Nos. 00-274C, 00-292C
(Judge Firestone)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM H. SWEET, M.D.,

and

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS, IN PART, AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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January 12, 2001

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM H. SWEET, M.D., and MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Plaintiffs, v. THE UNITED STATES, Defendant.	))))))))))))	Nos. 00-274C, 00-292C (Judge Firestone)

DEFENDANT'S PROPOSED FINDINGS OF UNCONTROVERTED FACT

Pursuant to Rule 56(d)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant submits the following proposed findings of uncontroverted fact in support of Defendant's Motion For Partial Summary Judgment, dated January 12, 2001.[1]

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 1.

On or about June 9, 1958, pursuant to sections 104a and 104c of the Atomic Energy Act of 1954 ("AEA"), Pub. L. 703, 68 Stat. 919 (1954), and regulations promulgated thereunder, the United States Atomic Energy Commission ("AEC") licensed plaintiff Massachusetts Institute of Technology ("MIT") to (1) "possess and operate" a nuclear research reactor located in Cambridge, Massachusetts (the "MIT reactor"); (2) "receive, possess and use" 12 kilograms of uranium enriched in isotope 235 as fuel for operation of the reactor; and (3) "possess, but not separate, such byproduct material as may be produced in the operation of the facility." The MIT

[1] "Sweet Compl. ¶ __" refers to the complaint filed in Case No. 00-274C on May 11, 2000, as amended on or about May 12, 2000; "MIT Compl. ¶ __" refers to the complaint filed in Case No. 00-292C on May 22, 2000; and "DA__" refers to the appendix attached to our motion for summary judgment.

license, designated as "No. R-37", indicated that "[e]xperimental facilities are provided for use in neutron diffraction work, horizontal beam experiments, neutron beam therapy experiments, exponential assembly experiments, and neutron irradiation studies." Sweet Compl. ¶ 7 & Exhibit A at 1; MIT Compl. ¶ 14.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 2.

On or about April 16, 1959, MIT's license was amended to exempt MIT as a nonprofit educational institution from the financial protection requirements of section 170a of the Price-Anderson Act. Sweet Compl., Exhibit A at 5-6.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 3.

On or about May 25, 1959, the AEC issued an indemnity agreement to MIT pursuant to section 170k of AEA (the "Interim MIT Indemnity Agreement"), reflecting an effective date of June 9, 1958. The Interim MIT Indemnity Agreement indicated that the AEC agreed to "indemnify and hold harmless" MIT and "other persons indemnified as their interests may appear" from "public liability in excess of $250,000 arising from nuclear incidents . . . ." The agreement further provided that the "obligations of the Commission under this agreement shall apply only with respect to such public liability as arises out of or in connection with the activity licensed under AEC License No. R-37" and that the "aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 including the reasonable cost of investigating and settling claims and defending suits for damage." Sweet Compl. ¶ 8 & Exhibit B at 1; MIT Compl. ¶ 17 & Exhibit A at 1.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 4.

The Interim MIT Indemnity Agreement indicated that it would be "superseded, in due

course, by the execution and issuance of a formal indemnity agreement" between MIT and the AEC. Sweet Compl. ¶ 8 & Exhibit B at 1; MIT Compl. ¶ 17 & Exhibit A at 1.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 5.

Subsequent to issuance of the Interim MIT Indemnity Agreement, the AEC and MIT entered into "Indemnity Agreement No. E-39," pursuant to section 170k of AEA. The agreement reflects a dated of May 13, 1964. Sweet Compl. ¶ 8 & Exhibit C at 7; MIT Compl. ¶ 18 & Exhibit B at 7.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 6.

In its original form, Article III, paragraph 1, of MIT Indemnity Agreement No. E-39 indicated that the "Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability." Sweet Compl. ¶ 9.b & Exhibit C at 3; MIT Compl. ¶ 18 & Exhibit B at 3.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 7.

In its original form, Article III, paragraph 3, of MIT Indemnity Agreement No. E-39 indicated that the "Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from the reasonable costs of investigating, settling and defending claims for public liability." Sweet Compl., Exhibit C at 4; MIT Compl. ¶ 19 & Exhibit B at 4.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 8.

In its original form, Article I, paragraph 5, of MIT Indemnity Agreement No. E-39 indicated that, "As used in this agreement, . . . 'Public liability' means any legal liability arising out of or resulting from a nuclear incident . . . ." Sweet Compl. ¶ 9.d & Exhibit C at 2; MIT

Compl. ¶ 19 & Exhibit B at 2.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 9.

In its original form, Article I, paragraph 2(a) of MIT Indemnity Agreement No. E-39 indicated that, "As used in this agreement, . . . 'Nuclear Incident' means any occurrence or series of occurrences at the location or in the course of transportation causing 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, explosive, or other hazardous properties of the radioactive material." Sweet Compl. ¶ 9.e & Exhibit C at 1; MIT Compl., Exhibit B at 1.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 10.

In its original form, Article I, paragraph 4, of MIT Indemnity Agreement No. E-39 indicated that, "As used in this agreement, . . . 'Person indemnified' means the licensee and any other person who may be liable for public liability." Sweet Compl. ¶ 9c & Exhibit C at 2; MIT Compl., Exhibit B at 2.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 11.

In its original form, Article I, paragraph 7, of MIT Indemnity Agreement No. E-39 indicated that, "As used in this agreement, . . . 'The radioactive material' means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) is produced as the result of operation of said reactor(s)." The agreement further provided that the terms "by product material", "source material", and "special nuclear material" "shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission." Sweet Compl., Exhibit C at 1, 3; MIT

Compl., Exhibit B at 1, 3.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 12.

In its original form, Article III, paragraph 5, of MIT Indemnity Agreement No. E-39 indicated that the "obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement." Sweet Compl., Exhibit C at 4; MIT Compl., Exhibit B at 4.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 13.

In its original form, Article V of MIT Indemnity Agreement No. E-39 indicated that the "parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission." Sweet Compl., Exhibit C at 5; MIT Compl., Exhibit B at 5.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 14.

In its original form, Article VII, paragraph 1, of MIT Indemnity Agreement No. E-39 indicated that the "term of this agreement shall commence as of the date and time specified in Item 4 of the Attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire . . . ." Item 2 of the "Attachment" to MIT Indemnity Agreement No. E-39 listed MIT License "R-37," and Item 4 indicated that the agreement was "effective as of 12:01 A.M., on the 9th day of June, 1958 and supersedes the interim indemnity agreement between the licensee and the Atomic Energy Commission dated May 25, 1959." Sweet Compl., Exhibit C at 7; MIT Compl., Exhibit B at 7.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 15.

On September 21, 1995, plaintiff William H. Sweet, M.D., MIT, Massachusetts General Hospital ("Mass General" or "MGH"), Lee Howard Farr, M.D., Associated Universities, Inc. ("AUI"), and the estates of Shields Warren, M.D., John C. Bugher, M.D., and Charles L. Dunham. M.D., were named defendants in Heinrich, et al. v. Sweet et al., No. 95-CV-3845 (E.D.N.Y.) (filed September 21, 1995) (the "Heinrich suit"), a class action brought by surviving family members of patients treated at Mass General, MIT, and Brookhaven National Laboratory in the 1950s and 1960s. The named plaintiffs included Evelyn Heinrich, on behalf of her husband George Heinrich, and Henry M. Sienkewicz, Jr., on behalf of his mother Eileen Rose Sienkewicz. The Heinrich plaintiffs alleged that various doctors and institutions -- including MIT, Dr. Sweet, Mass General, and the United States -- used their relatives and other terminally-ill cancer patients as "guinea pigs" for dangerous, non-therapeutic medical experiments involving "boron neutron capture therapy" ("BNCT"), an experimental treatment for certain forms of brain cancer. Sweet Compl. ¶¶ 13-16; MIT Compl. ¶¶ 38-41; Heinrich v. Sweet, 49 F. Supp.2d 27 (D. Mass.1999).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 16.

By letter dated November 8, 1995, counsel for MIT, Francis C. Lynch, forwarded a copy of the Heinrich complaint to the Director of Nuclear Reactor Regulation, Nuclear Regulatory Commission ("NRC"), in Washington, D.C. Mr Lynch's letter stated:

> This letter constitutes notice of a claim against the Massachusetts Institute of Technology ("MIT") that is subject to indemnification under Indemnity Agreement E-39 between the Atomic Energy Commission and MIT and, perhaps, additional agreements that pertained to the treatments at Brookhaven National Laboratory.

MIT Compl. ¶ 43 & Exhibit C; DA52.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 17.

By letter dated February 16, 1996, Marjorie S. Nordlinger, a staff attorney in the NRC's Office of the General Counsel, requested from Mr. Lynch a "statement of reasons" why "indemnification is required," as well as "any dispositive motion or other substantive papers that you have filed." Mr. Lynch replied to Ms. Nordlinger's February 16, 1996 letter by letter dated May 29, 1996. MIT Compl. ¶ 44; DA53-59.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 18.

By letter dated August 29, 1996, Ms. Nordlinger notified Mr. Lynch that "NRC indemnity should not be invoked in this case." Ms. Nordlinger's letter stated, in part:

> In sum, the Price-Anderson liability system did not cast the government as insurer of personal harms from medical administrations or from medical treatments without informed consent, but as indemnifier for unexpected but possible public dangers associated with the operation of nuclear reactors or materials used to fuel them.
>
> . . .
>
> In our view, then, injury to patients deliberately exposed to radiation would be covered by the Price Anderson liability system only if their injury were due to an explosion or other nuclear incident occurring at the MIT reactor while those patients were present for BNCT therapy, for example. Absent such a nuclear incident, Price-Anderson would not be available to limit liability or indemnify the medical program administered.

MIT Compl. ¶ 45 & Exhibit D; DA60-61.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 19.

By order dated November 18, 1996, the court dismissed the claims against defendants Warren and Dunham, and substituted the United States as defendant. Heinrich v. Sweet, 44 F.

