UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

November 30, 1984

MEMORANDUM FOR: Jerome Saltzman, Assistant Director
State and Licensee Relations
Office of State Programs

FROM: William J. Olmstead
Director and Chief Counsel, Regulations Division
Office of the Executive Legal Director

SUBJECT: NRC INDEMNIFICATION OF DOE FOR HIGH-LEVEL WASTE ACTIVITIES

This memorandum is in response to your October 3, 1984, memorandum to me concerning the same subject. Attached is a legal analysis responding to the questions posed in your memorandum. In addition to the responses to your specific questions, this office has concluded that the provisions of the Nuclear Waste Policy Act neither broaden nor diminish the authority granted by the Price-Anderson Act to the NRC or the DOE to indemnify their licensees or contractors.

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LEGAL ANALYSIS

QUESTION 1: What were the reasons and intent of the amendment to the definition of "person" in 10 CFR 140.3(g)?

QUESTION 2: What was the authority for the NRC to change the definition of "person" from that found in subsection 11s. of the Atomic Energy Act of 1954, as amended?

RESPONSE: Because of the interrelationship of questions 1 and 2, a consolidated response to these questions is appropriate. Subsection 11s. of the Atomic Energy Act of 1954, as amended, ("the AE Act") defines the term "person" as :

> (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing. [Emphasis added.]

The Energy Reorganization Act of 1974 ("the ERA") abolished the Atomic Energy Commission. In its place were created the Energy Research and Development Administration ("ERDA"), which became part of the Department of Energy ("DOE") upon enactment of Public Law 95-91, and the Nuclear Regulatory Commission ("NRC"). Subsection 201(f) of the ERA transferred to the NRC "all

the licensing and related regulatory functions of the Atomic Energy Commission." In addition, section 202 of the ERA provided as follows:

> Notwithstanding the exclusions provided for in section 110 a. or any other provisions of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2140(a)), the Nuclear Regulatory Commission shall, except as otherwise specifically provided by section 110 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2140(b)), or other law, have licensing and related regulatory authority pursuant to chapters 6, 7, 8, and 10 of the Atomic Energy Act of 1954, as amended, as to the following facilities of the [DOE]:
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> (1) Demonstration Liquid Metal Fast Breeder reactors when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.
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> (2) Other demonstration nuclear reactors -- except those in existence on the effective date of this Act -- when operated as part of the power generation facilities of an electric utility system, or when operated in any other manner for the purpose of demonstrating the suitability for commercial application of such a reactor.
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> (3) Facilities used primarily for the receipt and storage of high-level radioactive wastes resulting from activities licensed under [the AE] Act.
>
> (4) Retrievable Surface Storage Facilities and other facilities authorized for the express purpose of subsequent long-term storage of high-level radioactive waste generated by the [DOE], which are not used for, or are part of, research and development activities.

Neither the ERA nor the Department of Energy Organization Act modified the statutory definition of "person" in subsection 11s. of the AE Act. Since the term "Commission" in that definition is now interpreted to include both the NRC and the DOE, neither the NRC nor the DOE is generally considered to be a person under the AE Act. However, the provisions of subsections 202(1) and (2) of the ERA confer licensing jurisdiction upon the NRC for certain

production or utilization facilities to be operated by the DOE (or a DOE contractor). Subsection 170a. of the AE Act mandates that a facility licensee have and maintain financial protection of such type and in such amounts as the Commission in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection 170b. of the AE Act. 1/ As a further condition of the license, the Commission may require that the licensee execute and maintain an indemnification agreement in accordance with subsection 170c. of the AE Act. 2/ In anticipation of the need to indemnify these facility licensees, the NRC modified the definition of the term "person" in 10 CFR 140.3(g). This modification was merely a drafting device to enable the NRC to carry out the licensing mandate imposed on it by section 202 of the ERA. Hence, this definition now reads as follows:

> "Person" means: (1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the [Nuclear Regulatory] Commission or the Department [of Energy], except that the Department shall be considered a person within the meaning of the regulations in this part to the extent that its facilities and activities are subject to the licensing and related regulatory authority of the Commission pursuant to section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), any State or any political subdivision thereof, or any political entity within a

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1/ For "Federal agencies," as defined in 10 CFR 140.3(c), it has been long-standing Commission (AEC and NRC) policy not to require financial protection in the form of private liability insurance, but rather to have the Federal government self insure. (See the response to questions 8 and 9, infra).

