STATE OF NEW MEXICO
OFFICE OF THE GOVERNOR
SANTA FE
87503

TONEY ANAYA
GOVERNOR

November 26, 1985

RN 1029

The Honorable Marilyn Lloyd
U.S. ~~Representative~~
Chairman, Subcommittee on Energy Research and Production
Committee on Science and Technology
U.S. House of Representatives, Suite 2321
Rayburn House Office Building
Washington, D.C. 20515

Dear Representative Lloyd:

Thank you for inviting me to comment on your Subcommittee's inquiry into the need to extend and/or amend the Price-Anderson Act as it specifically relates to the Department of Energy's contractors engaged in federal nuclear energy activities.

This issue is of paramount concern to the State of New Mexico. Presently, the U.S. Department of Energy ("DOE") is constructing its Waste Isolation Pilot Plant ("WIPP") near Carlsbad, New Mexico. WIPP is a federal research and development facility which will store defense low level and transuranic wastes on a permanent basis and defense high level wastes on a temporary, retrievable basis. WIPP is now scheduled for operation in 1988 when the first radioactive wastes will be sent to New Mexico. DOE contractors or DOE itself will undertake the transportation, storage and research activities at WIPP with respect to these nuclear wastes. All of these activities pose potential long-term consequences to New Mexico's environment and citizens.

The fundamental question of "who will pay and how much" if a nuclear accident occurs must be answered through your efforts in a final and clear manner. While the current Price-Anderson Act attempts to address this question to a certain extent, its application to the unique aspects of the WIPP project is circuitous, cumbersome and fraught with inadequacies and legal ambiguities. New Mexico has been somewhat successful, through a lawsuit against DOE, in securing certain contractual assurances from DOE and an Opinion from the U.S. Justice Department confirming application of the Price-Anderson Act to WIPP as well as securing additional indemnification commitments from DOE itself. However, these commitments and assurances could be adversely affected by future congressional action with respect to the Price-Anderson Act and the WIPP project. For this reason, New Mexico is vitally concerned with any legislative action to extend and/or amend the current Price-Anderson Act.

Should your Subcommittee decide to recommend continuation of the Price-Anderson Act in some form, that Act should, at a minimum, accomplish the following:

1. Specific and express application of the Act to the WIPP facility and all attendant activities of DOE and/or its contractors, irrespective of whether WIPP is subject to NRC licensing;

2. A substantial increase, or removal altogether of any limits on the amount of financial protection from the artificially low $500,000,000.00 level in a manner that would insure that the amount of coverage for DOE activities is equal to any other NRC licensed commercial activity;

3. Specific and express application of the Act to:

a. The shipment of all types of nuclear waste to federal nuclear waste storage and disposal facilities;

b. The operation of all federal nuclear waste repositories and storage facilities;

4. The requirement that all DOE nuclear contractors be covered under the Price-Anderson scheme, either by express amendment in the Price-Anderson Act itself or by removing DOE's discretion in Section 170(d) of the Atomic Energy Act in this regard;

5. Application of the "waiver of defenses" provision in the Price-Anderson Act in the event of a nuclear incident at a federal nuclear waste storage and disposal facility, whether or not the incident rises to the level of an "extraordinary nuclear occurrence";

6. Elimination of the 20-year absolute statute of limitations in realistic recognition of the lengthy latency period for nuclear related injuries;

7. Extension of the definition of "nuclear incidents" to include situations where an accident occurs but there is no off-site release of radiation, so that evacuation costs could be eligible for indemnity coverage; and

8. Extension of the Price-Anderson Act coverage to 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 a successful diversion of nuclear material.