Supp.2d 408, 410 n.2 (D. Mass. 1999); DA40 (Docket No. 44).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 20.

The Heinrich suit was transferred to the United States District Court for the District of Massachusetts by order dated September 17, 1997. DA41 (Docket No. 57). Thereafter, a second amended complaint was filed on May 8, 1998, listing the following parties plaintiff: (1) Evelyn Heinrich, on behalf of her husband George Heinrich; (2) Henry M. Sienkewicz, Jr., on behalf of his mother Eileen Rose Sienkewicz; (3) Rosemary Gualtieri, on behalf of her father Joseph Mayne; (4) Walter Carl Van Dyke, on behalf of his father Walter Carmen Van Dyke; and all others similarly situated. Sweet Compl. ¶ 13 & Exhibit D at 1; MIT Compl. ¶ 47.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 21.

Paragraph 2(b) of the Heinrich second amended complaint stated:

> This action is brought to seek redress from the defendants who were responsible for using the decedents of plaintiffs and the class they represent as human guinea pigs, without their consent, in a series of extremely dangerous, painful and unproven medical experiments for which there was no reasonable basis to believe that the decedents would receive any therapeutic value. These experiments were the product of a common scheme devised by the defendants and were conducted on patients under the care of the Massachusetts General Hospital ("MGH") and other hospitals at reactor facilities at the Brookhaven National Laboratory ("BNL") which was operated by Associated Universities, Inc. ("AUI") in Upton, New York, an Atomic Energy Commission ("AEC") owned nuclear research center, and the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts. The principal doctors who, working in concert, devised and implemented these experiments were defendants Dr. Lee E. Farr, Chairman of the Medical Department at BNL during all times relevant here and Dr. William H. Sweet, a neurosurgeon at MGH. Defendants Shields Warren and Charles Dunham were the federal officers at the AEC responsible for funding and overseeing the experiments.

Sweet Compl., Exhibit D at 3.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 22.

Paragraph 2 of the Heinrich second amended complaint stated:

> The defendants acting in concert and as part of a common scheme, with substantial funding provided by the AEC, conducted extensive, unproven and dangerous medical experiments on over 140 terminally ill patients, without their knowledge or consent. The experiments ranged from injecting patients who suffered from brain tumors with toxic compounds of boron, uranium, or other substances solely to see where the substances would concentrate in the brain and what other biologic consequences the patients would suffer (at least 75 patients), to injecting brain tumor patients with one of the toxic substances and exposing them to the neutrons emanating from operating nuclear reactors where there was no reasonable basis to believe such radiation would provide any therapeutic benefit to the patient (at least 66 patients). Some of these patients had their skulls opened solely for the purpose of better exposing their brains to radiation.

Sweet Compl., Exhibit D at 3-4.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 23.

Paragraph 3 of the Heinrich second amended complaint stated:

> This suit is brought as a class action by the survivors and heirs of four of the unfortunate victims of these medical experiments, filed on behalf of all similarly situated survivors and heirs. One of the victims, George Heinrich, was subjected to non-therapeutic injections of boron to see what would happen to the boron in his body. Later he was subjected to a separate injection of boron plus neutron irradiation from the MIT reactor. This experiment was known as boron neutron capture therapy ("BNCT"). The second named victim, Eileen Sienkewicz, was subjected to a single boron injection followed by BNCT at MIT. The third named victim, Joseph Mayne, was a patient at MGH but was transported to BNL by Dr. Sweet where, under the supervision of Drs. Sweet and Farr, he received a boron injection and BNCT. The fourth named victim, Walter Van Dyke, a resident of New York, was part of a BNCT experiment at BNL which, from the outset, the doctors

> knew and acknowledged, to themselves, would provide no therapeutic benefit to Mr. Van Dyke. Defendants never obtained the consent of the plaintiffs' or the class' decedents or of the class members for these radiation and injection experiments. None of these named victims nor the remainder of the class were advised of the true nature of the experiments, the lack of any reasonable medical basis for such experiments or the excruciating pain and likely death which would occur as a result of such experiments. Defendants affirmatively misled the plaintiffs' and class' decedents by exploiting the decedents' desperate health condition, downplaying the risk of BNCT and grossly overstating the possible health benefits and, in the case of the injectees who did not receive BNCT, by failing to advise them that they were injected with toxic substances. This misconduct was made worse by the deliberate decision of defendants, acting in concert, never to advise the decedents during their lifetime or the class, even to this day, of the true facts of what occurred.

Sweet Compl., Exhibit D at 4-5.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 24.

Paragraph 5 of the Heinrich second amended complaint stated:

> Plaintiffs and the class seek compensation for pain, suffering and wrongful death of their decedents, for their own pain and suffering, and for punitive damages to deter defendants from ever again using any human beings, particularly the terminally ill, as guinea pigs for scientifically untested and unproven experimental procedures and to deter defendants from ever using any person for any medical experiment without first obtaining their informed consent after full and accurate disclosure. Plaintiffs and the class also seek injunctive relief to halt the institutional defendants from continuing the practices complained of here and to compel them to institute safeguards to prevent any recurrence of these practices.

Sweet Compl., Exhibit D at 6-7.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 25.

Paragraphs 8 and 9 of the Heinrich second amended complaint alleged that George Heinrich received two intravenous boron injections at Mass General on December 15, 1960, and

underwent BNCT at the MIT reactor on January 2, 1961. Sweet Compl. ¶ 15 & Exhibit D at 8-9.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 26.

Paragraph 11 of the Heinrich second amended complaint alleged that Eileen Sienkewicz underwent BNCT at the MIT reactor on November 15, 1960. Sweet Compl., Exhibit D at 10-11.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 27.

Paragraph 14 of the Heinrich complaint alleged that Joseph Mayne underwent BNCT at Brookhaven National Laboratory on June 14, 1951. Sweet Compl. ¶ 15 & Exhibit D at 12-13.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 28.

Paragraph 18 of the Heinrich second amended complaint alleged that Walter Carmen Van Dyke underwent BNCT at Brookhaven National Laboratory on March 6, 1957. Sweet Compl. ¶ 15 & Exhibit D at 15.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 29.

Paragraph 38 of the Heinrich second amended complaint alleged that

> The concept of neutron capture as a treatment for tumors is based on the idea of using radiation to kill tumor cells from the inside of the tumor, and on the use of an allegedly benign source of energy, slow neutrons, which become lethal only when captured by substances introduced into the tissues of the tumor. Unlike conventional radiation therapy or chemotherapy, both of which can harm both tumor and healthy tissue, BNCT is supposed to produce ionizing radiation only within the tumor. Thermal, or slow neutrons alone, are presumed to not have an ionizing effect by themselves, but can be "captured" by some nuclei that have an affinity for them. If the boron (or other neutron capturing substance) could be in theory confined to the tumor cells and if the radiation could be limited to slow neutrons, then, theoretically, the radiation damage should also be confined to the tumor cells.

Sweet Compl., Exhibit D at 25.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 30.

Paragraph 39 of the Heinrich second amended complaint alleged that

> The human experiments involved in this case can be divided into two categories: (1) the experiments in which patients underwent the full BNCT procedure, which involved the injection of boron (in some form) immediately prior to or during exposure to slow neutron radiation; and (2) the experiments where patients were injected with boron, or some other potential neutron capturing substance, but were not exposed to slow neutron radiation, solely to test the performance of the compound itself for future BNCT experiments.

Sweet Compl. ¶ 39 & Exhibit D at 26.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 31.

The Heinrich second amended complaint asserted several causes of action, including a "Bivens" claim for deprivation of constitutional rights (Count I); fraud-deceit (Count II); battery (Count III); intentional infliction of emotional distress (Count IV); strict liability for inherently dangerous activities (Count V); personal injury caused by exposure to toxic substances (Count VI); failure to obtain informed consent (Count VII); wrongful death (Count VIII); crimes against humanity (Count IX); negligence (Count X); and negligent misrepresentation (Count XI). Sweet Compl. ¶ 16 & Exhibit D at 51-75.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 32.

By letter dated March 26, 1999, counsel for MIT, Francis C. Lynch, forwarded a copy of the Heinrich second amended complaint to Ms. Nordlinger. Mr. Lynch's letter stated:

> I am writing to provide notice to the United States Nuclear Regulatory Commission ("NRC") that it is currently under an obligation to indemnify the Massachusetts Institute of Technology ("MIT") in the above-referenced lawsuit.

Mr. Lynch's letter further stated that "MIT hereby 'tenders' the case to the NRC." MIT Compl. ¶ 49 & Exhibit F; DA63-64.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 33.

By letter dated May 4, 1999, Ms. Nordlinger responded to Mr. Lynch's March 26, 1999 letter, stating, in part: "[O]ur 1996 correspondence ended with my August 29, 1996, letter affirming our opinion that Congress did not intend the mandatory Price-Anderson liability provisions for reactor incidents to include in their scope activities involving prescription of radiation dose within a doctor-patient relationship. To our knowledge, nothing has changed factually or materially that would cause us to alter that conclusion, nor did your recent letter provide us any reason to believe otherwise." MIT Compl. ¶ 49 & Exhibit G; DA65.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 34.

By letter dated August 10, 1999, counsel for Dr. Sweet, James E. Harvey, Jr., requested Ms. Nordlinger's "help in determining whether the Nuclear Regulatory Commission or any other government agency owes defense or indemnity to Dr. Sweet" in regard to the Heinrich claims. DA66-68.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 35.

By letter dated August 28, 1999, counsel for MIT, Owen Gallagher, notified Ms. Nordlinger that he was "formally renewing the request of M.I.T., that it be defended and indemnified pursuant to the terms and conditions of Indemnity Agreement E-39." MIT Compl. ¶ 50 & Exhibit H; DA69-70.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 36.

