sup> The legislative history of the statutory definition of "person indemnified" makes it clear that the phrase in question was

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<sup>15</sup>Act of December 31, 1975, Pub. L. No. 94-197, § 1, 89 Stat. 1111. As amended the definition now reads: "The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in Subsection 170c., and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) ...." 42 U.S.C. § 2014(t).

<sup>16</sup>42 U.S.C. § 2014(t).

<sup>17</sup>42 U.S.C. § 2010(c).

intended to apply only to nuclear incidents occurring outside the United States and that as to any nuclear incident inside the United States (including any WIPP-related incident) the term "person indemnified" has the broad definition discussed above, which includes the party to an indemnity agreement and "any other person who may be liable for public liability" whether or not WIPP is subject to the licensing authority of the NRC. A detailed analysis of the legislative history of the pertinent statutory definition is attached hereto as Exhibit 6.

The State has requested that DOE amend the nuclear hazards indemnity article in the WIPP contract to identify specifically the State of New Mexico as a "person indemnified" within the meaning of that article. In light of the above analysis such an amendment is unnecessary since the State of New Mexico clearly falls within the statutory definition of the term. However, nothing in the Price-Anderson Act or implementing regulations would preclude such an amendment. Any such amendment should be drafted to avoid any implication that only those persons specifically listed are "persons indemnified." The following addition to the definition section of the indemnity article immediately following Subparagraph (a)(3) (41 C.F.R. § 9-50.704-6(a)(3), Exhibit 4 would accomplish this purpose:

"(4) The term 'person indemnified' has the meaning set out in 42 U.S.C. § 2014(t) and, without limitation, includes the State of New Mexico, its municipalities and political subdivisions."

Since the foregoing change in the prescribed article "is not prohibited by statute, executive order, or administrative regulation and does not alter the meaning, intent or basic principles expressed in" the prescribed article, it would be permitted under 41 C.F.R. § 9-50.702.

IV. Separate Indemnification Agreement with the State

In the course of negotiations on the State liability issue, State officials proposed that a separate indemnity agreement be executed between DOE and the State whereby DOE would expressly and directly hold the State harmless from any WIPP-related liability. The State made this proposal as a possible alternative means of resolving its concern that it might not otherwise be covered by Price-Anderson indemnity agreements applicable to WIPP. A separate indemnity agreement with the State for the WIPP project and the State's role therein is not contemplated by applicable DOE regulations. Furthermore, a separate indemnity agreement is unnecessary in light of the above analysis which concludes that the State would be covered as a "person indemnified" under other agreements. Any remaining State concerns can be met by the amendment to the operating contract as discussed above.

There are presently two agreements between DOE and the State of New Mexico relating to WIPP--Contract DE-ACO4-79AL10752 dated July 10, 1978, which provides for independent review of environmental and safety aspects of WIPP by the State's Environmental Evaluation Group, and the "Agreement for Consultation and Cooperation" executed on July 1, 1981. Neither contract would

qualify for a statutory indemnity agreement under criteria stated in 41 C.F.R. § 9-10.5004 (Exhibit 3). In neither case is there "risk of liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work" or "risk of liability for a substantial nuclear incident caused by a product delivered to or for DOE under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity."<sup>18</sup> Obviously no nuclear incident could occur in the course of performing either contract; and whatever "product" is delivered to DOE (advice, criticism, consultation or the like) will be used in connection with a facility which will (and indeed already is) covered by a statutory indemnity agreement.

V. DOE's Discretion in Providing Price-Anderson Coverage for WIPP.

The State has expressed concern that certain actions on the part of DOE on which the State's coverage as a "person indemnified" depends are purely within the discretion of DOE. Since DOE's authority under Section 170d. is dependent upon DOE entering into indemnification agreements with contractors, the State would not be covered under the Price-Anderson Act if DOE elected to

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<sup>18</sup>41 C.F.R. § 9-10.5004 emphasis added.

(1) operate WIPP with its own personnel, (2) transport waste to the site in Federal vehicles, or (3) not include an indemnification clause in its WIPP operator or transporter contracts.<sup>19</sup> The authority to indemnify contractual activity under Section 170d. is (unlike certain NRC authority with respect to licensed facilities) discretionary with DOE.

As a practical matter there is little basis for State concern in either regard. Government-owned facilities in the atomic energy program of the United States have, since the days of the Manhattan Engineer District in the early 1940's, been operated by contractors rather than by the direct use of Government employees.<sup>20</sup> Furthermore, as previously noted, DOE has already exercised the discretion it has under Section 170d. in favor of extending Price-Anderson indemnification to WIPP. All DOE planning to date for WIPP contemplates a contractor-operator facility covered by a Price-Anderson indemnification agreement.<sup>21</sup>

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<sup>19</sup>The Government's own liability under these circumstances would be determined in accordance with the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671, et. seq.

<sup>20</sup>See Hiestand and Florsheim, The AEC Management Contract Concept, 29 Fed. B.J. 67 (1969).

<sup>21</sup>Exhibit 5; FEIS, § 6.12, pp. 6-42-43.

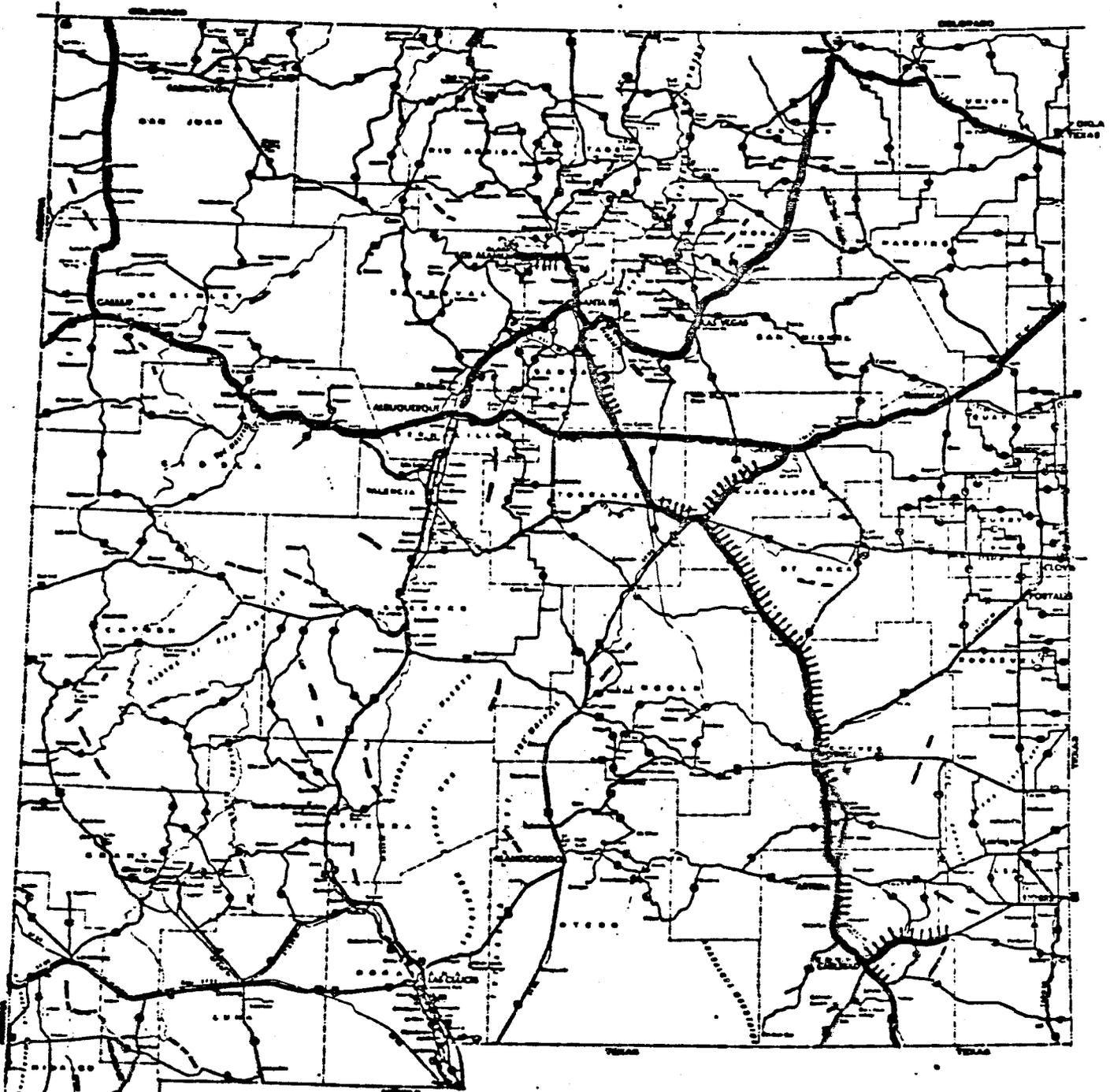
The State, however, wants assurance that DOE will not, in the exercise of its discretion in these matters, reverse its present intentions at some time in the future and thereby deprive the State of its protection under the Price-Anderson Act. The State has asked if DOE would be willing to enter into a stipulation to be filed with the court in the action now pending to the effect that it will operate WIPP and transport the waste to WIPP through a contractor and that the contract will contain the nuclear hazards indemnity article now included in the Westinghouse contract.

While it would appear that DOE's decisions on both of these matters are most unlikely to be reversed, it would be imprudent for DOE officials to bind their successors to exercise discretion conferred upon them by statute in a particular manner without regard to changes in circumstances, however remote the possibility of such changes might be. This problem could be avoided by a stipulation which binds DOE to notify the State in advance if it should decide to change its position on either of these matters, to give the State its reasons for changing its position, and to give the State an opportunity to comment before the new position is effectuated. Furthermore, the conflict resolution provisions of the Agreement for Consultation and Cooperation (Article IX) are available for resolving any differences between the parties on such issues should they arise.

On a related subject, the State has asked whether a DOE decision to ship waste to WIPP by Government vehicle would affect the State's indemnity coverage. As previously discussed, the State's coverage as a person indemnified flows from the indemnity articles in the DOE contracts for WIPP and the various facilities generating the waste. These indemnity articles cover nuclear incidents in the course of transportation to and from WIPP facilities under 41 CFR § 9-50.704-6(c)(2)(C) (Exhibit 4). The State's coverage under these articles would be unaffected by DOE's determination on whether to use contract carriers for waste shipments and whether to extend Price-Anderson indemnification to such carriers. Therefore, State coverage for nuclear incidents occurring during the course of such transportation is not dependent upon the existence of a Price-Anderson indemnification agreement in any contract between DOE and a private carrier. If the State is liable in whole or in part for a transportation accident causing a nuclear incident, that liability would be covered, even in the case of a shipment by Government vehicle. If the Government is the only party liable for a transportation accident arising from a Government shipment, that liability would not be covered by Price-Anderson, but would be actionable by any party suffering injury or damage (including the State) under the Federal Tort Claims Act without monetary limitation on the amount of recovery.

