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July 15, 1985

The Honorable Pete V. Domenici
United States Senate
Committee on Energy and Natural Resources
Washington, D.C. 20510

HAND DELIVERED

Dear Senator Domenici:

Thank you for the opportunity to respond to the questions expressed by you and Senator McClure. We appreciate your efforts on behalf of the State of New Mexico to ensure that protection is provided for our citizens and the State under the Price-Anderson Act. Our comments concerning Price-Anderson issues apply only to nuclear waste transportation and storage, and do not concern commercial nuclear power plants.

Responses to Questions For the Record

1. S. 1225 addresses some of New Mexico's concerns with Price-Anderson, but could go further in several cases.

a. The bill could be more explicit in assigning responsibility for all waste disposal incidents. First, it could unequivocally express the Department of Energy's liability for nuclear incidents that result from the storage and disposal of radioactive wastes. The only language in the bill that addresses DOE liability, found at Sec. 9, provides:

[T]he Secretary shall, to the extent that such activities are not undertaken by contract, be considered as if the Secretary were a contractor with whom an indemnity agreement has been entered into

By equating the status of DOE with that of a contractor for liability purposes, the implication is made that DOE is responsible only for its contractor-like activities and not for its sovereign decisions and actions.

Second, the bill should expressly mention the Waste Isolation Pilot Plant in New Mexico by name. As you know, the WIPP is experimental and is excluded by law from the NRC licensing process. Because of its



unique status, I attached to my testimony some specific suggestions for language changes to the bill to ensure that the WIPP is included. The legislation that authorizes construction of the WIPP, P.L. 96-164, expressly states:

No law enacted after the date of the enactment of this Act shall be held, considered, or construed as amending, superseding, or otherwise modifying any provision of this section unless such law does so by specifically and explicitly amending, repealing, or superseding this section.

Because one could argue that express inclusion of DOE in Price-Anderson could be considered a modification of the relationship established by P.L. 96-164, it would be best to also mention WIPP by name and refer to P.L. 96-164. This could be done by inserting the words "including the Waste Isolation Pilot Plant" after each reference to facilities for the storage or disposal of [nuclear] waste. A provision would be added to amend P.L. 96-164 to say that the WIPP is expressly covered by the indemnification provision of the Atomic Energy Act.

b. The bill falls short of assuring victims full compensation following a waste-related accident. Although it uses the term "full compensation" in its prefatory language, the bill does not provide statutory entitlement to compensation beyond the three tiers of coverage enumerated.

We recognize that concerns have been expressed with exposing the coffers of the United States government to unlimited liability. New Mexico is the host state to an experimental facility that will store large quantities of transuranic waste in perpetuity and high level wastes for a substantial period of time. As such, we are acutely aware of the fact that the transportation and storage of such material, especially on an experimental basis, carries with it risks that no one can calculate with any degree of certainty. In that sense, the risk that is inherent in the decision to contract and use such a facility is "unlimited." To the extent that that risk exceeds the current statutory limit, New Mexico and its citizens have "unlimited" liability. To the extent that the United States government decides to limit its own liability, New Mexico and its citizens remain liable without limit. To limit liability to a certain level does not, of course, reduce the inherent risks associated with any undertaking. It merely prevents the risk from being shifted. In this case we think that the United States government should bear full responsibility for the risks associated with its waste facilities. To the extent that it fails to do so, New Mexico is left with that risk. The concept of "limiting" liability is a fiction because someone will always be "stuck" with the risks that remain.

We understand that the bill is not perceived or characterized by its supporters as imposing any limitation. The funding mechanism provided is designed to provide an initial "pot" that is available for immediate containment and cleanup of the site of a nuclear incident. The question of additional compensation, especially for latent disease, is to be addressed by Congress after the submission of a report by the President. The fact that Congress may, after an incident, decide to accept liability beyond the level set in the bill leaves the issue unresolved. We question the ability of anyone to accurately predict the extent of the damage, especially latent disease, within the ninety days allotted by the bill.

The federal government should leave itself the option of sharing its liability not only with its contractors but with anyone whose negligence may contribute to a nuclear incident, including, for example, the manufacturers of components used in handling nuclear materials.

c. We are satisfied that New Mexico is a "person indemnified" within the meaning of 42 U.S.C. § 2014(t). That provision encompasses both persons with whom indemnity agreements are executed or who are required to maintain financial protection and "any other person who may be liable for public liability."

2. New Mexico does impose strict liability on defendants who engage in "abnormally dangerous" activities. First Nat. Bank in Albuquerque v. Nor-Am Agr. Products, Inc., 88 N.M. 74, 537 P.2d 682 (Ct. App. 1975), cert. denied sub nom New Mexico Mill & Elevator Co. v. First Nat. Bank in Albuquerque, 88 N.M. 29, 536 P.2d 1085 (1975).

Although New Mexico appellate courts have not considered the application of strict liability to the handling of nuclear materials, it is probable that such activities would be characterized as abnormally dangerous.

We have no problem with the concept of state law applying in the absence of an Extraordinary Nuclear Occurrence. There is, however, no clear statement that that would be the case, especially if a claim were asserted against the federal government. A sentence that specifies that "the law of the situs of the accident will apply" would rectify this concern.