A jury was impaneled in the Heinrich case on September 7, 1999. Prior to the start of

trial, on September 9, 1999, the court dismissed the claims of plaintiffs Joseph Mayne and Walter Carl Van Dyke. Sweet Compl. ¶ 17; Heinrich v. Sweet, 118 F. Supp.2d 73 n.1 (D. Mass. 1999); DA43 (Docket No. 217). .

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 37.

By letter dated September 7, 1999, Mr. Harvey notified Ms. Nordlinger of the commencement of trial proceedings in the Heinrich suit, and provided additional materials in furtherance of his August 10, 1999 letter. DA71-72.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 38.

By letter dated September 10, 1999, Mr. Harvey notified Ms. Nordlinger that, as a result of various pre-trial rulings, "trial is proceeding only on the negligence and fraud claims by the representatives for the estates of George Heinrich and Eileen Sienkewicz . . . ." Mr. Harvey further stated: "[I]f the NRC agrees it owes indemnity to Dr. Sweet, whether from dollar one or only above $250,000, please advise me." DA73-74.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 39.

By letter dated September 15, 1999, Ms. Nordlinger responded to Mr. Harvey's correspondence of August 10, 1999, September 7, 1999, and September 10, 1999. Referencing her prior correspondence to Mr. Lynch, Ms. Nordlinger's letter stated, in part: "As I have previously explained, it is our view that the acts involved in Heinrich v. Sweet are not covered by either the terms of the Act or by any discretionary action of the Commission." DA75-76.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 40.

On October 5, 1999, following the close of plaintiffs' case, the Heinrich court ruled that the evidence was sufficient for Count VII (informed consent), Count VIII (wrongful death), and

Count X (negligence), to go to the jury against defendants MIT, Dr. Sweet, and Mass General. DA47 (Docket No. 261).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 41.

On October 15, 1999, after 20 days of trial, the jury awarded Ms. Heinrich $250,000 in compensatory damages on her negligence claim and $250,000 on her wrongful death claim against both Dr. Sweet and Mass General, and awarded punitive damages of $750,000 against Dr. Sweet and $1,250,000 against Mass General. The jury awarded Mr. Sienkewicz $500,000 in compensatory damages on his negligence claim and $2,000,000 on his wrongful death claim against both Dr. Sweet and Mass General, and awarded punitive damages of $1,000,000 against Dr. Sweet and $2,000,000 against Mass General. The jury rejected the claim for lack of informed consent and found for MIT on all claims. Sweet Compl. ¶ 17; MIT Compl. ¶¶ 53-54; Heinrich v. Sweet, 83 F. Supp.2d 214, 216 n.1 (D. Mass. 2000).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 42.

Mr. Harvey forwarded the Heinrich jury verdict to Ms. Nordlinger by letter dated October 20, 1999. Mr. Harvey's letter stated, among other things, that "defense counsel are drafting post-trial motions which will be filed this week" and that "[w]e are strongly optimistic that punitive damages will be eliminated entirely and that the compensatory damages will be either eliminated or reduced." DA77.

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 43.

By memorandum dated February 9, 2000, the Heinrich court granted the United States' motion for judgment pursuant to the Government contractor exception to the Federal Tort Claims Act, 28 U.S.C. § 2671. On this issue, the court concluded that the United States could not be

held liable under the Federal Tort Claims Act for the alleged negligence of the private defendants because, based upon the evidence of record, "[t]he Federal Government in no sense control[led] 'the detailed physical performance' of all the programs and projects" of the private defendants. Heinrich v. Sweet, 83 F.Supp.2d 214, 224 (D. Mass. 2000).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 44.

By memorandum and order dated September 29, 2000, the Heinrich court granted the post-trial motions of Dr. Sweet and Mass General for reduction of the jury verdict for wrongful death. The court held that the plaintiffs' claims for wrongful death arose in 1961 and, applying the provisions of the applicable 1961 Massachusetts wrongful death statute, limited plaintiffs' damages to $20,000. Heinrich v. Sweet, 118 F. Supp.2d 73, 81 (D. Mass. 1999).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 45.

By memorandum and order dated September 29, 2000, the Heinrich court denied Mass General's motion for judgment as a matter of law on the defense of charitable immunity. On this issue, the court found that

> during the treatment of both Heinrich's and Sienkewicz's decedents, Sweet had actual knowledge of the imprecision of the localization of the boron injections to the cancerous brain tissue and the related imprecision of the neutron radiation, with the result that unacceptably high degrees of radiation necrosis were occurring in these and other of his patients. In short, Sweet well knew during his care of these patients that his BNCT treatments were not helping them, and, in fact, were causing severe side effects unrelated to the progressive effect of the fatal brain tumors. He pressed ahead anyway, believing in complete good faith that such experimentation on dying patients held out hope for other cancer victims. However praiseworthy his goal, his conduct with respect to the patients involved here was, as the jury found, negligent. While Mass General disagrees with these findings, they are amply warranted on the trial record. Vicarious negligence on the part of

Mass General does not, however, strip it of its charitable immunity.

The court further concluded:

> While Mass General thus was negligent along with Sweet, the doctrine of charitable immunity will relieve it from liability so long as its conduct was "charitable." It was not.
>
> . . .
>
> Here, by negligently persisting with boron injections after all hope of extending the lives of his patients or alleviating their suffering had vanished, Sweet violated that cardinal principle of the Hippocratic oath, "First, do no harm." The negligent harm done by Sweet here and imputed to Mass General was in no sense "charitable." Mass General simply cannot cloak conduct violative of medical ethics with charitable immunity. The jury verdict must stand.

Heinrich v. Sweet, 118 F. Supp.2d 73, 90-92 (D. Mass. 1999).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 46.

On September 29, 2000, the Heinrich court entered judgment in favor of Ms. Heinrich and Mr. Sienkewicz and against Dr. Sweet and Mass General as follows:

Plaintiff	Count	Sweet-MGH Joint & Several	Sweet Individual	MGH Individual
Heinrich	Negligence	$250,000	--	--
	Wrongful Death			
	Compensatory	--	--	--
	Punitive	--	$20,000	$20,000
Sienkewicz	Negligence	$500,000	--	--
	Wrongful Death			
	Compensatory	--	--	--
	Punitive	--	$20,000	$20,000
Totals		$750,000	$40,000	$40,000

DA83-84. The court also denied class certification and thus severed the claims of a later-added

plaintiff (Marc Oddo) to proceed as an independent action. 118 F. Supp.2d at 73 n.1; DA48-49 (Docket Nos. 311, 340).

PROPOSED FINDING OF UNCONTROVERTED FACT NO. 47.

On October 23, 2000, the Heinrich court stayed execution of the judgments pending appeal. Dr. Sweet and Mass General filed notices of appeal on December 6, 2000. DA50-51.

Respectfully submitted,

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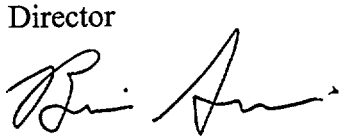

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January 12, 2001

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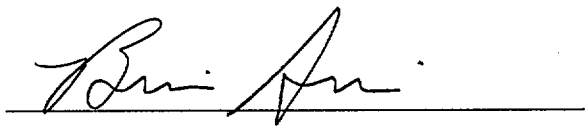

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WILLIAM H. SWEET, M.D., and MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Plaintiffs, v. THE UNITED STATES, Defendant.	))))))))))))	Nos. 00-274C, 00-292C (Judge Firestone)

DEFENDANT'S MOTION TO DISMISS, IN PART,
AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 12(b) of the United States Court of Federal Claims ("RCFC"), defendant respectfully requests the Court to dismiss Count III of the complaint in Case No. 00-274C and Count II of the complaint in Case No. 00-292C for lack of subject matter jurisdiction. Additionally, pursuant to RCFC 56(b), defendant respectfully requests the Court to grant summary judgment in defendant's favor as described below because there is no genuine issue as to any material fact and we are entitled to judgment as a matter of law. In support of this motion, we rely upon the pleadings of record, our proposed findings of uncontroverted fact, the following brief, and appendix.[1]

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[1] In the brief below, "Sweet Compl. ¶ __" and "Sweet Exh. __" refer to the complaint and attached exhibits, respectively, filed in Case No. 00-274C on May 11, 2000, as amended on or about May 12, 2000; "MIT Compl. ¶ __" and "MIT Exh. __" refer to the complaint and attached exhibits, respectively, filed in Case No. 00-292C on May 22, 2000; "DPFUF ¶ __" refers defendant's proposed findings of uncontroverted fact, dated January 12, 2001; and "DA__" refers to the appendix attached to this brief.

DEFENDANT'S BRIEF

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Court lacks jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, to entertain plaintiffs' requests for declaratory relief.

2. Whether defendant is entitled to summary judgment upon plaintiff William H. Sweet's indemnification claim regarding his liability from the case of Heinrich v. Sweet because that liability did not arise out of a "nuclear incident" and, thus, is not the type of "public liability" for which Federal indemnification is required under the Price-Anderson Act, 42 U.S.C. § 2210.

3. Whether defendant is entitled to summary judgment upon plaintiffs' indemnification claims regarding the costs of investigating and defending the Heinrich v. Sweet suit because that case did not allege claims for "public liability" and, in any event, the provision upon which plaintiffs rely for indemnity is no longer a valid and enforceable contractual term.

STATEMENT OF THE CASE

I. Nature Of The Case

This case involves the alleged breach of an "indemnity agreement" executed between the United States Atomic Energy Commission ("AEC") and the Massachusetts Institute of Technology ("MIT") pursuant to the Price-Anderson Act, 42 U.S.C. § 2210, as well as a second indemnity agreement believed to exist between the AEC and Associated Universities, Inc. ("AUI"). Sweet Compl. ¶ 2; MIT Compl. at 1. Since the late 1950s, MIT has owned and operated a nuclear research reactor licensed by the AEC and its successor agency, the Nuclear

Regulatory Commission ("NRC").[2] Further, from 1947 to 1998, AUI served as the contract operator of Brookhaven National Laboratory ("Brookhaven"), a nonprofit educational and research institution in Upton, New York. Sweet Compl. ¶¶ 7, 12.