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**—** TRUCK TRANSPORTATION ROUTES FOR WIPP WASTE SHIPMENTS

**|||||** SECTIONS REQUIRING IMPROVEMENTS FOR WHICH FEDERAL FUNDING IS REQUESTED

ROAD MAP  
OF  
NEW MEXICO

APPENDIX B

VI. Waiver of Defenses in the Event of an Extraordinary Nuclear Occurrence

The State has asked that this opinion specifically address the application of Section 170n. of the Act,<sup>22</sup> the so-called "waiver of defenses" provisions and the implementing language of the applicable indemnity articles to the WIPP project. This provision, which simplifies the determination of liability on the part of persons indemnified in the event of a nuclear incident which arises under certain enumerated circumstances and which is determined to have been an "extraordinary nuclear occurrence,"<sup>23</sup> was added to the Price-Anderson Act by a 1966 amendment.<sup>24</sup>

Ordinarily legal liability covered by Price-Anderson indemnification agreements is determined in accordance with the applicable tort law of the state where the accident or injury

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<sup>22</sup>42 U.S.C. § 2210(n).

<sup>23</sup>42 U.S.C. § 2014(j).

<sup>24</sup>Act of October 13, 1966, Pub. L. No. 89-645, § 3, 80 Stat. 891.

occurred.<sup>25</sup> However, in the special circumstances enumerated in Section 170n. and implementing indemnity provisions<sup>26</sup> the ordinary rules of state law are replaced by a federal standard for determination of indemnified liability. These "waiver of defenses" provisions<sup>27</sup> simplify liability determinations in the event of a nuclear incident determined to have been an "extraordinary nuclear occurrence" under damage criteria to be prescribed by the responsible agencies (now NRC and

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<sup>25</sup>Discussing the law prior to the enactment of § 170n., the legislative history of the amendment notes:

"Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity." [1966] U.S. Code Cong. Ad. News 3206.

<sup>26</sup>41 C.F.R. § 9-50.704-6(d), (e) (Exhibit 4).

<sup>27</sup>While the term "strict liability" is not used, § 170n permits DOE to incorporate in indemnity agreements waivers for inter alia, "any issue or defense as to conduct of the claimant or fault of persons indemnified." 42 U.S.C. § 2210(n)(1)(i).

meaning of the Act, and have Price-Anderson indemnity coverage.<sup>31</sup> The wastes to be shipped to WIPP are "special nuclear material" or "byproduct material."<sup>32</sup> Therefore, a nuclear incident occurring in the course of such transportation would, if determined to be an "extraordinary nuclear occurrence" invoke the waiver of defenses provisions.

On the other hand, a nuclear incident at the WIPP site could not invoke the waiver of defenses provisions since WIPP itself will be neither a "production or utilization facility" for purposes of Subsection (1)(a) of Section 170n. nor a "device" for purposes of Subsection (1)(c). It is important to bear in mind, however, that the 1966 amendments in no way limited Price-Anderson coverage to extraordinary nuclear occurrences or to nuclear incidents occurring under the circumstances enumerated in Section 170n. While the waiver of defenses provisions would be inapplicable to a nuclear incident at the WIPP site, such an incident would still be covered by basic Price-Anderson coverage with the liability of persons indemnified determined in accordance with the applicable tort law of the State of New Mexico.

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<sup>31</sup>These facilities are discussed in footnote 11 above.

<sup>32</sup>TRU waste always contains special nuclear material and sometimes byproduct material. HLW contains special nuclear material or byproduct material and sometimes both. (42 U.S.C. §§ 2014(e) and (aa)).

VII. Price-Anderson Coverage for Theft or Sabotage.

The State has asked whether, and to what extent, damages and injuries caused by criminal acts, such as theft or sabotage, directed against WIPP operations and related transportation would be covered by applicable indemnity agreements. Under the Price-Anderson system the extent of the authorized indemnity is prescribed by the statutory definitions of the key terms "nuclear incident,"<sup>33</sup> "public liability,"<sup>34</sup> and "persons indemnified."<sup>35</sup>

None of these statutory definitions would preclude coverage merely because the acts causing the nuclear incident and resulting public liability on the part of persons indemnified were criminal in nature. Thus, for example, damages caused by dispersal of material from the WIPP site or a transport vehicle by the explosion of a planted bomb at the site or in the vehicle would be covered. In the case of successful theft and diversion of material from the site or from a transport vehicle, the answer is less clear. A possible limitation on coverage in such cases arises by implication from language in the statute and the prescribed

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3342 U.S.C. § 2014(q).

3442 U.S.C. § 2014(w).

3542 U.S.C. § 2014(t).

indemnity article indicating that the public liability covered is that "arising out of or in connection with contractual activity, which includes in the course of transportation, of source, special nuclear or byproduct materials to or from a contract location."<sup>36</sup> The question raised by these words of limitation would be whether damage done after nuclear material is stolen from the place of contractual activity or the planned routes of transportation would be considered damage "arising out of or in connection with contractual activity."

A similar question raised in the context of activities licensed by NRC was rather thoroughly analyzed in a 1975 document entitled "Nuclear Regulatory Commission Staff Study Concerning Financial Protection Against Potential Harm Caused by Sabotage or Theft of Nuclear Materials."<sup>37</sup> This study concluded that, while damage resulting from sabotage or attempted theft from the site of licensed activity or a planned transportation route is covered by Price-Anderson, damage caused after successful theft is not.

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<sup>36</sup>42 U.S.C. § 2210(d); 41 C.F.R. § 9-50.704-6(c)(2)(ii)(C) (Exhibit 4).

<sup>37</sup>Reprinted in Hearings on H.R. 8631, Joint Committee on Atomic Energy, 94th Cong., 1st Sess. 455-524 (1975).

<sup>38</sup>H.R. Rep. No. 1306, 93d Cong., 2d Sess. 3 (1974).

The NRC staff study was prompted by a 1974 proposal to amend the Price-Anderson Act to clarify coverage for damages caused by material that is "illegally diverted from its intended place of confinement."<sup>38</sup> The amendment passed the Senate, but was deleted in conference pending further study. This 1974 legislative history and the NRC study it prompted currently leaves uncertain the applicability of Price-Anderson indemnity in the case of successful theft and diversion of material from the site or transport vehicle.

#### VIII. Recovery of State Clean-up Costs

The State has taken the position that it should be compensated by the Federal Government for all costs the State might incur in connection with clean-up activities following a radiological accident relating to WIPP. The State has questioned whether Price-Anderson indemnification can assure it of full cost recovery in a situation in which the State might find itself both a claimant for its own clean-up costs and a potential defendant and person indemnified whose negligence may have been partly responsible for the accident (e.g., negligent road or bridge maintenance discussed above). In the State's view it would normally have a valid claim under State law for clean-up costs

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<sup>38</sup>H.R. Rep. No. 1306, 93d Cong., 2d Sess. 3 (1974).

against a person whose negligence caused an accident. However, the State is concerned that such a claim could be defeated under certain circumstances by a valid defense of contributory or comparative negligence.

Absent an "extraordinary nuclear occurrence" invoking waivers as discussed above, all applicable State law defenses are ordinarily available to a person indemnified in determining whether such person has public liability covered by the Price-Anderson indemnity. If the State's claim is, under the circumstances of the particular accident, amenable to such defenses, the liability to the State of other parties could be precluded and indemnity coverage unavailable. The State has asked, in light of this potential noncoverage, that DOE indemnify the State for clean-up costs not covered by Price-Anderson.

DOE's policy on entering into indemnity agreements under its general authority (i.e., authority other than that conferred by the Price-Anderson Act) is set out in 41 C.F.R. § 9-10.5011 (Exhibit 3). DOE's liability under such indemnity agreements, unlike Price-Anderson coverage, must be "expressly subject to the availability of appropriated funds." Furthermore, the extending of such indemnity to the State would require the approval of the Secretary or his designee under 41 C.F.R. § 9-10.5011(d). The policy questions which would be raised in connection with Secretarial approval of such a indemnity agreement might be better raised in the context of ongoing discussions under the Stipulated Agreement of the relative roles and responsibilities of the State

and the Federal Government for emergency response to radiological incidents in New Mexico. Resolution of these issues in their proper context may render moot the indemnity question.

IX. DOE-Required Financial Protection - Potential Application to WIPP Nuclear Incidents

Section 170d. authorizes DOE in connection with authorized indemnity agreements to "require its contractor to provide and maintain financial protection ... to cover public liability arising out of or in connection with the contractual activity" and provides that if such financial protection is required, the authorized indemnity covers "claims above the amount of the financial protection required."<sup>39</sup> Therefore, the prescribed indemnity article provides that indemnification applies "[t]o the extent that the contractor and other persons indemnified are not compensated by any financial protection, permitted or required by DOE ..."<sup>40</sup> The maximum aggregate liability of all persons indemnified in a single nuclear incident is equal to the authorized indemnity coverage of \$500 million, except in cases in which DOE has required the contractor to maintain financial protection, in which cases the maximum aggregate liability figure is increased

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<sup>39</sup>42 U.S.C. § 2210(d). "The term 'financial protection' means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages." 42 U.S.C. § 2014(k).

<sup>40</sup>41 C.F.R. § 9-50.704-6(c)(1) (Exhibit 4).

by the amount of such financial protection, up to an additional \$60 million.<sup>41</sup>

The State has asked two questions pertaining to the financial protection provisions of the Act. First, the State is concerned that financial protection, such as appropriations or liability insurance, which the State may have and which might be potentially applicable to its liability in the event of a WIPP-related nuclear incident, would have to be exhausted before its indemnity coverage as a "person indemnified" under the WIPP operating contract would apply. Second, the State has asked whether DOE can require its operating contractor for WIPP to provide financial protection, such as nuclear liability insurance, in the amount of \$60 million and thereby increase the maximum protection available to the public from \$500 million to \$560 million.

Neither the Act nor the implementing indemnity article would require that State-provided financial protection be applied to its public liability before the indemnity coverage would attach. The financial protection that must be so applied before indemnification is only that financial protection which DOE "may require its contractor to provide and maintain,"<sup>42</sup> and that

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<sup>41</sup>42 U.S.C. § 2210(e).

<sup>42</sup>42 U.S.C. § 2210(d).

"permitted or required by DOE or the Nuclear Regulatory Commission."<sup>43</sup> As discussed above, the State will be covered, not as a DOE contractor, but as a "person indemnified" under DOE's operating contract for WIPP. DOE has no authority under the Act to require (or permit) such non-contractor "persons indemnified" to maintain financial protection, and the Act does not require that financial protection which such persons indemnified might elect to maintain be applied before indemnity coverage becomes operative.