Finally, Congress should not lose sight of the fact that the federal government must ultimately be held directly responsible for compensation

to those who suffer loss due to a nuclear accident occasioned from federal nuclear activities. The Price-Anderson Act should not be allowed to become an insulating shield to this direct obligation of the federal government. The public policy consideration behind the Price-Anderson Act of providing a cap on liability so as to encourage a commercial nuclear energy industry is totally inapplicable to nuclear facilities and activities operated by, or for, the federal government. In this regard, New Mexico and its citizens may be better served by congressional consideration of alternative or companion legislation in this area which would render the federal government strictly liable for any nuclear accidents involving federal activities in a manner that would guarantee full and speedy compensation to all injured parties, including the states.

We understand that the Department of Energy essentially agrees that the Price-Anderson Act should cover the WIPP Project. Enclosed is a copy of the testimony of Denise D. Fort, Director of the New Mexico Environmental Improvement Division, before the House Interior Committee's Subcommittee on Energy and the Environment on June 6, 1985, further discussing the points I raise above and the Department of Energy's position on the Price-Anderson Act. Also enclosed is a copy of testimony before, and responses to, questions of the Senate Energy and Natural Resources Committee on Energy Research and Development by Laure van Heijenoort, General Counsel of the New Mexico Environmental Improvement Division, on June 25, 1985. Ms. van Heijenoort's responses specifically address many of the questions your Subcommittee posed.

If you have any questions or desire further comment on specific aspects of proposed legislation involving the Price-Anderson Act, please contact Ms. Denise D. Fort, who is coordinating the State's effort in this area.

Sincerely,

TONEY ANAYA
Governor

TA/DF/sb

Attachment

cc: Denise D. Fort, Director, Environmental Improvement Division

TESTIMONY OF
DENISE D. FORT, DIRECTOR, ENVIRONMENTAL IMPROVEMENT DIVISION,
STATE OF NEW MEXICO
BEFORE THE
HOUSE INTERIOR COMMITTEE'S SUBCOMITTEE
ON
ENERGY AND THE ENVIRONMENT
JUNE 6, 1985

Introduction

I am presenting this testimony on behalf of the State of New Mexico as Director of the Environmental Improvement Division. Our State has had a long and intimate relationship with nuclear issues. New Mexico was one of the initial and most important states for mining and production of uranium. We are also the host state to the Los Alamos and Sandia National Laboratories and most recently have become the site of the Department of Energy's (DOE) Waste Isolation Pilot Plant Project (WIPP) near Carlsbad, New Mexico.

WIPP will soon become the nation's first deep geologic nuclear waste repository. Construction is about 65 percent complete and the first radioactive waste shipments are anticipated in October of 1988. Estimated to cost about 2.5 billion dollars over the thirty years of its operational life, the WIPP will ultimately isolate about 6 million cubic feet of transuranic wastes containing about 7.9 million curies from military sources. It will also serve as a research and development facility for about 17 million curies of high level military wastes. The high level wastes will be removed prior to repository closure in accord with the current "mission" statement contained in the State/DOE Consultation and Cooperation Agreement. With the WIPP facility so close to operational status, the State is acutely aware of the potential hazards that this repository poses to all our citizens.

The WIPP project has been under development since the early 1970's. During this period, particularly since 1978, the State and DOE have conducted extensive negotiations related to the project leading to a number of contractual agreements. This extensive background gives the State a unique view of radioactive waste repository development issues. I would like to share that unique experience with the Committee in your consideration of possible revision of the Price-Anderson Act. While much congressional attention has been directed recently to the problems of disposal of commercial nuclear waste, WIPP, with its limited mission of disposal of military wastes, can easily fall through the cracks. To ignore critical questions of liability arising out of WIPP's operations could be dangerous to New Mexico, its citizens, and the citizens of other states.