Plaintiffs MIT and William H. Sweet, M.D., allege that the United States breached one or both of these agreements by failing to provide indemnification with respect to the claims in Heinrich, et al. v. Sweet et al., No. CIV. A. 97-12134-WGY (D. Mass.) (originally filed September 21, 1995) (the "Heinrich suit"), a class action brought by surviving family members of patients treated at MIT and Brookhaven in the 1950s and 1960s. The Heinrich plaintiffs alleged that various doctors and institutions -- including MIT, Dr. Sweet, Massachusetts General Hospital ("Mass General"), and the United States -- used their relatives and other terminally-ill patients as "guinea pigs" for dangerous, non-therapeutic medical experiments involving "boron neutron capture therapy" ("BNCT"), an experimental treatment for certain forms of brain cancer. See generally Heinrich v. Sweet, 49 F. Supp.2d 27 (D. Mass.1999).

Following a 20-day jury trial in October 1999, the jury returned verdicts for two plaintiffs (Evelyn Heinrich and Henry M. Sienkewicz, Jr.) against Dr. Sweet and Mass General for wrongful death and negligence. MIT was found not liable on all claims. The United States was also dismissed as a defendant. The jury held Dr. Sweet individually liable in the amount of $1,750,000 (wrongful death), and jointly and severally liable with Mass General in the amount of $3,000,000 (negligence). Upon post-trial motion, the court reduced these amounts to $40,000 and $750,000, respectively. The court also denied class certification and thus severed the claims

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[2] In 1974, Congress abolished the AEC and assigned its regulatory responsibilities to the NRC. See Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1234 (1974) (codified as amended at 42 U.S.C. §§ 5801-5891).

of a later-added plaintiff (Marc Oddo) to proceed as an independent action. Id., 118 F. Supp.2d at 73 n.1. On October 23, 2000, the court stayed execution of the judgments pending appeal. Dr. Sweet and Mass General filed notices of appeal on December 6, 2000.

In this case, Dr. Sweet seeks an award of damages for his "defense costs in the Heinrich Civil Action" and "any amount for which he may be, or may become, liable in the Heinrich Civil Action," as well as a declaratory judgment declaring that the United States is obligated to indemnify Dr. Sweet against "his defense costs and any potential liability in the case (at least) of any claim brought by or on behalf of any patient who received BNCT at Brookhaven or MIT . . . ." Sweet Compl., Prayer for Relief ¶¶ A-C. Similarly, MIT seeks an award of damages for its "reasonable costs of investigating and defending the claims" plus interest, and a declaratory judgment declaring that the United States is obligated to indemnify MIT against the "reasonable costs of investigating and defending the claims" asserted in Heinrich as well as "any future public liability arising out of the BNCT clinical trials." MIT Compl., Prayer for Relief ¶¶ C-D.

II. Scope Of Defendant's Motion To Dismiss, In Part, and Motion For Partial Summary Judgment

Pursuant to this Court's direction at the status conference held on October 25, 2000, the following brief addresses several, but not all, of the issues raised in these consolidated cases. Specifically, Dr. Sweet's complaint in Case No. 00-274C presents three separate counts: (1) a claim for breach of the MIT indemnity agreement (Count I); (2) a claim for breach of the Brookhaven indemnity agreement (Count II); and (3) a claim for declaratory relief related to the Heinrich suit and future actions that may be covered by the MIT and Brookhaven indemnity agreements (Count III). MIT's complaint in Case No. 00-292C presents two counts: (1) a claim

for breach of the MIT indemnity agreement (Count I); and (2) a claim for declaratory relief related to the Heinrich suit and future actions that may be covered by the MIT indemnity agreements (Count II).

In Part I of the argument section below, we demonstrate that the declaratory relief claims of both Dr. Sweet (Count III) and MIT (Count II) should be dismissed because this Court lacks jurisdiction to award such relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

In Parts II and III below, we establish that defendant is entitled to summary judgment upon Dr. Sweet's indemnification claim regarding his liability from the Heinrich suit (Count I) because that liability did not arise out of a "nuclear incident" and, thus, is not the type of "public liability" for which Federal indemnification is required. (MIT was found not liable in Heinrich, and thus does not assert a breach of contract claim regarding indemnification claim for "public liability".)

In Part IV below, we show that defendant is entitled to summary judgment upon the indemnification claims of both Dr. Sweet (Count I) and MIT (Count II) under the MIT indemnity agreement for the costs of investigating and defending the Heinrich suit because that case did not allege claims for "public liability" and, in any event, the provision upon which plaintiffs rely for indemnity (Article III, paragraph 3, of the MIT indemnity agreement) is no longer a valid and enforceable contractual term.

As discussed in the October 25, 2000 conference, we do not address Dr. Sweet's claims regarding the alleged breach of the Brookhaven indemnity agreement (Count II) or arguments regarding exhaustion of administrative remedies, and instead reserve those issue for further proceedings. Thus, as regards Case No. 00-274C, our Rule 56 motion is one for partial summary

judgment. Because MIT does not assert claims under the Brookhaven agreement, our Rule 56 motion as it applies to Case No. 00-292C is one for summary judgment.

III. Statutory And Regulatory Background

A. The Price-Anderson Act: Original Provisions

Congress enacted the Atomic Energy Act of 1954 ("AEA"), Pub. L. 703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2281), to encourage private sector development of atomic energy for peaceful purposes. See H.R. Rep. No. 2181, 83d Cong., 2d Sess., 1-11 (1954). In its original form, the AEA provided for licensing of private construction, ownership, and operation of commercial and nonprofit nuclear power reactors under strict supervision by the AEC. See generally Duke Power Co. v. Carolina Environ. Study Group, Inc., 438 U.S. 59 (1978); Power Reactor Development Co. v. Electrical Workers, 367 U.S. 396 (1960). Soon afterwards, however, Congress recognized that the potential of a serious nuclear accident with catastrophic liability for the responsible reactor was hindering the desired participation of private industry:

> It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems -- the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle. Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. Thus, while repeatedly stressing that the risk of a major nuclear accident was

> extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation.

Duke Power, 438 U.S. at 63-64 (citations omitted).

In response to these concerns, in 1957, Congress amended the AEA to "make funds available for a portion of the damages suffered by the public from nuclear incidents" as well as to "limit the liability of those persons liable for such losses." Pub. L. 85-256, § 1, 71 Stat. 576 (September 2, 1957) (codified as amended at 42 U.S.C. §§ 2012(i), 2210). These amendments, commonly known as the Price-Anderson Act (the "Act"), established a detailed system to cover legal liability claims arising out of or resulting from a "nuclear incident." Such liabilities were referred to as "public liability." Pub. L. 85-256, § 3, 71 Stat. at 576 (42 U.S.C. § 2014(u)). In one of its essential features, the Act capped the "aggregate liability" arising from any single nuclear incident at $500 million, "together with the amount of financial protection required of the licensee or contractor." Id., § 170(e), 71 Stat. at 577-78 (42 U.S.C. § 2210(e)).

Within this overall limitation, two sources provided funds for "public liability". The primary layer of funds derived from the reactor-licensee, which was required as a condition of its license to maintain "financial protection" -- i.e., "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." Id., § 3, 71 Stat. at 576 (42 U.S.C. § 2014(j)). Financial protection could include "private insurance, private contractual indemnities, self insurance, [or] other proof of financial responsibility." Id., § 170(b), 71 Stat. at 576-77 (42 U.S.C. § 2210(b)). The required level of financial protection was "the amount of liability insurance available from private sources," id., which was approximately $60 million dollars in 1957. See Hearings Before the Joint Comm. on

Atomic Energy on Governmental Indemnity and Reactor Safety, 85th Cong., 1st Sess. 91 (1957); Duke Power, 438 U.S. at 65.

In the event a reactor exhausted its financial protection, the secondary layer of funds derived from Federal indemnification. Specifically, with respect to any licensee who was required to maintain financial protection, the Act authorized the AEC to "agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee." Id., § 170(c), 71 Stat. at 577 (42 U.S.C. § 2210(c)).

B. Early Amendments: Nonprofit Educational Licensees

In 1958, nonprofit educational licensees, such as MIT, were exempted from the financial protection requirement. Pub. L. 85-743, 72 Stat. 837 (August 23,1958) (adding § 170(k), 42 U.S.C. § 2210(k)). For licensees subject to this exemption, the Act authorized the AEC to

> agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents.

72 Stat. at 837. The Act further provided that the "aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including the reasonable cost of investigating and settling claims and defending suits for damage . . . ." Id.

C. Implementing Regulations and Form Indemnity Agreements

On September 11, 1957, the AEC published regulations implementing the financial protection and indemnity provisions of the Act. 22 Fed. Reg. 7223 (codified as Part 140, Title 10, C.F.R.); DA1-4. The regulations provided that standard form indemnity agreements, which had yet to be prepared, "shall contain such provisions as are required by law and such additional

provisions and such additional provisions as may be incorporated therein by the Commission pursuant to regulation." 22 Fed. Reg. at 7223-24, 7225; 10 C.F.R. § 140.17(a) (1958); DA2-4. Thereafter, on April 22, 1961, the AEC issued for public notice and comment a proposed form indemnity agreement applicable to nonprofit educational institutions. 26 Fed. Reg. at 3490, 3492-93 (April 22, 1961); DA7-10. At this time, the AEC noted that it had "entered into temporary indemnity agreements with licensees pending the adoption of the forms" and that, after the effective date of the amendments, it would "tender to each licensee subject thereto a definitive indemnity agreement" that would "supersede the temporary agreements." 26 Fed. Reg. at 3457; DA6.