In response to the State's second question, the Act would clearly authorize DOE to require its WIPP contractor to maintain financial protection in the form of nuclear liability insurance in the amount of \$60 million. Such requirement would, as the State has noted, increase overall protection for the public from \$500 million to \$560 million for a single nuclear incident. However, under current Department policy, "DOE contractors with whom statutory indemnity agreements ... are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents."<sup>44</sup>

The above policy reflects the fact that the cost of such insurance, if required, would normally be borne entirely by the

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<sup>43</sup>41 C.F.R. § 9-50.704-6(c)(1) (Exhibit 3).

<sup>44</sup>41 C.F.R. § 9-10.5010(a) (Exhibit 3).

Government, and the general policy of the Government to be self-insured as to the risks associated with its operations. There is no reason readily apparent, however, why an exception to this policy could not be made for the WIPP project as a part of the overall resolution of State concerns under the Stipulated Agreement. It would be inappropriate in this opinion to undertake the cost-benefit analysis which would be required to properly evaluate the State's proposal.

X. Settlement and Litigation Costs

The State has asked whether the entire indemnity fund of \$500 million (or \$560 million if financial protection is required) would be available for making payments to claimants who have suffered injury or damage as a result of a nuclear incident, or whether the fund could be reduced to the extent of costs incurred by persons indemnified in settlement or defense of the claims. Prior to 1975, Section 170d. of the Act authorized DOE to provide contractual indemnification "in the amount of \$500,000,000, including the reasonable costs of investigating and settling claims and defending suits for damage ...."<sup>45</sup> In 1975 Section 170d. was amended to provide for authorized DOE indemnity

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<sup>45</sup>Act of September 29, 1965, Pub. L. No. 89-210, §, 2, 79 Stat. 855.

settling claims and defending suits for damage."<sup>49</sup> The failure to amend Section 170e. can only be attributed to oversight, and the resulting ambiguity has been reconciled by the DOE in its Procurement Regulations in a manner consistent with the obvious Congressional intent.<sup>50</sup>

XI. State Recommendations for Amendments to the Price-Anderson Act.

During the discussions of the State liability issue State representatives made a number of recommendations for amendment of the Price-Anderson Act to improve the public protection afforded by the Act. (See Exhibit 1 pp. 5-6.)<sup>51</sup> The State has asked for DOE assistance in presenting its recommendations to the Congress. In 1975 Congress provided that NRC "shall submit to the Congress by August 1, 1983, a detailed report concerning the need for continuation or modification of the provisions of [Price-Anderson]."<sup>52</sup> DOE will be submitting comments to NRC prior

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4942 U.S.C. § 2210(e).

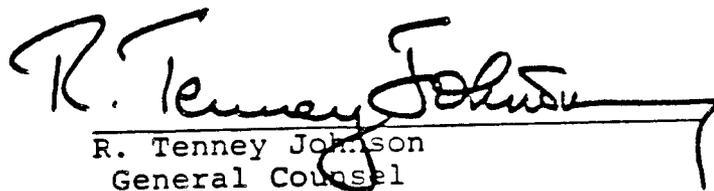
<sup>50</sup>In offering the amendment in question on the Senate floor, Senator Hathaway stated: "My amendment specifically excludes these [settlement and litigation] costs from any determination as to when the overall liability limitation has been reached." 121 Cong. Rec. § 22336 (daily ed. December 16, 1975).

<sup>51</sup>A number of the State's suggestions are the same as or similar to those recently made by the Comptroller General of the United States in a report to Congress, B-197742, September 14, 1981.

5242 U.S.C. § 2210(p).

to final issuance of this report. I have no legal objection to DOE's including the State's recommendations in its submission to NRC or otherwise assisting the State in bringing its views on these matters to the attention of the Congress. However, it should be understood that the DOE retains its right to express its own views on these matters and that any assistance it may render to the State does not necessarily require or imply DOE concurrence in any of the State's views on amendment of the Price-Anderson Act.

December 9, 1982  
Date

  
R. Tenney Johnson  
General Counsel

In subsection (b), the words "appropriation made by this section" are substituted for "the appropriation to the Treasury Department entitled 'Bureau of Internal Revenue Refunding Internal-Revenue Collections' " to eliminate unnecessary words.

**INTERPRETIVE NOTES AND DECISIONS**

Refund by Internal Revenue Service of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account Refunding Internal Revenue Collections rather than account Refund of Moneys Erroneously Re-

ceived and Covered, since initial receipt of fine by IRS was apparently treated as internal revenue collection and other account is available only when refund is not properly chargeable to any other appropriation. (1976) 55 Op Comp Gen 625.

**SUBCHAPTER III. LIMITATIONS, EXCEPTIONS, AND PENALTIES**

**§ 1341. Limitations on expending and obligating amounts**

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 923.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**Prior law and revision:**

Revised Section	Source (USCS)	Source (Statutes at Large)
1341(a)	31:665(a), (d)(2)(last sentence related to spending and obligations).	R.S. § 3679(a), (d)(2)(last sentence related to spending and obligations); Mar. 3, 1905, ch. 1484, § 4(1st par.), 33 Stat. 1257; Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48; restated Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765.
1341(b)	31:669(words after semicolon)	Aug. 23, 1912, ch. 350, § 6(words after semicolon), 37 Stat. 414.

LIST OF EXHIBITS

1. Joint Record of First Negotiation Session, November 12, 1981
2. Joint Record of Second Negotiation Session, January 19, 1982
3. DOE Procurement Regulations, 41 C.F.R. Subpart 9-10,.50
4. Nuclear hazards indemnity article, DOE Procurement Regulations, 41 C.F.R./§ 9-50.704-6
5. Excerpts, Contract DE-ACO4-78ETO5346, June 15, 1978, between DOE and Westinghouse Electric Corporation
6. Legislative History of the Definition of the Term "Person Indemnified" in the Price-Anderson Act

JOINT RECORD OF FIRST NEGOTIATION SESSION  
ON THE ISSUE OF  
STATE LIABILITY  
WASTE ISOLATION PILOT PLANT

November 12, 1981

The New Mexico Attorney General's position is that the Federal Government should indemnify and hold harmless the State of New Mexico for any liability it might sustain as a result of WIPP activities (State Position Papers, October 5, 1981). It is DOE's position that the State, as a person indemnified, under the Price-Anderson Act would be protected under the Act and implementing DOE indemnity agreements from bearing the financial burden of any "public liability" it might sustain as a result of a nuclear incident at the WIPP site or in the course of transportation of waste material to or from WIPP (DOE Response to State Position Papers, November 6, 1981). This issue was discussed at a meeting on November 12, 1981, at the State Capitol in Santa Fe. At this meeting the State was represented by Joseph F. Canepa, Deputy Attorney General, and Bruce Throne, Assistant Attorney General. DOE was represented by Donner T. Schueler, Assistant Manager for Projects and Energy Programs, ALO, and John F. McNett, Assistant Chief Counsel, ALO.

The State representatives outlined their remaining concerns relating to the protection afforded under the Price-Anderson Act and suggested various steps which DOE might take to minimize or eliminate those concerns. The Attorney General's concerns were divided into two categories--those expressed on behalf of the State Government as a party potentially liable for WIPP accidents (e.g., for improperly maintained roads and bridges or State negligence for consulting and cooperating with DOE on the project and as a result being found to be a joint tortfeasor) and those expressed on behalf of the public as the ultimate beneficiaries of Price-Anderson protection.

A. State Concerns

1. Is DOE authorized to extend Price-Anderson indemnity coverage to the operation of a disposal facility for defense waste and, if so, would the State be covered as a "person indemnified" under the applicable indemnity agreements? This concern could be met by one or more of the following actions:

a. A formal opinion should be issued by the DOE General Counsel on DOE's authority to extend Price-Anderson indemnification for WIPP operations and the State of New Mexico's status as a "person indemnified" under the indemnity agreements. This formal opinion should address all of the questions raised by the

State in these discussions covering interpretation of the Price-Anderson Act and implementing indemnity agreements as applied to WIPP, including the issue discussed in paragraph 1 of the Jacobvitz/Bingaman letter of March 29, 1978 (Attachment B to the DOE response of November 6, 1981), of whether a 1975 amendment to the statutory definition of "person indemnified" would preclude coverage of persons who are not parties to an indemnity agreement for a DOE facility. The concurrence of the Department of Justice, as a minimum, and the Comptroller General, if possible, should be obtained on this formal opinion of the DOE General Counsel.

b. An amendment should be executed to the present WIPP contract between DOE and Westinghouse and included in any new operating contract for WIPP upon completion of its construction which amendment expressly recognizes that the State of New Mexico is included among the "persons indemnified" under the Price-Anderson indemnity article of that contract, and that the indemnity provision does apply to the DOE WIPP project even though it is not an NRC licensed facility.

c. A separate Price-Anderson indemnity agreement for WIPP between DOE and the State of New Mexico should be executed. This agreement could be made a part of either the Consultation and Cooperation Agreement or the EEC contract or both. (The specific form of the agreement was not discussed.)

2. The State's coverage as a "person indemnified" is contingent upon DOE's decision to contract with persons outside the Government for activities relating to WIPP (including production, packaging, and transportation of the waste and operation of the WIPP facility) and to insert a Price-Anderson indemnity provision in the appropriate contracts. Recognizing that DOE's decisions in this area are discretionary, the State needs assurance that DOE will carry out such operations through contractors and will insert indemnity provisions in the appropriate contracts. Recommended courses of action to meet this concern were the following:

a. A separate indemnity agreement should be executed with the State (See 1.c.).

b. DOE should agree in a Stipulation to be filed with the Court in the State's action now pending that it will include a Price-Anderson indemnity agreement in the appropriate WIPP contracts. The State's preference would be that DOE agree to include the indemnity provision in all of its contracts pertaining to WIPP, including all contracts with carriers, producers and packagers of waste. However, if the formal opinion of the DOE General Counsel (See 1.a.) is sufficiently clear that an indemnity

agreement in the operating contract alone would cover all parties who could be liable for a nuclear incident arising from WIPP operations, an agreement to indemnify the operating contractor would probably suffice.

c. DOE should agree by Stipulation filed in Court to notify the State of its intent to enter into the contract or contracts covered by 2.b. so that it can assure itself of the stipulated coverage.

d. DOE should stipulate that it will not ship waste to WIPP in Government-owned and operated conveyances or, in the alternative, give assurance, through its formal legal opinion (1.a.), that its decision to do so will not preclude coverage of the State of New Mexico as a person indemnified for public liability it may sustain as the result of a waste transportation accident.

e. DOE should stipulate that it will engage an operating contractor for WIPP or, if it decides to operate WIPP with Government forces, that it will enter into a separate indemnity agreement with the State (See 2.a.).

