

September 28, 2000

Hon. Jack B. Weinstein
Senior United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Weinstein:

I am responding to your August 14, 2000, letter to Karen Cyr, the NRC's General Counsel, asking whether the U.S. Nuclear Regulatory Commission makes any use of restitution, disgorgement, or other forms of compensation for private delicts, and if, so, what regulations or guidelines the agency uses in deciding when and how to seek restitution and other forms of compensation, and whether the agency consults with the United States Attorney or private attorneys in making this decision. Your fundamental concern was with whether criminal, administrative, and tort models are mixed in any dealings we might have with mass torts and aggregative civil actions, and, if so, according to what principles.

The agency has not dealt with mass tort litigation on any scale, let alone the scale of, for example, the tobacco litigation or the Agent Orange litigation. However, it is well-known that the civilian uses of radioactive materials, most notably in power plants, do pose the risk of injury to large numbers of people. The risk is quite small, but it is nonetheless not zero. As I believe you are aware, in the event of a major offsite release of radiation at a nuclear power plant in the United States, all claims of radiological injury from the plant (other than those claims covered by workmens' compensation statutes) would be handled under the Price-Anderson Act, which is found at section 170 of the Atomic Energy Act of 1954, as amended (Price-Anderson is codified at 42 U.S.C. § 2210 and in definitions in 42 U.S.C. § 2014). Price-Anderson was first enacted in 1957 and has been periodically amended, most recently in 1988. It covers not just major accidents at nuclear power plants, but such accidents are a major focus of the Act. It was designed to address several of the features of mass torts, most notably the need to provide full and prompt compensation for widespread exposure to potentially harmful agents, the effects of which may not reveal themselves for many years; difficulties in proving causation; heavy transactional costs; and threats to the financial ability of many companies to respond to traditional damage awards.

Price-Anderson mixes tort and administrative law principles, and although the Act covers only private suits, it could operate along side the NRC's use of its authority under the Atomic Energy Act to pursue civil or criminal penalties for violations of the Atomic Energy Act or the agency's regulations. Under the indemnification provisions of Price-Anderson, all liability is channeled to the licensed operator of a power plant, and an operator's liability is in turn limited. Cases are removable to the Federal District Court where the accident took place, but this Court must apply State tort law to the extent that it is consistent with the Act. Justified claims are compensated

out of private insurance that the NRC requires each licensee to maintain, and, to the extent that damages exceed such insurance, out of a retrospective premium pool to which every power plant licensee must contribute in the event of an accident at any plant. The Act provides that there would be a waiver of defenses should the NRC determine that there has been an "extraordinary nuclear occurrence", that is, an event causing radiation levels off-site that are "substantial" and that have resulted, or will result, in "substantial" damage to off-site persons or property. The waivers relieve plaintiffs of a requirement to prove fault; they need prove only that the incident caused their injuries. The Act instructs the NRC to make full use of private insurance organizations to coordinate procedures for handling, investigating, and settling claims. Through 1997, there had been 195 claims, and compensation of about 131 million dollars paid. However, that amount included some transaction costs, such as legal expenses. The Act also permits punitive damages in some cases, thus reducing the amounts available to compensate injuries. In cases in which public liability may exceed the limit of liability, courts are authorized to establish priorities among claimants.

Congress will soon be considering whether to extend Price-Anderson. The NRC has recommended, among other things, that the Act be extended, and that Congress consider prohibiting punitive damages and increasing the retrospective premiums that licensees would pay in event of an accident that caused damages that exceeded what commercially available insurance would pay. Even if the Act is not extended, coverage will continue for all currently indemnified licensees. See NRC's report, NUREG/CR-6617, *The Price-Anderson Act - Crossing the Bridge to the Next Century: A Report to Congress* (October 1998), available on the World Wide Web at <http://www.nrc.gov/NRC/NUREGS/CR6617/nuregcr6617.html>.

The Price-Anderson Act is designed to cope with a mass tort after the fact, but much of the NRC's work is devoted to *preventing* a mass tort. Under the agency's statutory authorities other than Price-Anderson, the agency employs civil, criminal, and administrative modes, encourages settlement of disputes, and employs forms resembling restitution. For example, seeking to maintain or restore safe conditions, the agency may, on its own, deny license applications, and modify, suspend or revoke licenses already granted, and it may seek, through the Attorney General, injunctive or other equitable relief for violation of regulatory requirements. Aiming to deter unsafe conduct, the agency may on its own impose civil penalties, and may ask the Attorney General to pursue criminal penalties, including imprisonment. In matters that reach litigation before the agency's administrative judges, the agency encourages settlement, and reviews each proposed settlement to determine whether it is in the public interest. An overview of the considerations in making this determination may be found in a recent Commission order, *In re Sequoyah Fuels Corporation and General Atomics*, 46 NRC 195, CLI-97-13 (1997) (available at 1997 WL 687867 [NRC]).

In pursuit of a safety-conscious work environment, the agency uses something like restitution, though restitution before adjudication. It is the policy of the agency to encourage licensees to maintain or restore the pay and benefits of an employee who alleges retaliation for raising safety issues, pending reconsideration or resolution of the matter. See 61 Fed. Reg. 24339, col. 3 (May 14, 1996). The Department of Labor and the NRC have proposed related legislation to the Congress.

You are thinking about an important subject, and I hope that these few remarks will have been helpful to you. Please feel free to call me if you have questions. I would be pleased to have a copy of the speech that you give at the University of Illinois Law School.

Respectfully yours,

/RA/

Stephen G. Burns
Acting General Counsel

You are thinking about an important subject, and I hope that these few remarks will have been helpful to you. Please feel free to call me if you have questions. I would be pleased to have a copy of the speech that you give at the University of Illinois Law School.

Respectfully yours,

Stephen G. Burns
Acting General Counsel

Distribution:

- K. Cyr
- S. Burns/Chron (2)
- L. Chandler
- J. Gray
- T. Rothschild
- S. Crockett/Chron (2)
- OGC Reading File
- OGC Library Files (C. Carnahan)

DOCUMENT NAME: G:\GC\Crockett\Weinstein letter.wpd

To receive a copy of this document, indicate in the box: "C" = Copy without enclosures "E" = Copy with enclosures "N" = No copy

OFFICE	OGC		OGC							
NAME	S.Crockett		S.Burns							
DATE	10/ /00		10/ /00		10/ /00					

OFFICIAL RECORD COPY