On March 29, 1962, the AEC finalized the standard form indemnity agreement applicable to nonprofit educational institutions. 27 Fed. Reg. at 2884, 2887-2888 (March 29, 1962); 10 C.F.R. §§ 140.72(a), (b)(1), 140.79 & Appendix E (1963); DA11-16. This form indemnity agreement contained several standard provisions at issue in this case. For example, Article III, paragraph 1, of the form agreement provided:

> The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability.

27 Fed. Reg. at 2887; 10 C.F.R. § 140.79 (1963); DA15. Similarly, Article III, paragraph 3, provided:

> The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

Id.; DA15.

D. Subsequent Amendments To The Price-Anderson Act

Originally subject to a statutory expiration date of August 1, 1967, the Price-Anderson Act has been extended and amended several times since its enactment, the first occasion being on the eve of its expiration in 1966. Most of these amendments are not directly relevant to this case and, thus, are not addressed here in detail.[3]

By 1975, however, there was rising sentiment in Congress that Price-Anderson had outlived its intended purpose and should not be extended for another 10-year period. In hearings commenced before the Joint Committee on Atomic Energy, it was expressed that, with roughly two decades' operating experience in the atomic field, private industry had become increasingly able to assess and insure against the financial risks of a major nuclear incident. See S. Rep. 94-454, 94th Cong., 1st. Sess. 1975, reprinted in 1975 U.S.C.C.A.N. 2251, 2271 (Nov. 13, 1975) (views of Sen. John V. Tunney) ("The conditions envisioned when the Act was passed and extended have been satisfied. We now have a record of operating experience, and a theoretical basis for calculating the risks of nuclear power. That is what the private sector requires to make the kinds of educated estimates which form the basis for private insurance."). At the same time, however, although it recognized that the likelihood of a "serious nuclear accident" was still "extremely remote," the Joint Committee found that "no one can correctly conclude that such an accident could never occur." 1975 U.S.C.C.A.N. at 2251. Consequently, Congress extended Price-Anderson for another 10-year period, albeit with several amendments designed to "provide

[3] See, e.g., Pub. L. 89-210, 79 Stat. 855 (September 29, 1965) (extending coverage to August 1, 1977); Pub. L. 89-645, 80 Stat. 891 (1966) (adding "extraordinary nuclear occurrence" provisions); Pub. L. 94-197, 89 Stat. 1111 (December 31, 1975) (extending date to August 1, 1987, and adding "deferred premium" provisions); Pub. L. 100-408, 102 Stat. 1066 (August 20, 1988) (extending coverage to August 1, 2002, and adding "public liability action" provisions).

for the phaseout of governmental indemnity as a source of funds for public remuneration in the event of a nuclear incident." Pub. L. 94-197, 89 Stat. 1111 (December 31, 1975).

The 1975 amendments modified the Act in two material respects. First, in a series of amendments offered by Senator William D. Hathaway, sections 170(c), (d) and (k) of the Act were amended to exclude the "cost of investigating and settling claims and defending suits for damage" from the "aggregate indemnity for all persons indemnified in connection with each nuclear incident . . . ." Pub. L. 94-197, §§ 4(b), 5(b), 10(b), 89 Stat. at 1113-14. Second, the 1975 amendments effectively replaced the Federal layer of indemnity by requiring, in the event of a nuclear incident, that each of the (then) 60 or more commercial reactors contribute between $2 and $5 million in "deferred premium" payments toward public liability exceeding the amount of available financial protection. See Pub. L. 94-197, § 3, 89 Stat. at 1112 (amending 42 U.S.C. § 2210(b)); Duke Power, 438 U.S. at 66.[4]

The NRC issued a final rule implementing the Hathaway Amendments on March 26, 1984. 49 Fed. Reg. 11146 (March 26, 1984) (final rule issued "to conform certain sections of 10 CFR Part 140 both to Pub. L. 94-197 and the Atomic Energy Act of 1954, as amended."); DA23. In its notice, the NRC explained that,

> although the cost of investigating the settling liability claims and defending suits for damage is retained as part of financial

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[4] Theoretically, a third layer of Federal indemnity remained for the difference between the $560 million liability ceiling and the sum of the amounts available through financial protection and deferred premiums. However, since the liability ceiling remained the same, and because the funds available through retrospective premiums would increase as new reactors were licensed, the effect of the deferred premium provision was to reduce, and ultimately eliminate, the Federal Government's contribution to the liability pool. See Duke Power, 438 U.S. at 66-67 & n.8. The layer of Federal indemnity was subsequently eliminated, in effect, upon the licensing of the 80th reactor in 1982. See S. Rep. No. 100-218, 100th Cong., 1st Sess. 3 (1987).

> protection, i.e., both primary and secondary insurance, the final rule modifies certain sections of 10 CFR Part 140 in conformance with Pub. L. 94-197 to exclude these costs from government indemnity. . . .

49 Fed. Reg. at 11148; DA24. Accordingly, the NRC deleted Article III, paragraph 3, from the standard form indemnity agreement applicable to nonprofit educational licensees. See 49 Fed. Reg. 11152; 10 C.F.R. § 140.95 (1985); compare DA21 with DA28.

E. 1988 Amendments

Most recently, in 1988, Congress extended the Price-Anderson Act's coverage to August 1, 2002, and made several other significant amendments, such as provisions establishing Federal district court jurisdiction over a newly-created Federal "public liability" cause of action. See Pub. L. 100-408, 102 Stat. 1066 (August 20, 1988). Among the many changes, Congress revisited the question of coverage for the costs of investigating, defending, and settling public liability claims, now defined generally as "legal costs". Pub. L. 100-408, § 11(d)(2), 102 Stat. at 1078 (42 U.S.C. § 2014(jj)). For example, section 170(k) of the Act, applicable to nonprofit educational institutions such as MIT, was again amended to include "such legal costs of the licensee as are approved by the Commission" within the "aggregate indemnity for all persons indemnified in connection with each nuclear incident . . . ." Pub. L. 100-408, § 8, 102 Stat. at 1074 (42 U.S.C. § 2014(k)(1)). This latter amendment, however, applies only "with respect to nuclear incidents occurring on or after" August 20, 1988, i.e., the effective date of the amendments. See Pub. L. 100-408, § 20, 102 Stat. at 1084.

III. Statement of Facts

For our statement of facts, we respectfully refer the Court to Defendant's Proposed

Findings of Uncontroverted Fact, dated January 12, 2001. In this brief, we reference those facts and other informative facts that are necessary to our argument.

A. MIT License No. R-37

On or about June 9, 1958, the AEC licensed MIT to possess and operate a nuclear research reactor located in Cambridge, Massachusetts (the "MIT reactor"). DPFUF ¶ 1; Sweet Compl. ¶ 7 & Exh. A at 1; MIT Compl. ¶ 14. MIT was authorized to "receive, possess and use" 12 kilograms of uranium enriched in isotope 235 as fuel for operation of the reactor, and "possess, but not separate, such byproduct material as may be produced in the operation of the facility." DPFUF ¶ 1; Sweet Exh. A at 1. The MIT license indicated that "[e]xperimental facilities are provided for use in neutron diffraction work, horizontal beam experiments, neutron beam therapy experiments, exponential assembly experiments, and neutron irradiation studies." DPFUF ¶ 1; Sweet Compl. ¶ 7 & Exh. A at 1. On or about April 16, 1959, MIT's license was amended to exempt MIT from the financial protection requirements of the Price-Anderson Act. DPFUF ¶ 2; Sweet Compl., Exh. A at 5-6.

B. The Interim MIT Indemnity Agreement

On or about May 25, 1959, the AEC issued an indemnity agreement to MIT (the "interim indemnity agreement"), reflecting an effective date of June 9, 1958 (i.e., the date of MIT's license). DPFUF ¶ 3; Sweet Compl. ¶ 8 & Exh. B at 1; MIT Compl. ¶ 17 & Exh. A at 1. Pursuant to this agreement, the AEC agreed to "indemnify and hold harmless" MIT and "other persons indemnified as their interests may appear" from "public liability in excess of $250,000 arising from nuclear incidents . . . ." Id. Further, the "aggregate indemnity for all persons indemnified in connection with each nuclear incident" was not to exceed $500,000,000,"

including the reasonable cost of investigating and settling claims and defending suits for damage." Id.

The interim indemnity agreement also provided that it would be "superceded, in due course, by the execution and issuance of a formal indemnity agreement" between MIT and the AEC. Id. This statement is consistent with AEC comments, published in the Federal Register on April 22, 1961, noting that it had "entered into temporary indemnity agreements with licensees pending the adoption of the forms" and that, after the effective date of the amendments, it would "tender to each licensee subject thereto a definitive indemnity agreement" that would "supercede the temporary agreements." 26 Fed. Reg. at 3457; DA6. On March 29, 1962, the AEC finalized the standard form indemnity agreement applicable to nonprofit educational institutions. 27 Fed. Reg. at 2884, 2887-2888; DA12, 15-16.

C. MIT Indemnity Agreement No. E-39

Subsequent to issuance of the Interim MIT Indemnity Agreement, the AEC and MIT entered into "Indemnity Agreement No. E-39" pursuant to section 170k of Act. DPFUF ¶ 5; Sweet Compl. ¶ 8 & Exh. C; MIT Compl. ¶ 18 & Exh. B. This agreement indicated that it was "effective as of 12:01 A.M., on the 9th day of June, 1958 and supersedes the interim indemnity agreement between the licensee and the Atomic Energy Commission dated May 25, 1959." DPFUF ¶ 14; Sweet Exh. C at 7; MIT Exh. B at 7.[5]

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[5] For purposes of this motion, we do not stipulate that the indemnity agreements attached as exhibits to plaintiffs' respective complaints constitute true and correct copies of those documents. The two documents differ in some respects, and were amended on several subsequent occasions. The provisions that we rely upon and which we contend were included in the MIT indemnity agreement as originally issued are identified in our proposed findings of uncontroverted fact. See DPFUF ¶¶ 6-14.