Based on our extensive review of the WIPP project and the prolonged negotiations with the Department of Energy, the State has concluded that a nuclear incident relating to WIPP might result in the imposition of financial liability upon the State, and in lack of financial recourse for our citizens. We are concerned that the provisions of the Price-Anderson Act and the agreement we have with DOE form a shaky basis for any conclusion that the State of New Mexico would necessarily be indemnified for its own damages or that our citizens will be fully protected when they seek financial relief under that Act. The State, therefore, seeks statutory assurances on the part of the federal government to cover both claims for injury to our citizens and claims for injury to the State in the event of a WIPP related nuclear incident. We also seek indemnification if claims are filed directly against the State. Coverage by Price-Anderson would presumably provide assurance that funds are available for payment of claims. It would also provide claimants with a direct path to that fund: recovery would be problematic under the federal tort claims act. If a nuclear incident involving substantial injury to the State or its citizens were to occur, resolution of claims would be assured and

would be accomplished efficiently if the amendments to Price-Anderson that we propose are adopted. Additionally, neighboring states, principally Texas, would benefit from the specific inclusion of the WIPP project. The effects of a nuclear incident on-site, however unlikely, could extend well beyond New Mexico boundaries. All transportation corridor states would also share in these benefits.

Recommendations

We submit that three major and several ancillary recommendations warrant Congressional consideration.

1. Price-Anderson should specifically cover the Waste Isolation Pilot Plant Project by name. The State's position on liability for WIPP-related occurrences has varied little since the original negotiations on the Consultation and Cooperation Agreement in 1980 and 1981. Later legal agreements between the State and DOE required the DOE General Counsel to render a legal opinion* on the applicability of Price-Anderson to the WIPP project. His opinion stated that in all probability WIPP is covered in 2210(d), but this conclusion requires certain underlying assumptions. Specifically, in order to ensure indemnification of New Mexico, DOE would have to use only outside contractors to operate and maintain the facility rather than government personnel. Protection under Price-Anderson would also require that an indemnification clause be included in the WIPP-related operation and maintenance contract. DOE has refused to commit in writing to always meet these conditions, stating "...it would be imprudent for DOE officials to bind their successors to exercise discretion

---

*"U. S. DOE opinion of the General Counsel on Application of the Price-Anderson Act to the Waste Isolation Pilot Plant Project" at page 15.

conferred upon them by statute in a particular manner without regard to change in circumstances, however remote the possibility of such change might be." In light of the remaining uncertainties concerning whether Price-Anderson coverage would actually be present if needed, we think that it would be prudent for Congress to confirm DOE's and our legal agreement by amendment to Price-Anderson.

2. Price-Anderson should also include all shipments of nuclear waste to federal storage and disposal facilities. Under current law, a transportation related nuclear incident that involves government employees rather than those of a contractor would not be covered by Price-Anderson. New Mexico has been sufficiently concerned about this issue to have included a provision in the State/DOE Supplemental Stipulated Agreement* that confirms the DOE's willingness to extend Price-Anderson coverage to include the transportation of nuclear wastes to the WIPP, as well as the facility operations and emplacement of defense nuclear wastes. The State prefers to avoid any future legal difficulties related to this extension of coverage by assuring that the shipment of all nuclear wastes are specifically covered in Price-Anderson. Our proposal would also benefit other states that provide the transportation routes for repository bound nuclear wastes.

On the broader issue of transportation to a commercial repository currently under development, we certainly support the inclusion of coverage for such waste shipments either to or from the Monitored Retrievable Storage (MRS) or the repository itself. The Environmental Assessment prepared for the commercial

---

*Supplemental Stipulated Agreement Resolving Certain State Off-Site Concerns Over WIPP, 12/28/82.

repository program under the Nuclear Waste Policy Act (Section 112) indicates that the number of shipments required to handle the commercial spent nuclear fuel wastes over the life of the project would be a total of 173,229 by truck, or a total of 22,465 by rail. An additional 6,720 truck shipments would be required for the Defense high level wastes. The potential impact of these shipments is of great concern to the transportation corridor states as well as to the host states for repository and MRS facilities.

3. Congress should specifically include federal high level nuclear waste repository and storage facilities in the Price-Anderson coverage. As the ultimate destination or temporary storage facility for the commercial spent nuclear fuel and other radioactive wastes specified in the Nuclear Waste Policy Act, these federal installations represent major sources of potential health and safety risk to the host states, as well as to those living along the transportation corridors. The highest degree of assurance for their protection is mandatory.