3. The formal DOE legal opinion (1.a.) should discuss the application of the waiver of defenses provisions of Section 170n. of the Act (42 U.S.C. § 2210(n)) and implementing indemnity agreements to WIPP and related transportation. Are the DOE facilities from which WIPP waste is to be shipped "production or utilization facilities" within the meaning of the Act? Is the waste itself "special nuclear material or by-product material"? What is the affect of these provisions on State indemnification?

4. DOE should stipulate in an agreement filed in Court that only waste from a "production or utilization facility" as defined in the Act, which waste is either "special nuclear material or by-product material" as defined in the Act will be stored at or transported to or from the WIPP facility.

5. The formal DOE legal opinion should address the question of indemnity coverage for damage arising from acts of theft or sabotage. The State would urge DOE to interpret Section 170d. and implementing DOE indemnity agreements more broadly in its formal opinion than did the 1975 NRC study of this question in the context of licensee operations. (The NRC study concluded that indemnity coverage would apply to a nuclear incident occurring in the course of a criminal act at the site of licensed activity or along normal transportation routes, but not to damage caused after the material is successfully diverted from such locations.) If such an opinion is obtained, specific amendments to the DOE contract(s) for WIPP operation should be made to make this coverage clear. If DOE cannot conclude that damages after a

successful criminal diversion are covered by DOE indemnity, then a clarifying amendment to the Price-Anderson Act should be recommended to Congress (See Part B, Item 3, below).

6. It is the State's position that it should be compensated by the Federal Government for all costs of clean-up or emergency response activity conducted by the State after a transportation or on-site operational accident. Ordinarily the State could recover clean-up costs from the party liable for the accident and that party's liability would be covered by applicable Price-Anderson indemnity provisions. The State's concern is that its claim, and Price-Anderson coverage, may be defeated by a valid defense of comparable or contributory negligence asserted by defendants (including the Federal Government) if the acts or omissions of the State (e.g., negligent State emergency response, faulty road maintenance or the State's consultation and cooperation) were a contributing cause of the accident. (The DOE response to the State's position papers acknowledged that State law defenses would be available to a person indemnified, absent an "extraordinary nuclear occurrence" involving the waivers of § 170n.) Also, injuries sustained by members of the State's emergency response and clean-up teams may not be covered by Price-Anderson indemnity. The State wants to be assured that it will be compensated by the Federal Government for clean-up and emergency response costs, including claims paid to its injured employees, if such costs are not covered by Price-Anderson and even if the State is contributorily or comparably negligent.

7. If the State incurs costs pursuant to a precautionary evacuation because of a threatened nuclear accident which does not materialize because there is no release of radiation, such costs would not be covered by Price-Anderson because they would not be the result of a "nuclear incident," within the meaning of 42 U.S.C. § 2014(q). The State would like a separate agreement from DOE to reimburse it for these costs. It would also like to see a recommendation made to Congress to broaden the statutory definition of a "nuclear incident" to cover such cases. (The GAO report of September 14, 1981, which was Attachment C to DOE's response to the State position papers, has already recommended such legislation.)

8. The formal DOE legal opinion should assure the State that it will not be required to exhaust its own financial protection (e.g., liability insurance) before it is covered as a "person indemnified" under the indemnity agreement(s) between DOE and one or more of its contractors.

9. The formal DOE legal opinion should assure the State that, as indicated in the prescribed indemnity provisions, the entire 500 million dollars of indemnity coverage will be available to pay claims and will not be reduced by the costs of processing and

defending claims. (While the currently prescribed DOE indemnity agreements so provide, the statute itself may be ambiguous.)

**B. Public Concerns** The State representatives acknowledged that most of the public concerns would have to be addressed by Congress in appropriate amendments to the Price-Anderson Act. The State is aware of the "detailed report concerning the need for continuation or modification of the provisions" of the Price-Anderson Act which Section 170p. (42 U.S.C. § 2210(p)) requires NRC to submit to Congress by August 1, 1983. DOE has advised the State of NRC's intent to obtain DOE recommendations for inclusion in that report, and that DOE's report to NRC would be an appropriate vehicle for advising Congress of New Mexico's views on these matters. The specific concerns mentioned were the following:

1. The 500 million dollar limit is not adequate to assure compensation for all injuries and damages which might be sustained in a nuclear incident. These corrective measures were suggested by the Attorney General's representatives.

a. Amend the Act to increase the limit in an amount sufficient to account for inflation which has occurred since 1957 when the limit was originally set. (The GAO report of September 14, 1981, concluded (p. 9) that inflation has shrunk the limit to 183 million in 1957 dollars.)

b. Amend the Act along the lines recommended by GAO in its September 14, 1981, report so that maximum available coverage through Government indemnity for a nuclear incident occurring in the course of DOE contract operations would be equal to that then available, through the insurance pools, for an incident occurring in the course of NRC-licensed activity.

c. Apart from Congressional action, DOE should exercise the authority it already has under § 170d. of the Act (42 U.S.C. § 2210(d)) to require its WIPP operating contractor to purchase 60 million dollars in nuclear risk insurance. Such action would have the effect of raising the limit for a WIPP related nuclear incident from 500 million dollars to 560 million dollars. (The State is aware that current DOE policy is not to require or permit its contractors to purchase such insurance at Government expense. DOEPR § 9-10.5010(a), Attachment D to DOE Response, November 6, 1981. It is the State's position that an exception to this policy should be made to demonstrate DOE's concern for the adequacy of public protection in New Mexico.)

2. Amend Section 170n. of the Act (42 U.S.C. § 2210(n)) to make the waiver of defenses provisions applicable in the event of an "extraordinary nuclear occurrence" at the WIPP site. (The current law would preclude such application because WIPP is not

a "production or utilization facility.") The State's objective could be accomplished by amending Section 170n.(1)(a) to include a "nuclear waste disposal facility" or by amending the entire section to make the waiver provision applicable to any "nuclear incident" which meets the "extraordinary nuclear incident" criteria, rather than restricting the waivers to nuclear incidents occurring under the three particular circumstances mentioned in § 170n.(1). Also, DOE's regulations stating the criteria for an "extraordinary nuclear occurrence" should be made less stringent.

3. Amend the Price-Anderson Act as necessary to make the indemnity provisions applicable to damages or injuries sustained after material is successfully diverted by criminal acts (terrorism, theft or sabotage) from the site of contract activity or normal routes of transportation.

4. Increase the "cap" on the waiver of the defense of the statute of limitations in the event of an extraordinary nuclear occurrence beyond the present period of twenty years from the date of the incident. (Section 170n.(1)(iii))

5. Enact an appropriate amendment to the Price-Anderson Act or the Federal Tort Claims Act, or both, so that the waiver of defenses provisions of Section 170n. would apply to the Federal Government's own liability in the event of an extraordinary nuclear occurrence.

6. Amend the definition of a "nuclear incident" to make it clear that a threatened release which does not occur, but because of which evacuation costs are incurred, would be eligible for indemnity coverage. (See GAO report of September 14, 1981, pp. 10-11, where the same recommendation was made.)

JOINT RECORD OF SECOND NEGOTIATION SESSION  
ON THE ISSUE OF  
STATE LIABILITY  
WASTE ISOLATION PILOT PLANT

January 19, 1982

The second negotiation session on the issue of State liability was held on the afternoon of January 19, 1982, in the offices of the Chief Counsel, Albuquerque Operations Office, DOE. The State was represented by Joseph F. Canepa, Special Assistant Attorney General, and Mr. Robert H. Neill of the Environmental Evaluation Group. DOE was represented by John F. McNett, Assistant Chief Counsel.

At the beginning of the meeting Mr. McNett advised the State representatives that the DOE Office of the General Counsel had agreed that a formal opinion of the General Counsel could be prepared to address the legal issues raised by the State in the first negotiation session on State liability held on November 12, 1981, and that Mr. McNett had been requested to draft that opinion. The State's representatives were also advised that DOE would seek to obtain the formal concurrence of the Department of Justice in the DOE General Counsel's opinion. It was further agreed that DOE would bring to the attention of the Congress any recommendations the State may want to make for amendment of the Price-Anderson Act after consideration of the General Counsel's opinion, either through the detailed report to be submitted by August 1, 1983, under the provisions of Section 170p. of the Atomic Energy Act, or by other appropriate means.

During the remainder of the meeting State and DOE representatives agreed upon the following list of specific issues to be addressed in the proposed DOE General Counsel's opinion.

1. The authority of DOE under the Price-Anderson Act to extend indemnity coverage to operation of the WIPP facility and related transportation.

2. That the term "persons indemnified" as used in the Act and implementing indemnity agreements includes persons who are not parties to indemnity agreements and, in the case of WIPP, would include the State of New Mexico.

3. That DOE's authority to cover "persons indemnified" other than parties to indemnity agreements is not restricted by a 1975 amendment to the statutory definition of the term "persons indemnified."

4. The appropriateness of amending the existing Westinghouse contract, or the standard indemnity article in any contract for operation of WIPP, to provide specifically that the State of New Mexico is included as a "person indemnified" under such contract.

5. The appropriateness of a separate Price-Anderson indemnity agreement with the State of New Mexico to cover any WIPP-related public liability of the State.

6. The appropriateness of DOE's agreement, in a stipulation to be filed in court, that it will exercise the discretion it has under the Price-Anderson Act in favor of extending indemnity coverage in WIPP-related contracts.

7. The appropriateness of DOE's agreement, in a stipulation to be filed in court, that DOE will conduct WIPP operations and related transportation through contractors eligible for Price-Anderson indemnity agreements or, in the alternative, that a separate indemnity agreement would be executed with the State to fill any gaps caused by a DOE decision to conduct such operations or transportation with Government personnel.

8. Application of the "waiver of defenses" provisions of Section 170n. of the Act to WIPP, including whether waste to be shipped to WIPP is "special nuclear material or by-product material" within the meaning of the Act, and whether WIPP or the facilities from which waste is to be shipped are "production or utilization facilities" under the Act.

9. The extent to which Price-Anderson coverage under DOE indemnity agreements covers nuclear incidents occasioned by criminal acts of theft or sabotage, whether the incident occurs at the contract site, in the course of transportation, or after successful diversion of the material.

10. Whether the State could be barred from indemnity coverage for its clean-up costs incurred after a transportation accident by a valid claim of comparable or contributory negligence against the State in connection with the accident (e.g., an accident caused in part by faulty highway maintenance).

11. If the circumstances described in paragraph 10. could defeat the State's recovery, the appropriateness of a separate

indemnity agreement to cover State clean-up costs regardless of State negligence.