In its original form, the MIT indemnity agreement contained "public liability" provisions that parroted the AEC's standard form indemnity agreement for nonprofit educational institutions. For example, Article III, paragraph 1, provided:

> The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability.

DPFUF ¶ 6; Sweet Exh. C at 3; MIT Exh. B at 3 (derived from 27 Fed. Reg. at 2887; 10 C.F.R. § 140.79 (1963) (Appendix E)). Similarly, Article III, paragraph 3, provided:

> The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

DPFUF ¶ 7; Sweet Exh. C at 4; MIT Exh. B at 4.

D. The Heinrich Suit

On September 21, 1995, surviving family members of cancer patients treated at Mass General, the MIT reactor, and Brookhaven National Laboratory in the 1950s and 1960s filed a putative class action suit against MIT, Dr. Sweet, and other named defendants in the United States District Court for the Eastern District of New York (the "Heinrich suit"). DPFUF ¶ 15; Sweet Compl. ¶¶ 13-16; MIT Compl. ¶¶ 38-41. The Heinrich plaintiffs alleged that various doctors and institutions -- including MIT, Dr. Sweet, Mass General, AUI, and the United States -- used terminally-ill patients as "guinea pigs" for dangerous, non-therapeutic medical experiments involving "boron neutron capture therapy" ("BNCT"), an experimental treatment for certain forms of brain cancer. Id. Specifically, the Heinrich complaint, as amended, alleged as follows:

> This action is brought to seek redress from the defendants who were responsible for using the decedents of plaintiffs and the class they represent as human guinea pigs, without their consent, in a series of extremely dangerous, painful and unproven medical experiments for which there was no reasonable basis to believe that the decedents would receive any therapeutic value. These experiments were the product of a common scheme devised by the defendants and were conducted on patients under the care of the Massachusetts General Hospital ("MGH") and other hospitals at reactor facilities at the Brookhaven National Laboratory ("BNL") which was operated by Associated Universities, Inc. ("AUI") in Upton, New York, an Atomic Energy Commission ("AEC") owned nuclear research center, and the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts. The principal doctors who, working in concert, devised and implemented these experiments were defendants Dr. Lee E. Farr, Chairman of the Medical Department at BNL during all times relevant here and Dr. William H. Sweet, a neurosurgeon at MGH. Defendants Shields Warren and Charles Dunham were the federal officers at the AEC responsible for funding and overseeing the experiments.

DPFUF ¶ 21; Sweet Exh. D at 3.[6]

According to the Heinrich complaint, BNCT involved a two-step process: injecting a patient with a boron compound (intravenously or via the carotid artery) and, thereafter, exposing the patient's brain to an external source of slow neutron radiation. Sweet Exh. D at 3. The complaint explained that, in theory, BNCT offered a localized and thus desirable treatment for brain cancer because, it was thought, the boron compound would concentrate in tumor cells rather than healthy cells and, in turn, the slow neutron exposure would result in lethal ionizing radiation only for the tumor cells that had absorbed the boron:

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[6] The court subsequently dismissed the claims against defendants Warren and Dunham By order dated November 18, 1996, and substituted the United States as defendant. The case itself was thereafter transferred to the United States District Court for the District of Massachusetts by order dated September 17, 1997. Sweet Compl. ¶ 13; MIT Compl. ¶ 47; Heinrich v. Sweet, 44 F. Supp.2d 408, 410 n.2 (D. Mass. 1999).

> The concept of neutron capture as a treatment for tumors is based on the idea of using radiation to kill tumor cells from the inside of the tumor, and on the use of an allegedly benign source of energy, slow neutrons, which become lethal only when captured by substances introduced into the tissues of the tumor. Unlike conventional radiation therapy or chemotherapy, both of which can harm both tumor and healthy tissue, BNCT is supposed to produce ionizing radiation only within the tumor. Thermal, or slow neutrons alone, are presumed to not have an ionizing effect by themselves, but can be "captured" by some nuclei that have an affinity for them. If the boron (or other neutron capturing substance) could be in theory confined to the tumor cells and if the radiation could be limited to slow neutrons, then, theoretically, the radiation damage should also be confined to the tumor cells.

DPFUF ¶ 29; Sweet Exh. D at 25.

The experiments covered by the Heinrich complaint were thus divided into two distinct categories: "(1) the experiments in which patients underwent the full BNCT procedure, which involved the injection of boron (in some form) immediately prior to or during exposure to slow neutron radiation; and (2) the experiments where patients were injected with boron, or some other potential neutron capturing substance, but were not exposed to slow neutron radiation, solely to test the performance of the compound itself for future BNCT experiments." DPFUF ¶ 30; Sweet Compl. ¶ 39 & Exh. D at 26. For both categories of experiments, the gravamen of the complaint was that

> . . . . Defendants never obtained the consent of the plaintiffs' or the class' decedents or of the class members for these radiation and injection experiments. None of these named victims nor the remainder of the class were advised of the true nature of the experiments, the lack of any reasonable medical basis for such experiments or the excruciating pain and likely death which would occur as a result of such experiments. Defendants affirmatively misled the plaintiffs' and class' decedents by exploiting the decedents' desperate health condition, downplaying the risk of BNCT and grossly overstating the possible health benefits and, in

> the case of the injectees who did not receive BNCT, by failing to advise them that they were injected with toxic substances. This misconduct was made worse by the deliberate decision of defendants, acting in concert, never to advise the decedents during their lifetime or the class, even to this day, of the true facts of what occurred.

DPFUF ¶ 23; Sweet Exh. D at 4-5.

The Heinrich complaint asserted several causes of action, including a "Bivens" claim for deprivation of constitutional rights (Count I); a "fraud-deceit " claim (Count II); battery (Count III); intentional infliction of emotional distress (Count IV); strict liability for inherently dangerous activities (Count V); personal injury caused by exposure to toxic substances (Count VI); failure to obtain informed consent (Count VII); wrongful death (Count VIII); crimes against humanity (Count IX); negligence (Count X); and negligent misrepresentation (Count XI). DPFUF ¶ 31; Sweet Exh. D at 51-75. As relief, the Heinrich plaintiffs sought "compensation for pain, suffering and wrongful death of their decedents, for their own pain and suffering, and for punitive damages to deter defendants from ever again using any human beings, particularly the terminally ill, as guinea pigs for scientifically untested and unproven experimental procedures and to deter defendants from ever using any person for any medical experiment without first obtaining their informed consent after full and accurate disclosure." DPFUF ¶ 24; Sweet Exh. D at 6-7.

By letter dated November 8, 1995, MIT's counsel forwarded a copy of the Heinrich complaint to the NRC's Director of Nuclear Reactor Regulation, stating that the claims raised in the Heinrich suit were "subject to indemnification under Indemnity Agreement E-39 between the Atomic Energy Commission and MIT and, perhaps, additional agreements that pertained to the

treatments at Brookhaven National Laboratory." DPFUF ¶ 16; MIT Compl. ¶ 43 & Exh. C; DA52. Following an exchange of correspondence on this issue, Marjorie S. Nordlinger, a staff attorney in the NRC's Office of the General Counsel, notified MIT's counsel of her opinion that "NRC indemnity should not be invoked in this case" insofar as "the Price-Anderson liability system did not cast the government as insurer of personal harms from medical administrations or from medical treatments without informed consent, but as indemnifier for unexpected but possible public dangers associated with the operation of nuclear reactors or materials used to fuel them." DPFUF ¶¶ 17-18; MIT Compl. ¶¶ 44-45 & Exh. D; DA60-61. As the case approached trial, Ms. Nordlinger repeated this opinion in response to similar inquiries from Dr. Sweet's counsel. DPFUF ¶¶ 34, 37-39; DA66-68, 71-76.

A jury was impaneled in the Heinrich case on September 7, 1999. DPFUF ¶ 36; Sweet Compl. ¶ 17; MIT Compl. ¶ 53. Prior to the start of trial, on September 9, 1999, the court dismissed the claims of the two named plaintiffs allegedly treated at Brookhaven National Laboratory, Joseph Mayne and Walter Carl Van Dyke. DPFUF ¶ 36; Heinrich v. Sweet, 118 F. Supp.2d 73 n.1 (D. Mass. 1999); DA43.

On October 15, 1999, the jury returned verdicts for the remaining two plaintiffs (Evelyn Heinrich and Henry M. Sienkewicz, Jr.) against Dr. Sweet and Mass General for wrongful death and negligence. DPFUF ¶ 41; DA80-82; Sweet Compl. ¶ 17; MIT Compl. ¶¶ 53-54; Heinrich v. Sweet, 83 F. Supp.2d 214, 216 n.1 (D. Mass. 2000). MIT was found not liable on all claims. Id. The United States was also dismissed as a defendant pursuant to the Government contractor exception to the Federal Tort Claims Act, 28 U.S.C. § 2671. DPFUF ¶ 43; 83 F. Supp.2d at 224. In total, the jury held Dr. Sweet individually liable in the amount of $1,750,000 (wrongful death),

and jointly and severally liable with Mass General in the amount of $3,000,000 (negligence). DPFUF ¶ 41; Sweet Compl. ¶ 17; 83 F. Supp.2d at 216 n.1.

Dr. Sweet's counsel forwarded the Heinrich jury verdict to the NRC by letter dated October 20, 1999, indicating, among other things, that "defense counsel are drafting post-trial motions which will be filed this week" and that "[w]e are strongly optimistic that punitive damages will be eliminated entirely and that the compensatory damages will be either eliminated or reduced." DPFUF ¶ 42; DA77. During these post-trial proceedings, Dr. Sweet filed his complaint in this Court on May 11, 2000, and MIT filed its complaint on May 22, 2000.