There are other issues related to Price-Anderson that should be considered. In the Supplemental Stipulated Agreement cited above, the State identified several important changes to the Act. The Department of Energy agreed that it would "...assist the State in presenting the State's recommendations for amending the Price-Anderson Act...which recommendations include but are not limited to..." the following:

1. Increasing substantially the amount of protection from the present 500 million dollar level;

2. Equalizing the maximum amount of coverage through government indemnity for nuclear accidents occurring in the

course of DOE contract operations, such as WIPP, with the coverage available for nuclear incidents occurring for NRC licensed activities;

3. Making the "waiver of defenses" provision applicable in the event of a nuclear incident at the WIPP site even though WIPP is not a "production or utilization facility" and whether or not it is an "extraordinary nuclear occurrence;"

4. The current statute of limitation allows suit to be instituted within three years of the date a claimant first knew, or reasonably could have known, of his injury, but in no event more than twenty years after the date of the nuclear incident. §42 U.S.C. §2210(n). The definition should be amended to eliminate the twenty year consideration based on current understanding of the latency period predicted for many human health effects.

5. Extending the definition of "nuclear incident" to include situations where an accident occurs but there is no off-site release of radiation in order to provide that evacuation costs would be eligible for indemnity coverage;

6. Extending the Price-Anderson Act coverage to cover 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 a successful diversion of the nuclear material.

Conclusion

The willingness of the federal government to provide adequate and binding assurances to its citizens that they will not have to bear the financial risk of a nuclear accident related to the WIPP Project seems a reasonable request from a state about to host the first deep geologic nuclear waste repository. DOE has concurred, in the negotiated stipulation we jointly entered, that such a request is reasonable. A failure to provide such statutory assurances would certainly raise questions among New Mexicans about the fairness and appropriateness of the national program for the disposal of nuclear waste.

We will be pleased to provide additional material or information as may be necessary. Thank you for the opportunity to present our views.

TESTIMONY OF

LAURE VAN HEIJENOORT, GENERAL COUNSEL, ENVIRONMENTAL IMPROVEMENT DIVISION

STATE OF NEW MEXICO

BEFORE THE

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

ON

ENERGY RESEARCH AND DEVELOPMENT

JUNE 25, 1985

I am testifying before you on behalf of the State of New Mexico and the Director of the Environmental Improvement Division, Denise Fort. I appreciate the opportunity you have given me to comment on Senate Bill 1225.

New Mexico is the host state to the Waste Isolation Pilot Plant Project (WIPP) near Carlsbad. WIPP will soon become the nation's first deep geologic nuclear waste repository. Construction is about 65 percent complete and the first radioactive waste shipments are anticipated in October of 1988. Estimated to cost about 2.5 billion dollars over the thirty years of its operational life the WIPP will ultimately contain about 7.9 million curies of transuranic wastes and serve as a research and development facility for about 17 million curies of high level wastes. The high level wastes will be removed prior to repository closure in accord with the current "mission" statement contained in the State/DOE Consultation and Cooperation Agreement. With the WIPP facility so close to operational status, the State is acutely aware of the problems and potential hazards that this repository poses to all our citizens.

Senate Bill 1225, which would amend that portion of the Atomic Energy Act of 1954 popularly called the Price-Anderson Act, addresses many but not all of our concerns.

1. Inclusion of WIPP in Price-Anderson Coverage

The bill extends Price-Anderson coverage to "activities . . . involving the storage or disposal of spent nuclear fuel, high-level radioactive waste, and transuranic waste . . ." (p. 8, lines 6-10). We welcome the specific inclusion of waste repositories. To ensure inclusion of the WIPP site, we recommend that clarifying language be added. Our recommendations on this point are attached hereto as Exhibit "A". Our amendment to the bill would clarify that Price-Anderson applies to all repositories regardless of whether the nuclear waste received is of commercial or military origin, high or low level character. Also, a repository such as the WIPP would not be excluded merely because it is not NRC licensed or because it is experimental.