3. a. The \$2.4 billion figure is the maximum amount available under the S. 1225 structure. It assumes that the 94 commercial nuclear reactors that are currently on-line will remain on-line until 2012, the duration of the proposed amendment. It also assumes that all twenty-one nuclear power plants that are covered by construction permits will come on-line and remain on-line. Given the twenty to forty years expected life of a plant and the fact that many existing plants are already ten to twenty years old, this may not be realistic. It also assumes that coverage of \$500,000,000 per

incident could be collected by a one mil per kilowatt-hour surcharge on electricity generated and sold by commercial nuclear plants after an incident. A substantial nuclear incident at a commercial plant could cause a reassessment of the safety of other plants of similar design. This could result in a substantial diminution in the amount of electricity generated by nuclear plants after an incident, with a corresponding diminution of the level of compensation available for a subsequent waste-related incident. Thus, the \$2.4 billion figure is an upper limit, but does not tell us how much money would actually be available. The fact that there is no inflation factor raises the concern that the figure, even if adequate in 1987, may not be adequate in 2000.

3. b.&c. We think that the scheme set up under S. 1225 is an improvement over the current provisions. The language in Section 6 that requires the President's report to set forth "the estimated requirements for full, equitable, and efficient compensation and relief of all claimants" is a positive step. Yet we are skeptical that the President will have the capability to accurately assess in ninety days the extent of damage and predict the cost of compensation for latent illnesses that may not become manifest for twenty to thirty years. Once an incident has occurred, we think that there will be a concerted effort by the responsible party or parties to affect Congressional decision making. This would force the State and its citizens to spend their resources fighting an essentially political battle. We think that the ground rules should be established now. We also do not think that an after-the-fact attempt to fashion a solution could be done quickly. New Mexico is facing major problems in assigning liability for its existing environmental problems after they have been created. Examples are uranium mill tailings piles and gasoline contamination of groundwater.

4. The compensation provisions of H.R. 2524 obviously provides more coverage. The fact that the bill does not identify a fund does not affect the ability of the federal government to provide complete indemnification for its activities. This scheme is no different than that established for tort actions. Although it does not set up a compensation fund to cover every possible claim that could be filed against it, the federal government recognizes that it has what amounts to unlimited exposure for tort claims. Appropriations are made as the need arises. The Anti-Deficiency Act only prohibits an officer or employer of the United States from creating a new obligation that exceeds an appropriation. Its object is to prohibit federal contracting beyond limits set by Congress. Here we are not concerned with the administrative creation of a debt; we are concerned with whether the federal government should limit its liability for the risks associated with its activities.

5. It would be reasonable to require a declaration by the Governor of a state as a prerequisite to a precautionary evacuation and, perhaps, to set standards by regulation for such a declaration. New Mexico is concerned

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that under current law a release would have to occur before a compensable evacuation could be effectuated.

6. Please see the response to question 1.a.

7. The studies and estimates of worst-case nuclear incidents involving the transportation and storage of nuclear waste run the gamut in cost. Further research is needed in this area. We therefore cannot say with scientific certainty whether \$2.4 billion is sufficient or not. If, as explained in detail in the response to question 3.a., the number of commercial nuclear power plants on-line is less than predicted, the compensation level could be substantially lower than \$2.4 billion. Also, if we see a return to the high inflation of recent years, the real dollar value of the compensation available will diminish on the twenty-five year life of the amendment, while the inventory of wastes transported and stored grows.

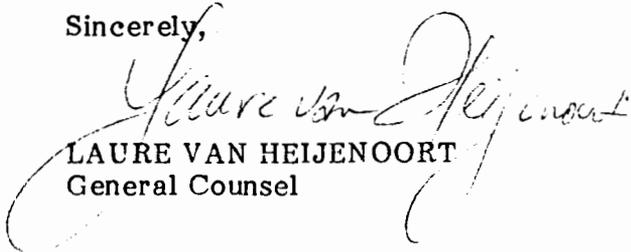
8. The interpretation of the statute of limitations provision that you adopt is plausible but the language is far less than clear to me and others whom I have consulted on the issue. The clause "but in no event more than twenty years after the date of the nuclear incident" sounds preemptory and final. We recommend that language be added to clearly state that the law is as you interpret it. The following sentence could be added after the above-quoted clause:

No state is precluded from enacting or applying a longer statute of limitations to any action involving a claim arising out of a nuclear incident.

New Mexico has a three-year limitation on actions for personal injury. The statute starts to run at the manifestation of an injury. § 37-1-8 NMSA; Garcia v. Presbyterian Hosp. Center, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979).

9. Please see the response to question 2.

Sincerely,



LAURE VAN HEIJENOORT
General Counsel

LvH/sb

<u>Issue</u>	<u>Position*</u>
<u>Limit on Liability:</u>	
a) NRC licensees	None
b) DOE contractors	Unlimited liability
c) DOE waste activities	Unlimited liability
<u>Waiver of Defenses:</u>	
a) ENO criteria	None
b) Statute of Limitations	Needs clarification that statute establishes minimum timeframe
<u>Length of Extension:</u>	Acceptable. If limit on liability, should have inflation adjustment factor
<u>Precautionary Evacuations:</u>	Yes, upon Governor's proclamation

Acts of Untraceable Theft
or Sabotage:

Should cover

*If no position has been established indicate "none."