The Heinrich court entered judgment in favor of Ms. Heinrich and Mr. Sienkewicz and against Dr. Sweet and Mass General on September 29, 2000. DPFUF ¶ 46; DA83-84. In so doing, the court granted the post-trial motions of Dr. Sweet and Mass General for reduction of the jury verdict for wrongful death, and denied Mass General's motion for judgment as a matter of law on the defense of charitable immunity. DPFUF ¶¶ 44-45; Heinrich v. Sweet, 118 F. Supp.2d 73, 81 (D. Mass. 1999). On the former issue, the court held that the plaintiffs' claims for wrongful death arose in 1961 and, applying the provisions of the applicable 1961 Massachusetts wrongful death statute, limited plaintiffs' damages to $20,000. DPFUF ¶ 44; 118 F. Supp.2d at 81. In its decision denying the defense of charitable immunity, the court found that

> during the treatment of both Heinrich's and Sienkewicz's decedents, Sweet had actual knowledge of the imprecision of the localization of the boron injections to the cancerous brain tissue and the related imprecision of the neutron radiation, with the result that unacceptably high degrees of radiation necrosis were occurring in these and other of his patients. In short, Sweet well knew during his care of these patients that his BNCT treatments were not helping them, and, in fact, were causing severe side effects unrelated to the progressive effect of the fatal brain tumors. He

> pressed ahead anyway, believing in complete good faith that such experimentation on dying patients held out hope for other cancer victims. However praiseworthy his goal, his conduct with respect to the patients involved here was, as the jury found, negligent. . . . .

DPFUF ¶ 45; 118 F. Supp.2d at 90-91.

In sum, the court found Dr. Sweet individually liable in the amount of $40,000 (wrongful death), and jointly and severally liable with Mass General in the amount of $750,000 (negligence). DPFUF ¶ 46; DA83-84. The court also denied class certification and thus severed the claims of a later-added plaintiff (Marc Oddo) to proceed as an independent action. Id.; 118 F. Supp.2d at 73 n.1.

On October 23, 2000, the court stayed execution of the judgments pending appeal. DPFUF ¶ 47; DA48-49. Dr. Sweet and Mass General appealed from this judgment on December 6, 2000. Id.

SUMMARY OF ARGUMENT

Regarding plaintiffs' claims for declaratory relief, it has long been recognized that this Court and its predecessor courts do not have the general equitable powers of a Federal district court to grant prospective relief. Further, it is similarly established that the Declaratory Judgment Act, 28 U.S.C. § 2201, does not vest this Court with jurisdiction to award the type of declaratory relief sought by plaintiffs. Accordingly, plaintiffs claims for declaratory relief, which are grounded upon 28 U.S.C. § 2201, should be dismissed for lack of jurisdiction.

Additionally, defendant is entitled to summary judgment upon Dr. Sweet's indemnification claim regarding his liability in the Heinrich suit. Under the plain terms of the MIT indemnity agreement, Price-Anderson indemnification requires that "public liability" arise

out of or result from a "nuclear incident," and not simply any type of incident somehow related to the operations of the licensed facility. Here, however, no such "nuclear incident" is present. According to the Heinrich complaint, the MIT nuclear reactor performed without incident with respect to the BNCT experiments -- i.e., there is no suggestion but that the MIT reactor furnished, safely and as expected, the desired types and quantity of radiation for Dr. Sweet's experiments. Rather than stemming from a "nuclear incident," the liability that was both alleged and found in Heinrich resulted from Dr. Sweet's medical decision to continue BNCT experiments when there was no reasonable basis to believe that his patients would receive any therapeutic value. As a result, the liability alleged and found against Dr. Sweet did not arise out of a "nuclear incident" and, thus, is not the type of "public liability" for which Federal indemnification is required under the MIT indemnity agreement or the Price-Anderson Act.

Further, defendant is entitled to summary judgment upon the indemnification claims of both Dr. Sweet and MIT under the MIT indemnity agreement for the costs of investigating and defending the Heinrich suit. By its terms, Article III, paragraph 3, provides for indemnification only with respect to the reasonable costs of investigating, settling and defending "claims for public liability." For the reasons described above, however, the claims asserted in the Heinrich suit did not constitute claims for "public liability". In any event, the provision upon which plaintiffs rely for indemnity (Article III, paragraph 3, of the MIT indemnity agreement) is no longer a valid and enforceable contractual term. Rather, amendments to the Price-Anderson Act in 1975 excluded the costs of investigating, settling, and defending suits for public liability from the Federal layer of indemnity.

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' Claims For Declaratory Relief

As noted above, a significant portion of the relief sought in this case is declaratory in nature. Specifically, Dr. Sweet seeks a judgment declaring that the United States is obligated to indemnify Dr. Sweet against "his defense costs and any potential liability in the case (at least) of any claim brought by or on behalf of any patient who received BNCT at Brookhaven or MIT . . . ." Sweet Compl., Prayer for Relief ¶¶ A-C. Similarly, MIT requests a judgment declaring that the United States is obligated to indemnify MIT against the "reasonable costs of investigating and defending the claims" asserted in Heinrich as well as "any future public liability arising out of the BNCT clinical trials." See MIT Compl., Prayer for Relief ¶¶ C-D. Both plaintiffs assert that this Court has jurisdiction to award declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Sweet Compl. ¶ 4; MIT Compl. ¶ 4.

It has long been recognized, however, that this Court and its predecessor courts do not "have the general equitable powers of a district court, to grant prospective relief." Bowen v. Massachusetts, 487 U.S. 879, 905 (1988). Further, it is similarly established that the Declaratory Judgment Act does not vest this Court with jurisdiction to award the type of declaratory relief sought by plaintiffs. United States v. King, 395 U.S. 1, 3-4 (1969) ("There is not a single indication in the Declaratory Judgment Act or its history that Congress, in passing that Act, intended to give the Court of Claims an expanded jurisdiction that had been denied to it for nearly a century."). Accordingly, defendant respectfully requests the Court to dismiss for lack of jurisdiction Count III of the complaint in Case No. 00-274C and Count II of the complaint in Case No. 00-292C.

II. Summary Judgment Is The Appropriate Means By Which To Resolve This Case

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); Celotex Corp. v. United States, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Sweats Fashions, Inc. v. Pennill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987). Thus, when the record as a whole would not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); accord Celotex, 477 U.S. at 327. A fact is material if it could affect the outcome of the suit, and its materiality is determined by the substantive law applicable to the case. E.g., Spirit Leveling Contractors v. United States, 19 Cl. Ct. 84, 89 (1989).

Initially, we need only inform the Court of the basis for our motion and identify those portions of the pleadings, discovery responses, and our affidavits that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. We need not support our motion by negating plaintiffs' claims or by demonstrating the absence of a genuine issue. We only must show "that there is an absence of evidence to support [plaintiffs'] case," i.e., an absence of evidence as to a material fact upon which plaintiffs bear the burden of proof. Celotex, 477 U.S. at 323-25; Sweats Fashions, 833 F.2d at 1563; DJ Manufacturing Corporation v. United States, 86 F.3d 1130 (Fed Cir. 1996). We are entitled to summary judgment if plaintiffs then fail to come forward with sufficient evidence to establish that there is a genuine issue for trial. Anderson, 477 U.S. at 247-48; Sweats Fashions, 833 F.2d at 1563.

Here, the essence of MIT's complaint is that the "United States, after due demand, has in breach of its contract with MIT, failed to indemnify MIT for the reasonable costs it incurred in investigating and defending Heinrich v. Sweet." MIT Compl. ¶ 58 (Count I). Similarly, in Count I of his complaint, Dr. Sweet alleges that the "United States is liable, under the MIT Indemnity Agreement, to indemnify Dr. Sweet against his costs in defending the Heinrich and Sienkewicz claims, and against any liability he may have on those claims upon the entry of judgment." Sweet Compl. ¶ 25. For the reasons discussed below, defendant is entitled to summary judgment upon these breach of contract claims because there is no genuine issue as to any material fact and we are entitled to judgment as a matter of law.

III. Defendant Is Entitled To Summary Judgment Upon Dr. Sweet's Indemnification Claim For Public Liability

As detailed above, the Heinrich court found Dr. Sweet individually liable upon the claims of plaintiffs Heinrich and Sienkewicz in the amount of $40,000 (wrongful death), and jointly and severally liable with Mass General in the amount of $750,000 (negligence). MIT was found not liable, and thus does not assert an indemnification claim for "public liability".

In support of his claim regarding the amounts for which he was found liable in Heinrich, Dr. Sweet asserts that, under the MIT indemnity agreement, the AEC agreed to "indemnify and hold harmless the licensee [MIT] and other persons indemnified, as their interests may appear, from public liability." Sweet Compl. ¶ 9.b. & Exh. C at 3 (Article III, paragraph 1). The essence of Dr. Sweet's complaint is that, as an "other person indemnified," the liability found against him in the Heinrich suit constitutes "public liability" for which Federal indemnification is required. In this regard, Dr. Sweet emphasizes that, in one of its pre-trial rulings, the Heinrich court held

that the MIT indemnity agreement "covers" the BNCT treatments at issue in the case. Sweet Compl. ¶ 21 (citing Heinrich v. Sweet, 62 F. Supp.2d 282, 298-99 (D. Mass. 1999)).

Assuming but not conceding that Dr. Sweet qualifies as an "other person indemnified" and has standing to sue under MIT's indemnity agreement, defendant is nevertheless entitled to summary judgment on this issue because, as a matter of law, the liability found in Heinrich against Dr. Sweet does not constitute the type of "public liability" for which Price-Anderson indemnification is required. As explained below, the Heinrich court's preliminary ruling on this issue is contrary to well-settled canons of contract interpretation, the plain meaning of the MIT indemnity agreement, as well as the purpose and legislative history behind the Price-Anderson Act itself.