2. Transportation of Nuclear Waste to Repositories

We support the inclusion of transportation of nuclear waste to repositories in Price-Anderson. The recommended language in our exhibit would extend coverage to transportation of low-level waste. One reason for including low-level waste is that there is no generally accepted definition that precisely differentiates between the various levels of waste. If low-level were excluded from Price-Anderson coverage, disputes might arise as to the character of particular material. It might also be appropriate to include in the bill a directive to the NRC to promulgate regulations defining the terms. State input would, of course, be part of this process. Other

federal agencies should be bound by the definitions. One problem has been the inconsistent use of terms by various agencies.

3. Inclusion of Department of Energy Activities

The bill as drafted would apply only to activities undertaken by the Department of Energy contractor and Nuclear Regulatory Commission licensees involving nuclear materials. The act of a DOE employee which precipitates a nuclear incident is not covered. If the DOE will not perform any activities that could lead to an incident, inclusion in Price-Anderson will not pose an additional risk to the government. If the agency's employees do get involved on such activities, the states and the public deserve the same level of protection they would get for contractor and licensee activities.

4. Unlimited Liability for Defense Related Activities

The approach to liability limits taken in SB1225 is a laudable improvement over the outdated limits currently in place. Approximately $2.4 billion would be available per incident. The amount would be less if the approximately twenty nuclear power plants currently scheduled to come on-line are not able to do so or if existing plants go off-line at a rate higher than expected. The amount available for nuclear incidents involving non-commercial wastes would be the same, although the source would be different. The limit seems large and would undoubtedly be sufficient for the most probable nuclear incidents. But if a worst-case disaster were to occur, the amount would be woefully inadequate. The cost of reclaiming air, soil and water and replacing contaminated facilities could more than use up

available funds, with no money left for personal injury claims that might not appear for twenty years.

Arguments have been made that a Congressional elimination of the limits of liability under Price-Anderson would conflict with the provisions of the Anti-Deficiency Act, 31 U.S.C.S. § 1341 et. seq. We disagree. The federal government does not impose limits on liability levels for most types of claims that can be asserted against it, even though it has established, by statute, procedures and time periods for the filing of claims and commencement of actions. The fact that sufficient money may not have been appropriated to cover a judgment would affect the process of collecting on a judgment, but not the validity of the judgment. The government does not appropriate money in advance to cover all possible liabilities that it faces; it appropriates money as the need arises. The Anti-Deficiency Act only prohibits an officer or employee of the United States from creating an obligation that exceeds an appropriation. Here we are not concerned with the administrative creation of a debt. Rather we are concerned with a Congressional decision to limit its exposure to liability for its activities and those of its contractors. The object of the Anti-Deficiency Act is to prohibit federal contracting beyond limits set by Congress; it does not purport to limit, for example, that liability to an amount appropriated by Congress for the payment of claims.

5. Statute of Limitations

Price-Anderson currently limits the time in which suit may be instituted in the event of an extraordinary nuclear occurrence to three years from the date a claimant knew or reasonably could have known of his or her

injury and its cause, but in no event more than twenty years after the date of the nuclear incident. 42 U.S.C. § 2210(n). We think that the twenty year outside limit should be removed because many of the illnesses associated with radiological hazards take longer than twenty years to become apparent. The cancers most commonly associated with radiation exposure, other than leukemia, such as lung, liver, kidney, bone and stomach, generally do not become manifest for 20-30 years after exposure. If an outside time limit is thought to be necessary, the twenty year figure should be changed to thirty years and thereby more accurately correspond to manifestation time frame.