12. Whether any "financial protection" which the State may have acquired for itself must be exhausted before the Government indemnity available under any WIPP-related DOE contract would apply.

13. That in the event of a nuclear incident the entire 500 million dollars in indemnity coverage would, as indicated in DOE standard indemnity agreements, be available for payment of claims and not be reduced by the costs of processing and defending claims.

14. The appropriateness of a DOE requirement that its operating contractor for WIPP purchase 60 million dollars in nuclear risk insurance, thereby increasing the total public protection package for a WIPP-related accident from 500 million to 560 million dollars.

15. Whether the provisions of Section 170p. of the Act requiring a detailed report to Congress by August 1, 1983, afford an appropriate means for presenting State recommendations to Congress for amendment of the Price-Anderson Act.

**Subpart 9-10.50 Indemnification of DOE Contractors****§9-10.5000 Scope of subpart.**

This subpart describes the established policies concerning (a) indemnification of DOE contractors against public liability for a nuclear incident arising out of or in connection with the contract activity, and (b) indemnification of DOE contractors against liability for nonnuclear risks arising out of or in connection with the contract activity.

**§9-10.5001 Applicability.**

(a) With respect to indemnification against public liability for a nuclear incident, the pertinent policies and procedures set forth in this subpart shall be applicable in entering into indemnity agreements with:

- (1) DOE contractors engaged in the operation of production or utilization facilities; and
- (2) DOE contractors whose work entails the risk of public liability for a substantial nuclear incident.

(b) With respect to indemnification against liability for nonnuclear risks, the pertinent policies and procedures set forth in this subpart shall be applicable in entering into indemnity agreements with any DOE contractors.

**§9-10.5002 Definitions.**

(a) The term "DOE contractor" means any DOE prime contractor, including any agency of the Federal Government with which DOE has entered into an interagency agreement.

(b) The term "construction contractor" means a DOE contractor who is constructing an installation for DOE which, when completed, will be a production or utilization facility.

(c) The term "nuclear incident" means:

(1) Any occurrence within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material; and

(2) Any such occurrence outside the United States, if such occurrence involves a facility or device owned by, and used by or under contract with, the United States.

(d) The term "person indemnified" means:

(1) With respect to a nuclear incident occurring within the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability; or

(2) With respect to any nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with DOE or any project to which indemnification under the provisions of section 170 d of the Atomic Energy Act of 1954, as amended, has been extended, or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(e) The term "production facility" means:

(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium 233; or

(2) Any facility designed or used for the separation of the isotopes of uranium or the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or

(3) Any facility designed or used for the processing of irradiated materials containing special nuclear material, except laboratory scale facilities designed or used for experimental or analytical purposes only.

(f) The term "public liability" means any legal liability (including liability 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 contract activity arising out of or resulting from a nuclear incident, except: (1) 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, and (2) claims arising out of an act of war. "Public liability" also includes damage to property of persons indemnified, provided that such property is covered under the terms of any financial protection that may be required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(g) The term "substantial nuclear incident." See §9-10.5005.

(h) The term "utilization facility" means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U 233.

(i) The term "nuclear reactor" means an apparatus, other than an atomic weapon, designed or used to sustain nuclear fission in a self-supporting chain reaction.

**§9-10.5003 Statutory indemnity - section 170d of the Atomic Energy Act of 1954, as amended.**

Section 170d of the Atomic Energy Act of 1954, as amended, authorizes DOE "to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident." Contractors identified in §9-10.5001(a) are eligible for such statutory indemnity.

**§9-10.5004 Authority of Heads of Procuring Activities to negotiate statutory indemnity agreements.**

(a) Heads of Procuring Activities are authorized to negotiate statutory indemnity agreements with contractors identified in §9-10.5001(a) (1).

(b) Pursuant to §9-10.5005, Heads of Procuring Activities are authorized to enter into a statutory indemnity agreement whenever it has been determined that a contractor in sub-paragraph (2) of §9-10.5001 (a), is engaged in activities involving the risk of public liability for a substantial nuclear incident. Such a determination may be based upon either the risk of liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work, or the risk of liability for a substantial nuclear incident caused by a product delivered to or for DOE under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement. If, pursuant to §9-10.5005, a Head of a Procuring Activity determines that the maximum conceivable damage which could result from a nuclear incident arising in the course of a contractor's activities falls between \$1 million and \$60 million, he shall submit the proposed indemnification with a recommendation, and all supporting data, to the Head of the Agency or designee for appropriate action.

**§9-10.5005 Substantial nuclear incident.**

(a) With respect to subparagraph (2) of §9-10.5001(a), and pursuant to the provisions of §9-10.5004, a Head of a Procuring Activity may be required to determine whether a contractor's activities involve the risk of public liability for a substantial nuclear incident and thus make the contractor eligible to obtain a statutory indemnity agreement from DOE. The determination by a Head of a Procuring Activity shall be based on the criteria in (b) below.

(b) If, after a study of the maximum conceivable damage which can result from an incident arising out of or in connection with the contractor's activities, the Head of a Procuring Activity concludes that the maximum conceivable damage per incident to property and persons is \$60 million or more, the contractor may be found to be under a risk of public liability for a substantial nuclear incident and the Head of the Procuring Activity is authorized to execute a statutory indemnity agreement under such a contract. If such a study of the maximum conceivable damage indicates a figure of \$1 million or less, the contractor should not be considered to have a risk of public liability for a substantial nuclear incident, and therefore, shall not be made a party to a statutory indemnity agreement. If the study indicates that the maximum conceivable damage falls between \$1 million and \$60 million, the Head of a Procuring Activity will submit the proposed indemnification of such contractor to the Head of the Agency or designee with a recommendation and all supporting data.

(c) The Head of the Agency or designee, on such a recommendation, may take one of the following actions:

(1) Determine that the contractor is under risk of public liability for a substantial nuclear incident and that the contractor should be extended a statutory indemnity agreement; or

(2) Determine that the contractor should not be extended a statutory indemnity. In this case, the Head of the Agency or designee may authorize the Head of a Procuring Activity to authorize the contractor to purchase nuclear liability insurance or to offer the contractor a general authority indemnity agreement.

#### §9-10.5006 Statutory indemnity contract article.

The contract article contained in §9-50.704-6 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work. The contract article contained in §9-50.704-7 shall be incorporated in all contracts in which a statutory indemnity agreement is to be included upon a determination that the contractor is under risk of public liability only for a substantial nuclear incident caused by a product delivered to or for DOE, under the contract where such product is expected to be used in connection with a facility or device not covered by a statutory indemnity agreement.

#### §9-10.5007 Contractual assurance.

Heads of Procuring Activities are authorized to include in all contracts for:

(a) Architect-engineer services in connection with the construction of a production or utilization facility;

(b) The supply of component parts (including construction contracts where the work does not entail the risk of occurrence of a substantial nuclear incident) for a production or utilization facility; and

(c) The supply of equipment or services which would be a part of, or contribute to, or be used in connection with the construction or operation of a production or utilization facility, assurances that DOE will enter into a statutory indemnity agreement with the contractor who will operate a facility on its completion. Assurances will be given, however, only to those contractors and suppliers who might be held liable in connection with a substantial nuclear incident occurring after completion of the facility. The form of contractual assurance which shall be utilized is contained in §9-50.704-8.

**§9-10.5008 "Representation" for use in subcontracts and purchase orders of prime contractor holding statutory indemnity agreement.**

A DOE contractor with whom a statutory indemnity agreement has been executed in the form contained in §9-50.704-6 may include in any of its subcontracts and purchase orders a representation that the work under the prime contract is covered by a statutory indemnity agreement with DOE, and that this indemnity covers all persons who may be liable for public liability for any nuclear incident arising out of or in connection with the activity under the prime contract. A suggested form of "representation" follows:

(a) The contractor represents that there is included in its prime contract with DOE an indemnity agreement, entered into by DOE under the authority of Section 170 of the Atomic Energy Act of 1954, as amended by Public Law 85-256 (the "Price-Anderson Act"), a copy of which may be obtained from the contractor (is attached hereto); that, under said agreement, DOE has agreed to indemnify the contractor and other persons indemnified, including the subcontractor, against claims for public liability (as defined in said Act) arising out of or in connection with the contractual activity; that the indemnity applies to covered nuclear incidents which (1) take place at a "contract location" (which term, as defined in the indemnity agreement, does not include the location of the subcontractor's plant and facilities); or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a "contract location"; or (3) involve items produced or delivered under the prime contract. The obligation of DOE to indemnify is subject to the conditions stated in the indemnity agreement.

(b) DOE will not approve the inclusion, in the subcontracts and purchase orders of an indemnified prime contractor, of any provision whereby the prime contractor indemnifies the subcontractor or supplier against public liability for a nuclear incident because any such liability will be covered by the statutory indemnity agreement of the prime contractor.

**§9-10.5009 Fees.**

No fee will be charged a DOE contractor for a statutory indemnity agreement.

**§9-10.5010 Financial protection requirements.**

(a) DOE contractors with whom statutory indemnity agreements under the authority of section 170 d of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents, except (1) that DOE contractors now covered by insurance against such liability, with the approval of the DOE, may continue to carry such insurance; and (2) with the approval of the Controller, contractors engaged in the operation of DOE facilities may be required or permitted to furnish financial protection in an amount not to exceed \$1 million.

(b) If nuclear liability insurance is carried by a contractor who is a Nuclear Regulatory Commission (NRC) licensee, DOE will pay an equitable portion of the insurance premium under its contract (or would include such an item in the calculation of a fixed price), but normally a statutory indemnity agreement would not be granted under the contract.

**§9-10.5011 General contract authority indemnity.**

(a) DOE also has general contract authority to enter into indemnity agreements with its contractors. Under such authority a certain measure of protection is extended to the DOE contractor against risk of liability, but the assumption of liability by DOE will be expressly subject to the availability of appropriated funds. Prior to enactment of section 170 of the Atomic Energy Act of 1954, as amended, this authority was exercised in a number of Atomic Energy Commission contracts and this type of indemnification remains in some DOE contracts.

(b) It is the policy of DOE, subsequent to the enactment of section 170, to restrict indemnity agreements with DOE contractors, with respect to protection against public liability for a nuclear incident, to the statutory indemnity provided under section 170. However, it is recognized that circumstances may exist under which a DOE contractor may be exposed to a risk of public liability for a nuclear occurrence which would not be covered by the statutory indemnity.

(c) While it is normally DOE policy to require its contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect a DOE contractor against liability for uninsured non-nuclear risks.

(d) If circumstances as mentioned in paragraph (b) or (c) of this section do arise, it shall be the responsibility of the Heads of the Procuring Activities to submit to the Head of the Agency or designee for his review and decision, all pertinent information concerning the need for, or desirability of, providing a general authority indemnity to a DOE contractor.