2/ If the financial protection required by the NRC is $60 million or less, the maximum Federal government indemnity available is $500 million. If the financial protection required exceeds $60 million, the Federal government indemnity available equals $560 million less the amount of financial protection required. (Subsections 170c. and e. of the AE Act.)

State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

QUESTION 3: Does the NRC have authority to condition the DOE license so as to require DOE to enter into an agreement with NRC to indemnify DOE for its activities relating to civilian high-level waste repositories and transportation?

QUESTION 4: If the NRC has this authority, does it have discretion in the exercise of this authority?

RESPONSE: Since questions 3 and 4 also are interrelated, they are addressed together in a consolidated response.

The NRC's licensing authority over DOE activities relating to civilian high-level waste repositories is based on subsection 202(3) of the ERA and on its materials licensing authority under the AE Act. The type of facility described in subsection 202(3) of the ERA is neither a production nor a utilization facility (nor is it licensed under sections 103 or 104 of the AE Act). Consequently, although the Commission has the authority under subsection 170a. of the AE Act to require the DOE (or a DOE contractor) to enter into an indemnity agreement covering these activities relating to civilian high-level waste repositories, the NRC need not require the execution of such an agreement.

If an indemnity agreement is executed, it could be between the NRC and the DOE (or a DOE contractor) under subsection 170a. of the AE Act. However, in this situation, the DOE can accomplish the same objective by indemnifying its contractor(s) under subsection 170d. of the AE Act. This latter method was followed in the West Valley situation -- the licensee indemnity was suspended in recognition of DOE's independent indemnification authority.

In the past, the NRC staff has dealt with situations where the law did not require Price-Anderson coverage, but the staff argued that such coverage should be required based upon " the public perception" of Price-Anderson coverage. The high-level waste area is another area where Price-Anderson coverage may not be required by statute, but where, as a practical matter, the public perception of the scope of the Price-Anderson Act may afford the NRC and the DOE little leeway within which to exercise their discretion.

QUESTION 5: What is the amount of protection that would be provided under the indemnity agreement?

RESPONSE: The sum of $500 million in government indemnity, as provided in subsection 170e. of the AE Act.

QUESTION 6: Is this protection affected by whether DOE uses contractor personnel or DOE employees?

RESPONSE: As a practical matter, the DOE has indicated that it intends to use contractor personnel in the conduct of activities relating to civilian high-level waste repositories. Hence, question 6 becomes moot, and there is no need to speculate on whether there is any difference in the protection that might be afforded these two groups of workers.

QUESTION 7: Can this indemnity coverage cover the period of DOE's post-operational custodial period?

RESPONSE: Under the existing law, NRC indemnity coverage can remain in effect only as long as the license to which the indemnity agreement applies remains in effect.

QUESTION 8: Can financial protection be required?

QUESTION 9: If NRC were to provide indemnity coverage to DOE in a fashion similar to its coverage for Federal reactor licensees under Subpart C of Part 140, what is its authority not to require financial protection? (see the "note" to §140.51).

RESPONSE: Since questions 8 and 9 are interrelated, they are addressed together in a consolidated response.

Since the regulations implementing the Price-Anderson Act were promulgated in 1960, it has been consistent Commission (AEC and NRC) policy not to require

financial protection of "Federal agency" licensees operating production or utilization facilities. For these Federal agency licensees, the Federal government acts as a self insurer. The Commission, exercising its authority under subsections 170a and b. of the AE Act, has elected not to require these licensees to expend additional Federal funds to purchase financial protection in the form of private insurance from the liability insurance pools. It is unlikely that this long-standing Commission practice would be overturned without some very compelling reasons.