6. Strict Liability

Price-Anderson currently provides strict liability for extraordinary nuclear occurrences for production and utilization facilities and certain NRC contract activities. 42 U.S.C. § 2210(n). The bill would extend the coverage of this provision to repositories. We think that strict liability ought to be the standard for any nuclear incident and that it is confusing to have two standards. It is certainly likely that a court would apply strict liability to an ultrahazardous activity, such as the handling of nuclear materials, under tort law.

including both commercial and defense nuclear waste repositories and related activities.
volving activities ^ under the risk of public liability for a substantial incident.

"(B)(i)The authority conferred upon the Secretary pursuant to subparagraph (A) to enter into agreements of indemnification with contractors shall include contracts entered into by the Secretary for the purpose of carrying out such activities as the Secretary is authorized to undertake, pursuant to

on a permanent, temporary or experimental basis
this Act or any other law, involving the storage or disposal ^ of spent nuclear fuel, high-level radioactive waste, ~~or~~ transuran-

or low level waste or any combination thereof.
ic waste ^ including the transportation of such materials to a storage or disposal site or facility, and the construction and

whether or not such facilities or activities are licensed by the Commission.
operation of any such site or facility. ^ For all such activities.

the authority conferred upon the Secretary pursuant to subsection 170 d. (1)(A) shall be the exclusive means of indemnification under this section.

"(ii) For the purpose of compensating...SAME

financial protection required of licensees pursuant to subsection 170 a., from the nuclear waste fund established pursuant to section 302 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10222).

"(iii) Public liability claims arising out of activities involving the storage or disposal of all other spent nuclear fuel, high-level radioactive waste, or transuranic waste not specified in clause (ii), including but not limited to national defense wastes, including the transportation of such materials to a storage or disposal site or facility, and the construction and operation of any such site or facility, shall be compensated in accordance with the provisions of this Act, and from the same source of funds applicable to all other contractors indemnified pursuant to this subsection.

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510

June 27, 1985

Ms. Laure van Heijenoort
Counsel, Environmental Improvement Division
State of New Mexico
P.O. Box 968
Santa Fe, New Mexico 87504-0968

Dear Ms. van Heijenoort:

On Tuesday, June 25 you appeared before my Subcommittee to present testimony on Senate bill S. 1225. As a follow-up to this hearing, I would like to request that you provide written responses to the attached questions from myself and my Colleagues. In addition to the questions, I have attached a table of issues under consideration for Price-Anderson renewal. I ask that you briefly summarize your position on each of the issues for our records. If you have any questions on these matters, please call Marilyn Meigs of my staff at 202-224-4431.

In order that this information can be made part of the record, I must receive your written responses by no later than July 10, 1985.

Your position in this hearing is greatly appreciated.

Sincerely,

Pete V. Domenici
Chairman, Subcommittee on
Energy Research and Development

Attachments

PVD:MMt

Questions for the Record
The State of New Mexico
Laure van Heijenoort

From Senator James A. McClure

1. In your opinion , how effectively does S. 1225 address your state's concerns, especially with respect to its provisions for:

   a) assigning responsibility to the government for all waste-disposal incidents;
   b) assuring victims of full compensation following a waste-related accident;
   c) indemnifying states in the event of a waste-related accident

2. With respect to strict liability, it is my understanding that most states now impose strict liability for ultrahazardous activities, and these state provisions would pre-empt the provisions of Price-Anderson, where defenses are waived only in the event of an Extraordinary Nuclear Occurrence.

   Does your State now impose strict liability rules for ultrahazardous activities? If not, do you have plans to enact such laws? It seems to me that problems such as strict liability are better left to the states anyway, rather than forcing a federal standard uniformly on all states. So perhaps the best solution to your problem of strict liability might preferably be handled on a state level.

3. The only federal law I am aware of that provides for unlimited federal liability is the Federal Tort Claims Act. Fortunately for us, when Congress wrote and passed this bill back in 1945, they saw fit to include a reasonable set of defenses by which the government could protect its revenues -- and thus protect the taxpayers -- from potentially ruinous lawsuits.