(e) Where the indemnified risk is nonnuclear, the amount of general authority indemnity extended to a fixed-price contractor should normally have a maximum obligation equivalent to the amount of insurance that the contractor usually carries to cover such risks in his other commercial operations or, if the risk involved is dissimilar to those normally encountered by the contractor, the amount that it otherwise would have reasonably procured to insure this contract risk.

(f) In the event that a DOE contractor has been extended both a statutory indemnity and a general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.

(g) The provisions of this subsection do not restrict or affect the policy of DOE to pay its cost-reimbursement type contractors for the allowable cost of losses and expenses incurred in the performance of the contract work, within the maximum amount of the contract obligation.

**§9-10.5012 Service type insurance policies.**

(a) Service type insurance policies are cost reimbursement type contracts or subcontracts in which the insurer provides claim and loss adjustment services on a cost reimbursement basis, which satisfies state and Federal insurance requirements.

(b) Service type insurance policies may be used when one or more of the following criteria are present and the Contracting Officer approves:

- (1) Pure risk commercial insurance is not available or, if available, cost is not considered reasonable;
- (2) Inherent risks in the contract are new and a part of the process of commercialization;
- (3) The service type insurance is needed to implement jointly funded projects; or
- (4) The service type insurance arrangement is considered in the Government's best interest.



(b) The contractor shall not permit any individual to have access to Restricted Data or other classified information, except in accordance with the Atomic Energy Act of 1954, as amended, and DOE's regulations or requirements.

(c) The term "Restricted Data" as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

**NOTE:** This clause should be used in place of the clauses entitled "Security", §9-50.704-1, and "Classification", §9-50.704-4, in contracts with educational institutions for off-site research that are not likely to produce Restricted Data or classified information.

**§9-50.704-6 Nuclear hazards indemnity.**

(a) This article is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(1) The definitions set out in the Act shall apply to this article.

(2) The term "contract location" means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the contractor is engaged in the performance of contractual activity under this contract.

(3) The term "extraordinary nuclear occurrence" means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in Subpart E of 10 CFR 84C

(b) Except as hereafter permitted or required in writing by DOE, the contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability, arising out of or in connection with the contractual activity, provided that the costs of such financial protection will be reimbursed to the contractor by DOE.

(c) (1) To the extent that the contractor and other persons indemnified are not compensated by any financial protection, permitted or required by DOE or the Nuclear Regulatory Commission (NRC), DOE will indemnify the contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable costs of investigating and settling claims and defending suits for damage for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under section 170 of the Act, including this contract, shall not exceed \$500 million in the aggregate for each nuclear incident occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (c)(1) of this section is public liability which (i) arises out of or in connection with the contractual activity; and (ii) arises out of or results from:

(A) A nuclear incident which takes place at a contract location; or

(B) A nuclear incident which takes place at any other location and arises out of or in the course of the performance of contractual activity under this contract by the contractor's employees, individual consultants, borrowed personnel or other persons for the consequences of whose acts or omissions the contractor is liable, provided that such incident is not covered by any other indemnity agreement entered into by DOE or the NRC pursuant to section 170 of the Act; or

**(C) A nuclear incident which arises out of or in the course of transportation of source, special nuclear, or by-product materials to or from a contract location, provided such incident is not covered by any indemnity agreement entered into by DOE with the transporting carrier, or with a carrier's organization acting for the benefit of the transporting carrier, or with a licensee of NRC, pursuant to Section 170 of the Act; or**

**(D) A nuclear incident which involves items (such as equipment, material, facilities, or design or other data) produced or delivered under this contract, provided such incident is not covered by any other indemnity agreement entered into by DOE or NRC pursuant to Section 170 of the Act.**

**(d) In the event of an extraordinary nuclear occurrence which:**

**(1) Arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or**

**(2) Arises out of or results from or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility, or**

**(3) During the course of the contract activity, arises out of or results from the possession, operation, or use by the contractor or a subcontractor of a device utilizing special nuclear material or by-product material.**

DOE and the contractor on behalf of itself and other persons indemnified, insofar as their interests appear, each agrees to waive:

**(i) Any issue or defense as to the conduct of the claimant or fault of persons indemnified, including, but not limited to:**

**(A) Negligence;**

**(B) Contributory negligence;**

**(C) Assumption of the risk; or**

**(D) Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God.**

As used herein, "conduct of the claimant" includes conduct of persons through whom the claimant derives his cause of action:

**(ii) Any issue or defense as to charitable or governmental immunity;**

**(iii) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than 20 years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.**

**(e) The waivers set forth in paragraph (d) of this article:**

**(1) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;**

**(2) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;**

**(3) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefore are either payable or required to be provided under any workmen's compensation or occupational disease law;**

**(4) Shall not apply to any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law;**

**(5) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;**

(6) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts, or other proof of financial protection; and

(7) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the limit of liability provisions under subsection 170e of the Atomic Energy Act of 1954, as amended, and (ii) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) The contractor shall give immediate written notice to DOE of any known action or claim filed or made against the contractor or other person indemnified for public liability as defined in paragraphs (2) of section (c). Except as otherwise directed by DOE, the contractor shall furnish promptly to DOE, copies of all pertinent papers received by the contractor or filed with respect to such actions or claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of section (c) above, DOE shall have the right to, and shall collaborate with, the contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) The indemnity provided by this article shall not apply to public liability arising out of, or in connection with, any activity that is performed at a licensed facility, and that is covered by a Nuclear Regulatory Commission indemnity agreement authorized by Section 170 of the Act.

(h) The obligations of DOE under this article shall not be affected by any failure on the part of the contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the contractor, or by the completion, termination or expiration of this contract.

(i) The parties to this contract enter into this article upon the condition that this article may be amended at any time by the mutual written agreement of DOE and the contractor, and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.

(j) The provisions of this article shall not be limited in any way by, and shall be interpreted without reference to, any other article of this contract, including Article \_\_\_\_\_, Disputes, provided, however, that the following provisions of this contract: Article \_\_\_\_\_, Covenant Against Contingent Fees; Article \_\_\_\_\_, Officials Not to Benefit; Article \_\_\_\_\_, Assignment; and Article \_\_\_\_\_, Examination of Records; and any provisions later added to this contract which under applicable Federal law, including statutes, executive orders and regulations, are required to be included in agreements of the type contained in this article, shall apply to this article.

(k) The following section will be included in those contracts containing indemnity agreements executed under the general contract authority of DOE.

To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this article, or is effectively relieved of public liability by an order or orders limiting same, pursuant to section 170e of the Atomic Energy Act of 1954, as amended, the provisions of Article \_\_\_\_\_ (General Authority Indemnity) shall not apply.

~~§9-50.704-7 Nuclear hazards indemnity - product liability.~~

~~(a) This article is incorporated into this contract pursuant to the authority contained in section 170d of the Atomic Energy Act of 1954, as amended (hereinafter called the Act)~~

(1) The definitions set out in the Act shall apply to this article.

AWARD/CONTRACT

EXHIBIT 5

DE-AC04-78ET05346

2 EFFECTIVE DATE June 15, 1978

3 REQUISITION PURCHASE REQUEST PROJECT NO

4 CERTIFIED FOR REG 2 AND OF RATING

5 ADMINISTERED BY U. S. Department of Energy Albuquerque Operations Office Contracts and Procurement Division Box 5400 Albuquerque, New Mexico 87115

6 ADMINISTERED BY (If other than block 5) U. S. Department of Energy Albuquerque Operations Office Waste Isolation Pilot Plant Project P. O. Box 5400 Albuquerque, New Mexico 87115

CONTRACTOR NAME AND ADDRESS: Westinghouse Electric Corporation Advanced Energy Systems Division P. O. Box 10864 Pittsburgh, Pennsylvania 15222

9 DISCOUNT FOR PROMPT PAYMENT 10 SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 11

SHIP TO MARK FOR

12 PAYMENT WILL BE MADE BY U. S. Department of Energy Albuquerque Operations Office Finance Division P. O. Box 5400 Albuquerque, New Mexico 87115

THIS PROCUREMENT WAS [ ] ADVERTISED [X] NEGOTIATED PURSUANT TO

[ ] 10 USC 2304 (a) [X] 41 USC 252 (K)(10) / FPR 1-3.210(a)(13)

ACCOUNTING AND APPROPRIATION DATA: Appropriation: 89X201.40 Obligation Plan Symbol: 362 Allotment: AL-81-40 E&R: 39-JM03-77-13-F

Table with 5 columns: 17 QUANTITY, 18 UNIT, 19 UNIT PRICE, 20 AMOUNT. Row 1: Technical Assistance/Operating Contractor Support for the Waste Isolation Pilot Plant Project as described herein.

THIS IS A COPY OF THE EXECUTED DOCUMENT CONTRACTS & PROCUREMENT DIVISION, A/O

TOTAL AMOUNT OF CONTRACT \$ See ARTICLE V

CONTRACTING OFFICER WILL COMPLETE BLOCK 22 OR 26 AS APPLICABLE

22 CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 3 copies to issuing office) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents to this award contract: (a) the solicitation, if any and (c) such provisions, representations, certifications, and specifications as are attached or incorporated by reference herein. (Attachments are listed herein)

26 [ ] AWARD (Contractor is not required to sign this document) Your offer on Solicitation Number... including the additions or changes made by you which additions or changes are set forth in the above is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer; and (b) this award contract. No further contractual document is necessary.

23 NAME OF CONTRACTOR Westinghouse Electric Corp. (Signature of person authorized to sign)

27 UNITED STATES OF AMERICA BY Thomas R. Clasky (Signature of Contracting Officer)

24 NAME AND TITLE OF SIGNER (Type or print) George W. Hardigg Vice President

25 DATE SIGNED 1/9/79

28 Thomas R. Clasky Deputy Manager Albuquerque Operations Office Contracting Officer

26 DATE SIGNED U 4 JAN 1979 04 JAN 1979

## SCHEDULE

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CONTRACT SCHEDULE

ARTICLE I - SCOPE OF WORK

The Contractor shall provide, pursuant to negotiated Task Agreements as described herein, all necessary services, material, equipment and facilities, (except as furnished by the Government), to perform the work associated with the Waste Isolation Pilot Plant (WIPP) Project as set forth in Exhibit A, Statement of Work. Exhibit A, and its Appendix which sets forth the Task Agreements, shall constitute the entire Scope of Work required by this contract.

ARTICLE II - PERIOD OF PERFORMANCE

The period of performance of this contract shall be June 15, 1978 through completion of the construction of WIPP (estimated to be during 1985), or the completion date of any Task Agreement entered into hereunder, whichever date is later, unless terminated earlier or extended by mutual agreement.