   Now I cannot believe that the Congress today would act any less responsibly now than it did then. And that is why, instead of providing a total blank check, the provisions of S. 1225 or any other bill to renew Price-Anderson will necessarily assign some of the decision-making responsibilities to the Congress at hand, and must provide some stop-valves against total bankruptcy.

   a) Do you think the $2.4 billion limit in S. 1225 is sufficiently high to meet immediate needs in the event of an accident involving the nuclear waste disposal program?

   b) Do you feel that the Congressional review and action under expedited procedure provides reasonable assurance that additional compensation funds will be made available if needed?

   c) If you'll note in Section 5 of S. 1225, the bill assigns to Congress the responsibility, in the event that

additional compensation funds are needed, to "take whatever action is necessary, including approval of appropriate compensation plans, to compensate the public in full for all public liability claims resulting from" the accident. Does this language, together with the expedited procedures set forth in Section 6, satisfy your state's concerns for full compensation?

4. What is your opinion about Congressman Sid Morrison's bill, H.R. 2524, as compared to S. 1225? Do you feel that H.R. 2524 does a better job of assuring full compensation than does S. 1225? Have you read the complete text of his bill? I have, and it is easy to identify where the first $5B of funds will come from (the Nuclear Waste Fund), and in this respect, the two bills are essentially similar, other than a little quibbling over the dollar amounts -- $2.4B vs. $5B.

But beyond that, it's not at all clear where the rest of the money will come from in H.R. 2514. It says nothing about Congressional action -- and as I understand it, the Anti-Deficiency Act prohibits the government from spending any federal revenues in advance of appropriations. So we are talking about Congressional action to obtain the money. But there are no assurances in H.R. 2514 that Congress will ever act, let alone act expeditiously.

Have you considered this problem in your appraisal of Sid Morrison's bill?

5. If precautionary evacuations were to be included under Price-Anderson coverage, shouldn't there be some official declaration of the necessity for such evacuations, so that we do not end up with some overly-nervous county clerk, or whatever, announcing a precautionary evacuation every time his mother-in-law threatens to come to town for a visit? Wouldn't unnecessary evacuations be an irresponsible expenditure of taxpayer's money? So don't we need some reasonable control over the situation?

Questions from Senator Domenici

6. On page 3 of your testimony you state that not just DOE contractors should be covered but, DOE employees as well. I communicated this concern, along with the others expressed by New Mexico to Senator McClure as he was preparing this Bill. He tells me that the language on page 21 of the Bill -- amending the definitions in the Atomic Energy Act -- does what you suggest. Could you look at that and get back to us?

7. You express concerns about the $2.4 billion limit in the Bill. You say it could be "woefully inadequate." Do you mean this for nuclear waste related accidents which might happen at WIPP? If so, please provide the Committee with your documentation on this.

Furthermore, I am not clear as to what the point of your discussion on unlimited liability is. Is the Governor for unlimited liability (that is not what his letter to me says)? Do you favor applying the Federal Tort Claims Act?

8. In the area of statute of limitations, I read Price-Anderson differently than you do. I read that it says utilities and contractors cannot use as a defense, that any statute of limitations has expired if it is less than 20 years. In other words, the Federal limit is a minimum, not a maximum. If New Mexico wanted 30 years, it could pass a law to do so. Could you look into that for me?

9. In a similar vein -- you ask for a Federal standard of strict liability for accidents less than "Extraordinary Nuclear Occurrences." Again, if the State of New Mexico wanted such a standard, it would simply have to enact one. Why should the Federal government enter into this?

TONEY ANAY
GOVERNOR

DENISE D. FO
DIRECTOR

STATE OF NEW MEXICO

ENVIRONMENTAL IMPROVEMENT DIVISION

P.O. Box 968, Santa Fe, New Mexico 87504-0968

(505) 984-0020

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 illnessess 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

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

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

Acts of Untraceable Theft
or Sabotage:

Should cover

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