ARTICLE III - TASK AGREEMENTS

The services requested by the U. S. Department of Energy (DOE) under Article I above shall be embodied in Task Agreements negotiated by the parties and shall include, but not be limited to: (1) the services to be furnished; (2) the estimate of cost, fixed-fee and period of performance for such services; (3) the amount of funds obligated by the Government therefor; (4) the Contractor's key personnel designated for each task; and (5) terms and conditions required by law or regulations not otherwise contained herein. Each Task Agreement shall be subject to all the terms, conditions, and provisions of this contract and any reference in the provision of this contract to "the contract" or "this contract" shall be deemed to have equal and separate application to each such Task Agreement, except where the context of the reference indicates otherwise.

The DOE neither represents nor guarantees (1) that any or all requirements for services for the above described project arising during the contract term shall be embodied in Task Agreements hereunder, or (2) any minimum or maximum dollar amount for any individual or aggregate of tasks that may be negotiated and entered into by the parties.

Task Agreement No. 1 under this contract has been set forth in the Appendix to Exhibit A, Statement of Work. Performance of additional tasks under this contract shall be subject to the following task ordering procedure:

- C. Estimated Cost and Fixed Fee - The total estimated cost and fixed fee is \$8,925,000.
- D. Obligation of Funds - Pursuant to the General Provisions clause of Exhibit B of this contract entitled "Limitation of Funds," total funds in the amount of \$5,000,000 have been obligated by the Government, which is estimated to cover performance to on or about March 1, 1979.

ARTICLE VI - PAYMENTS

Payment by the Government shall be made in accordance with the General Provisions clause entitled "Allowable Cost, Fixed-Fee and Payment" and Exhibit D, Billing Instructions.

ARTICLE VII - DELIVERY/REPORTING REQUIREMENTS

- A. The reporting requirements for all work performed under this contract are contained in Exhibit C, Contract Reporting Requirements. In addition, special plans and reports shall be prepared and submitted as reasonably prescribed by the Contracting Officer.
- B. Specific deliverables shall be as specified in each Task Agreement and may consist of statements, charts, reports, briefing notes, tabulations, vu-graphs, and other forms of presentation as appropriate.

ARTICLE VIII - ACCEPTANCE

Acceptance of the services and deliverables called for hereunder shall be accomplished by the Contracting Officer, or his duly authorized representative.

ARTICLE IX - OPERATION OF THE WIPP

During the term of this contract, the Government anticipates that a determination will be made as to whether or not the WIPP will be constructed and operated and whether or not the services of the Contractor will be utilized for the operation of the WIPP. If the Government elects to utilize the services of the Contractor, the parties agree to negotiate in good faith reasonably in advance of construction completion a contract modification which will cover operation of the WIPP. Preliminary to such negotiation, the Contractor will prepare and submit to the Contracting Officer a detailed cost estimate and a management and staffing plan based on guidance furnished by the Contracting Officer.

Clause 62 - Organizational Conflicts of Interest, contained in Exhibit B, General Provisions, of this contract shall not preclude the selection of the Contractor for the operation of the WIPP either by virtue of the language of this ARTICLE IX or as a result of competition should a future determination be made to compete the effort for the operation of the WIPP.

ARTICLE X - KEY PERSONNEL

The key personnel referred to in the General Provision Clause of this contract entitled "Key Personnel" are:

R. Mairson	Project Manager
C. Klanian	Deputy Manager
P. Bradbury	Mgr., Safety Analysis and Licensing
C. Williams	Mgr., Quality Assurance
B. Baer	Mgr., Radiation Safety and Industrial Hygiene
D. Hulbert	Mgr., Engineering
R. Brown	Mgr., Program Management
J. Schmidt	Mgr., Construction
J. Koetting	Mgr., Administration

In the administration of the Key Personnel Clause of the General Provisions of this contract, the parties recognize the necessity to avoid actions which would unreasonably curtail promotional opportunities of employees assigned to key positions.

ARTICLE XI - CONFIDENTIALITY OF INFORMATION

A. To the extent that the work under this contract requires that the Contractor be given access to confidential or proprietary business, technical, or financial information belonging to the Government or other companies, the Contractor shall, after receipt thereof, treat such information as confidential and agrees not to appropriate such information to its own use or to disclose such information to third parties unless specifically authorized by the Contracting Officer in writing. The foregoing obligations, however, shall not apply to:

1. Information which, at the time of receipt by the Contractor, is in the public domain;
2. Information which is published after receipt thereof by the Contractor or otherwise becomes part of the public domain through no fault of the Contractor;
3. Information which the Contractor can demonstrate was in its possession at the time of receipt thereof and was not acquired directly or indirectly from the Government or other companies;

normally necessitates that the Contractor be given access to internal DOE information. Such services typically include assistance in the preparation of program plans, evaluation, monitoring or review of contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements of work; the making of recommendations, or the rendering of an opinion or advice regarding any technical problem, issue, or question.

#### CLAUSE 63 - CONTROL OF CONTRACTOR BY FOREIGN INTEREST

The Contractor shall promptly notify the Contracting Officer of any change or proposed change in the ownership or control of the Contractor corporation which has the potential of creating a situation where the corporation is or could be owned or controlled by foreign interest. In the event this situation occurs, this contract may be terminated for convenience of the Government pursuant to the clause of this contract entitled "TERMINATION FOR DEFAULT OR FOR CONVENIENCE OF THE GOVERNMENT."

#### CLAUSE 64 - AVAILABILITY OF APPROPRIATED FUNDS

Except as may be specifically provided to the contrary in this contract in the clause entitled "Nuclear Hazards Indemnity," the duties and obligations of the Government hereunder calling for the expenditure of appropriated funds shall be subject to the availability of funds appropriated by the Congress which DOE may legally expend for the purposes herein.

#### CLAUSE 65 - NUCLEAR HAZARDS INDEMNITY

- (a) This clause is incorporated into this contract pursuant to the authority contained in subsection 170(d) of the Atomic Energy Act of 1954, as amended (hereinafter called the Act).
- (1) The definitions set out in the Act shall apply to this clause.
  - (2) The term "contract location" means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any Contractor-owned or -controlled facility, installation, or site at which the Contractor is engaged in the performance of contractual activity under this contract.
  - (3) The term "extraordinary nuclear occurrence" means an event which DOE has determined to be an extraordinary nuclear

occurrence defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in Subpart E of 10 CFR 840.

(b) Except as hereafter permitted or required in writing by DOE, the Contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability. DOE may at any time require in writing that the Contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, provided that the costs of such financial protection will be reimbursed to the Contractor by DOE.

(c) (1) To the extent that the Contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE or the Nuclear Regulatory Commission (NRC), DOE will indemnify the Contractor, and other persons indemnified, against (i) claims for public liability as described in subparagraph (2) of this paragraph (c); and (ii) the reasonable costs of investigating and settling claims, and defending suits for damage for such public liability, provided that DOE's liability, excluding such reasonable costs, under all indemnity agreements entered into by DOE under Section 170 of the Act, including this contract, shall not exceed \$500 million in the aggregate for each nuclear incident occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in paragraph (c) (1) of this section is public liability which (i) arises out of or in connection with the contractual activity; and (ii) arises out of or results from:

(A) A nuclear incident which takes place at a contract location;

(B) A nuclear incident which takes place at any other location and arises out of or in the course of the performance of contractual activity under this contract by the Contractor's employees, individual consultants, borrowed personnel or other persons for the consequences of whose acts or omissions the Contractor is liable, provided that such incident is not covered by any other indemnity agreement entered into by DOE or the NRC pursuant to Section 170 of the Act; or

(C) A nuclear incident which arises out of or results from in the course of transportation of source, special nuclear, or byproduct materials to or from a contract location; provided such incident is not covered by any indemnity agreement entered into by DOE with the transporting carrier, or with a carrier's organization acting for the transporting carrier, or with a licensee of NRC, pursuant to Section 170 of the Act; or

(D) A nuclear incident which involves items (such as equipment, materials, facilities, or design or other data) produced or delivered under this contract, provided such incident is not covered by any other indemnity agreement entered into by DOE or NRC pursuant to Section 170 of the Act.

(d) In the event of an extraordinary nuclear occurrence which:

(1) Arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(2) Arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility, or

(3) During the course of the contract activity arises out of or results from the possession, operation, or use by the Contractor or a subcontractor of a device utilizing special nuclear material or byproduct material, DOE, and the Contractor on behalf of itself and other persons indemnified, insofar as their interests appear, each agree to waive:

(A) Any issue or defense as to the conduct of the claimant or fault of persons indemnified, including, but not limited to:

1. Negligence;
2. Contributory negligence;
3. Assumption of the risk;
4. Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God.

As used herein, "conduct of the claimant" includes conduct of persons through whom the claimant derives his cause of action;

(B) Any issue or defense as to charitable governmental immunity;

(C) Any issue or defense based on any statute of limitations if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than 10 years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue of defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified.

(e) The waivers set forth in paragraph (d) of this clause:

- (1) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;
- (2) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;
- (3) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;
- (4) Shall not apply to any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law;
- (5) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;
- (6) Shall be effective only with respect to those obligations set forth in this agreement and in insurance policies, contracts, or other proof of financial protection;
- (7) Shall not apply to, or prejudice the prosecution or defense of any claim or portion of claim which is not within the protection afforded under (i) the limit of liability provisions

under subsection 170e of the Atomic Energy Act of 1954, as amended, and (ii) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

- (f) The Contractor shall give immediate written notice to DOE of any known action or claim filed or made against the Contractor or other person indemnified for public liability as defined in paragraph (2) of Section (c). Except as otherwise directed by DOE, the Contractor shall furnish promptly to DOE copies of all pertinent papers received by the Contractor or filed with respect to such actions or claims. When DOE shall determine that the Government will probably be required to make indemnity payments under the provisions of Section (c) above, DOE shall have the right to, and shall, collaborate with the Contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right (1) to require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder, and (2) to appear through the Attorney General on behalf of the Contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the Contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.
- (g) The indemnity provided by this clause shall not apply to public liability arising out of or in connection with any activity that is performed at a licensed facility, and that is covered by a Nuclear Regulatory Commission indemnity agreement authorized by Section 170 of the Act.
- (h) The obligations of DOE under this clause shall not be affected by any failure on the part of the Contractor to fulfill its obligation under this contract, and shall be unaffected by the death, disability, or termination of existence of the Contractor to fulfill its obligation under this contract.
- (i) The parties to this contract enter into this clause upon the condition that this clause may be amended at any time by the mutual written agreement of DOE and the Contractor and that such amendment may, by its express terms, provide that it will apply to any nuclear incidents which occur thereafter.
- (j) The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clauses of this contract (including Clause 13 - Disputes): Provided, however, That the following provisions of this contract: Clause 20 - Covenant Against Contingent Fees; Clause 19 - Officials Not to Benefit; Clause 8 - Assignment of Claims; and Clause 9 - Examination of

Records by Comptroller General; and any provisions later added to this contract which under applicable Federal law, including statutes, executive orders and regulations, are required to be included in agreements of the type contained in this clause shall apply to this clause.

CLAUSE 66 - ALTERATIONS IN CONTRACT

The following alterations have been made in the provisions of this contract.

- (a) CLAUSE 24 - UTILIZATION OF LABOR SURPLUS CONCERNS, is deleted in its entirety and the following substituted therefor:

"UTILIZATION OF LABOR SURPLUS AREA CONCERNS

- (a) It is the policy of the Government to award contracts to labor surplus area concerns that agree to perform substantially in labor surplus areas, where this can be done consistent with the efficient performance of the contract and at prices no higher than are obtainable elsewhere. The Contractor agrees to use his best efforts to place his subcontracts in accordance with this policy.
- (b) In complying with paragraph (a) of this clause and with paragraph (b) of the clause of this contract entitled "Utilization of Small Business Concerns," the Contractor in placing his subcontracts shall observe the following order of preference: (1) Small business concerns that are labor surplus area concerns, (2) other small business concerns, and (3) other labor surplus area concerns.
- (c) (1) The term "labor surplus area" means a geographical area identified by the Department of Labor as an area of concentrated unemployment or underemployment or an area of labor surplus.
- (2) The term "labor surplus area concern" means a concern that together with its first-tier subcontractors will perform substantially in labor surplus areas.
- (3) The term "perform substantially in a labor surplus area" means that the costs incurred on account of manufacturing, production, or appropriate services in labor surplus areas exceed 50 percent of the contract price."
- (b) CLAUSE 48 - COST ACCOUNTING STANDARDS, is deleted in its entirety and the following substituted therefor:

1. AMENDMENT/MODIFICATION NO. M001		2. EFFECTIVE DATE 4-17-79	3. REQUISITION/PURCHASE REQUEST NO.	4. PROJECT NO. (If applicable)	1
5. ISSUED BY S. DOE-ALO Contracts and Procurement Division Box 5400 Albuquerque, New Mexico 87115		6. ADMINISTERED BY (If other than block 5)			
CONTRACTOR NAME AND ADDRESS Westinghouse Electric Corporation Advanced Energy Systems Division P. O. Box 10864 Pittsburgh, Pennsylvania 15222		FACILITY CODE		8. AMENDMENT OF SOLICITATION NO.	
				DATED _____ (See block 9)	
				<input checked="" type="checkbox"/> MODIFICATION OF CONTRACT/ORDER NO. DE-AC04-78ET05346	
				DATED 6/15/78 (See block 11)	

THIS BLOCK APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

The above numbered solicitation is amended as set forth in block 12. The hour and date specified for receipt of Offers  is extended,  is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation, or as amended, by one of the following methods:

(a) By signing and returning \_\_\_\_\_ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted, or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If, by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided such telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

ACCOUNTING AND APPROPRIATION DATA (If required)

THIS BLOCK APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

This Change Order is issued pursuant to \_\_\_\_\_

The Changes set forth in block 12 are made to the above numbered contract/order.

The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc) set forth in block 12.

This Supplemental Agreement is entered into pursuant to authority of P.L. 95-91 and other applicable law.

\* modifies the above numbered contract as set forth in block 12

DESCRIPTION OF AMENDMENT/MODIFICATION

The General Provisions Clause 65 - NUCLEAR HAZARDS INDEMNITY is hereby modified as follows:

1. In the paragraph (d)(3)(C), line five, delete the reference "10 years," and insert therefor, "20 years."

THIS IS A COPY OF THE  
EXECUTED DOCUMENT  
CONTRACTS & PROCUREMENT  
DIVISION, ALO

As amended herein, all terms and conditions of the document referenced in block 8, as heretofore changed, remain unchanged and in full force and effect

CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT  CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 3 COPIES TO ISSUING OFFICE

NAME OF CONTRACTOR/OFFEROR <u>Bert E. Kost</u> (Signature of person authorized to sign)		17. UNITED STATES OF AMERICA	
		BY <u>[Signature]</u> (Signature of Contracting Officer)	
NAME AND TITLE OF SIGNER (Type or print) Bert E. Kost, Manager Contracts Management - APSD	16. DATE SIGNED	18. NAME OF CONTRACTING OFFICER (Type or print) <u>[Signature]</u>	19. DATE SIGNED <u>4/17/79</u>

LEGISLATIVE HISTORY OF  
THE DEFINITION OF THE TERM "PERSON INDEMNIFIED"  
IN THE PRICE-ANDERSON ACT

The amendments to the Atomic Energy Act of 1954 known as "the Price-Anderson Act" were first enacted by Congress in Public Law 85-256 (1957). This legislation authorized the Atomic Energy Commission to enter into indemnification agreements covering public liability for a nuclear incident which might result from the activities of AEC contractors and licensees. The indemnification agreements authorized by the Price-Anderson Act cover the public liability of all "persons indemnified." (42 U.S.C. § 2210(c) and (d)) The statutory definition of the term "person indemnified" is, accordingly, a key factor in determining the scope of authorized indemnity. That definition was originally incorporated into the statute as Section 11 r. of the Atomic Energy Act of 1954, was subsequently amended on two occasions, and is now found in Section 11 t. (42 U.S.C. § 2014(t)). A review of the legislative history of this provision shows that the term "person indemnified" was intended to have the broadest possible scope for the maximum protection of the public, and that, insofar as nuclear incidents occurring within the United States are concerned, that broad scope has been retained throughout the history of the Price-Anderson Act.

Public Law 85-256 (1957) defined the term "person indemnified" as follows:

- "r. The term 'person indemnified' means the person with whom an indemnity agreement is executed and any other person who may be liable for public liability." [1957] U.S. Code Cong. & Ad. News 629

The legislative history states:

"The definition 'person indemnified' means more than just the person with whom the indemnity agreement is executed. . . . Where the Commission and a contractor decide to take advantage of the provisions of this act, an indemnity agreement will be executed with the prime contractor. The

phrase 'person indemnified' also covers any other persons who may be liable." Id. at 1818

Section 5 of Public Law 87-615 (1962) amended Section 11 r. to read as follows (new wording is underscored):

"r. The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability; or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Commission or any project to which indemnification under the provisions of section 170 d, has been extended or under any subcontract, purchase order or other agreement, of any tier, under any such contract or project."  
[1962] U. S. Code Cong. & Ad. News 477

The legislative history of this amendment to the definition of "person indemnified" states:

". . . Price-Anderson indemnity coverage has, from its inception extended to any person who may be liable for public liability. This coverage was intentionally broad since the primary purpose of the legislation was to protect the public. As such, there was no reason to restrict coverage to those situations in which contractors or licensees of the Commission were the parties determined to be liable. This coverage has been preserved in section 5 with respect to incidents occurring within the United States and with respect to the operation of the nuclear ship Savannah. It is reflected in section 5, clause (1).

"This reason, however, does not underlie the extension of Price-Anderson indemnity to incidents outside the United States. The principal purpose of this extended coverage is to protect AEC contractors and subcontractors. Therefore, coverage in section 5, clause (2), has been limited to the contractor himself, or to any other person who may be liable for public liability provided that the other person's liability results from his activities under a subcontract, purchase order, or other agreement of any tier under the basic contract. In addition, section 5, clause (2), incorporating the provisions of section 2 of H. R. 10775 also covers contractors, subcontractors, and others similarly situated, who qualify for indemnification solely on the basis of participating in a joint project of the AEC and another Government agency, a coverage not clearly provided in the earlier H. R. 9244." Id. at 2215-16

The definition of "person indemnified" in the Price-Anderson Act read as amended by Public Law 87-615 and quoted above from 1962 until 1975. (Public Law 89-645 (1966) changed only the designation of the section from 11 r. to 11 t. in order to accommodate new definitions. [1966] U. S. Code Cong. & Ad. News 1052)

Public Law 94-197 (1975) changed only clause (1) of the statutory definition of "person indemnified." The 1975 amendment changed the definition to read, as it now reads (42 U. S. C. § 2014(t)), as follows (new wording is underscored):

"t. The term 'person indemnified' means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in subsection 170 c. and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) . . . . [clause (2) unchanged]." [1975] U. S. Code Cong. & Ad. News, 89 Stat. 1111

The legislative history of this amendment states:

"The bill amends the definitions of 'nuclear incident' and 'person indemnified' in section 11 of the Atomic Energy Act to permit the Commission and ERDA to extend the provisions of the Price-Anderson Act to certain activities outside the territorial limits of the United States . . . . "

"The existing definitions of 'person indemnified' and 'nuclear incident' do not permit indemnity protection for activities licensed by the Nuclear Regulatory Commission if the nuclear incident occurs outside the territorial limits of the United States, with the exception of the now retired nuclear ship Savannah. There are two situations in which the protection afforded by the Price-Anderson Act with respect to licensed activities would be extended to nuclear incidents occurring outside the territorial limits of the United States. The first situation involves ocean shipments of new or spent fuel which may move outside the territorial limits of the United States during ocean transit from one licensed nuclear facility to another. The second situation involves nuclear facilities which are physically located outside of the territorial limits of the United States but whose construction and operation are licensed by the Nuclear Regulatory Commission, such as a floating nuclear powerplant located beyond the limits of the territorial sea of the United States. The legislation would authorize the Commission to extend Price-Anderson indemnity protection to such shipments and such facilities. . . . "

"Section 1 of the bill would also amend subsection 11t. of the Atomic Energy Act of 1954, as amended, by broadening the definition of 'person indemnified', as that term is used in subsection 170 c., to include nuclear incidents outside the United States. This change preserves consistency within the Act. Section 1 would further amend subsection 11t. by an alternative description of a 'person indemnified' as a person 'who is required to maintain financial protection'. This provides for the situation in which the \$560 million limit on liability is provided wholly by

private insurance protection, in which case the execution of an indemnity agreement would not be an absolute requirement." [1975] U.S. Code Cong. & Ad. News 2262-63, 2268

Thus, reading the current definition of the term "person indemnified" for purposes of a nuclear incident occurring within the United States and covered by an indemnification agreement with a DOE contractor authorized by Section 170 d. (42 U.S.C. § 2210(d)), it is clear, in light of the above legislative history, that such person includes:

"... the person with whom an indemnity agreement is executed ... and any other person who may be liable for public liability ...." (42 U.S.C. § 2014(t))