A. Principles Of Contract Interpretation

The fundamental objective of contract interpretation is to ascertain the parties' intent and effectuate the purpose of their agreement. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir.1991) (citing Arizona v. United States, 216 Ct. Cl. 221, 575 F.2d 855, 863 (1978)). Consequently, contract interpretation begins with the plain language of the agreement. Gould, 935 F.2d at 1274; McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1435 (Fed. Cir.1996). The words of the contract are to be understood according to their "ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." Harris v. Department of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir.1998). Toward this end, examination of the circumstances in which the parties exchanged their promises, such as evidence of prevailing trade practice and custom, may illuminate the context for the parties' agreement and, thus, the meaning of its terms. Metric Constructors, Inc. v. National Aeronautics & Space Admin., 169

F.3d 747, 751 (Fed. Cir.1999) (citing Gholson, Byars, & Holmes Constr. Co. v. United States, 351 F.2d 987, 999 (Ct. Cl. 1965)).

More generally, contractual terms must be read as a harmonious, integrated whole, interpreting the provisions in their larger contractual context, rather than in isolation. See Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 351 F.2d 972, 979 (1965). Thus, an interpretation that accommodates all contract terms is favored over one that results in a conflict between terms. Granite Constr. Co. v. United States, 962 F.2d 998, 1003 (Fed. Cir.1992), cert. denied, 506 U.S. 1048 (1993); Hol-Gar Mfg. Corp., 351 F.2d at 979. A corollary of this rule is that an interpretation that renders a contract term nugatory will be rejected. United States v. Johnson Controls, Inc., 713 F.2d 1541, 1555 (Fed. Cir. 1983). See also Arizona v. United States, 216 Ct. Cl. 221, 575 F.2d 855, 863 (1978) (court will avoid interpretation that renders a portion of the contract "useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.").

B. The Heinrich Suit Did Not Present Claims Arising Out Of Or Resulting From A "Nuclear Incident"

Under these principles, and when the particulars of the MIT indemnity agreement are considered, it is manifest that the claims asserted in Heinrich did not constitute the type of claims to which Price-Anderson indemnification applies. Under the agreement, the only type of liability eligible for indemnification is "public liability," a statutory term of art specifically defined to mean "any legal liability arising out of or resulting from a nuclear incident . . . ." Sweet Compl., Exh. C at 2. Thus, under the plain terms of the agreement, Price-Anderson indemnification requires that the liability in question arise out of or result from a "nuclear incident," and not

simply any type of incident somehow related to the operations of the licensed facility.

Here, however, no such "nuclear incident" is present. Much to the contrary, according to the Heinrich complaint, the MIT nuclear reactor performed without incident with respect to the BNCT experiments -- i.e., there was no suggestion but that the MIT reactor furnished, safely and as expected, the desired quantities of radiation for Dr. Sweet's experiments. Instead, in the plaintiffs' view, the wrong committed was that the BNCT experiments were performed at all. It is thus not surprising that neither the jurisdiction nor the merits of the claims presented in the Heinrich complaint were expressly based upon a "nuclear incident" or the Price-Anderson Act itself. Indeed, when the issue of Price-Anderson's applicability arose in the case, the Heinrich plaintiffs vigorously disputed that their claims involved a "nuclear incident" and further stressed, for example, that many of their claims -- i.e., those based solely upon toxic boron injections -- did not even involve radioactive materials. Heinrich v. Sweet, 62 F. Supp.2d at 297-98 & n.2.

Rather than stemming from a "nuclear incident," the liability that was both alleged and found in Heinrich resulted from a fundamentally distinct and calculated event: Dr. Sweet's medical decision to continue BNCT experiments when there was no reasonable basis to believe that his patients would receive any therapeutic value. Although the legal theories asserted were many and varied, the singular factual predicate of the complaint was the alleged use of the plaintiffs' decedents as

> human guinea pigs, without their consent, in a series of extremely dangerous, painful and unproven medical experiments for which there was no reasonable basis to believe that the decedents would receive any therapeutic value.

DPFUF ¶ 21; Sweet Exh. D at 3. These allegations -- which in no way expressly refer to or

depend upon a "nuclear incident" in particular or even the Price-Anderson Act generally -- were subsequently borne out at trial, at least with respect to plaintiffs Heinrich and Sienkewicz. For example, in its post-trial opinion, the court found that

> during the treatment of both Heinrich's and Sienkewicz's decedents, Sweet had actual knowledge of the imprecision of the localization of the boron injections to the cancerous brain tissue and the related imprecision of the neutron radiation, with the result that unacceptably high degrees of radiation necrosis were occurring in these and other of his patients. In short, Sweet well knew during his care of these patients that his BNCT treatments were not helping them, and, in fact, were causing severe side effects unrelated to the progressive effect of the fatal brain tumors. He pressed ahead anyway, believing in complete good faith that such experimentation on dying patients held out hope for other cancer victims. However praiseworthy his goal, his conduct with respect to the patients involved here was, as the jury found, negligent. . . . .

DPFUF ¶ 45; Heinrich v. Sweet, 118 F. Supp.2d 73, 90-91 (D. Mass. 1999). In short, Dr. Sweet's liability stemmed from his own medical malpractice; a nuclear incident was neither alleged nor found.

In this light, while the conduct that formed the basis of Dr. Sweet's liability in Heinrich may amount to some type of "incident," it does not involve a nuclear incident. The fact that a portion of the challenged conduct took place at a licensed nuclear facility was entirely inconsequential to the merits of the claims presented in Heinrich. Indeed, as the Heinrich court observed in one of its pre-trial rulings, "what separates the Plaintiffs' allegations regarding the use of radiation treatment from the type of radiation therapy that occurs every day in hospitals is that the various defendants here are alleged affirmatively to have misrepresented the therapeutic worth of the treatment." Heinrich v. Sweet, 49 F. Supp.2d 27, 41 (D. Mass.1999). Thus, because the liability alleged and found against Dr. Sweet did not arise out of a "nuclear incident," it is not

the type of "public liability" for which Federal indemnification is required under the MIT indemnity agreement or the Price-Anderson Act.

Moreover, the Heinrich court's preliminary ruling on this issue does not require a different result. See Heinrich, 62 F. Supp.2d at 298-99 (citing Gilberg v. Stepan Co., 24 F. Supp. 2d 325 (D. N.J. 1998)). Notably, the Heinrich court emphasized that its ruling was based "only on a preliminary record" and was "intended in no way to bind any subsequent tribunal faced with the task of determining whether the United States in fact must indemnify a judgment rendered against the private defendants." 62 F. Supp.2d at 298. For these reasons, the court did not squarely hold that the MIT indemnity agreement required indemnification but, rather, "presumptively" ruled that the agreement "may eventually be interpreted to cover the challenged conduct." Id. As explained below, however, a more thorough analysis based upon the express terms of the MIT indemnity agreement as well as the legislative history behind the Price-Anderson Act demonstrates that the conduct challenged in Heinrich is not covered by the Act's indemnification scheme.

First, the Heinrich court failed to recognize that, as defined in the Act and the indemnity agreement, a "nuclear incident" is expressly predicated upon an "occurrence," a term historically used in the insurance industry to denote the type of "triggering event" that must happen for insurance coverage to apply. Specifically, the MIT indemnity agreement defines "nuclear incident" as "any occurrence or series of occurrences at the location or in the course of transportation causing 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, explosive, or other hazardous properties of the radioactive material." DPFUF ¶ 9; Sweet Exh. C

at 1 (emphasis added). In turn, an "occurrence" is a term of art used in the insurance industry to specify an unexpected cause of loss. See 9 Lee R. Russ & Thomas F. Segalla, Couch on Insurance §§126.25, 126.29 (3d ed. 1999) ("occurrence" means "an accident, including a continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."). Accord 7A J. Appleman, Insurance Law and Practice § 4508.02, p. 362 (Berdal ed. 1979); Robert E. Keaton and Alan L. Widiss, Insurance Law § 5.4(g) (1988). This evidence further supports the conclusion that Dr. Sweet's liability, which was based solely upon his knowing decision to continue BNCT treatments after their therapeutic value had ended, does not constitute the type of "public liability" for which Price-Anderson indemnification is required. See Metric Constructors, 169 F.3d at 751 ("courts should use evidence of trade practice and custom not only to determine the meaning of an ambiguous provision, but to determine whether a contract provision is ambiguous in the first instance.").[7]

Second, in its preliminary ruling, the Heinrich court failed to consider the ample legislative history showing that, by enacting the Price-Anderson Act and the statutory term "nuclear incident," Congress sought to provide indemnification for uninsurable risks related to unexpected nuclear reactor failures, malfunctions, and the like, rather than medical malpractice

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[7] Other portions of the MIT indemnity agreement expressly define the term "occurrence" as involving the unintended release of radioactive material. Specifically, the statutory concept of an "extraordinary nuclear occurrence" ("ENO"), which was added to the Act in 1966 and thereafter incorporated into the MIT indemnity agreement, Sweet Exh. C at 10, is defined as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement" in amounts that the NRC or the Secretary of Energy determine will result in "substantial" damages to persons or property offsite. Pub. L. No. 89-645, § 1, 80 Stat. 891 (emphasis added).

claims related to the practice of nuclear medicine.

As explained more fully above, the central purpose behind Price-Anderson's enactment was to address industry concerns that a nuclear accident, although extremely unlikely to occur, could potentially result in extraordinarily extensive and, thus, uninsurable damage to the public. For example, the Joint Committee on Atomic Energy described the problem before Congress as follows:

> All of the new reactors which are being built or planned have incorporated into them every conceivable device to see that they are safe. The reactors themselves are constructed with immediate shielding designed to minimize blast damage. They also have gas-tight fragment-proof containers of concrete and steel built around the, such as the sphere which was built around the experimental submarine reactors at West Milton, N.Y. The possibility of dangerous materials escaping and causing damage outside the reactor facilities is infinitesimal. However, the possibility does still exist.
>
> . . .
>
> Since radioactive materials are many times more toxic and poisonous than other substances, the companies which are interested in participating in the reactor program are hesitant about assuming the liabilities which could ensue in the remote event of a reactor meltdown with the resulting release of fission products and radioactive materials into the air. At this stage in the development of atomic energy these companies do not envision any profit for many years from the research and development efforts that have to be put into the program. Yet, in the unlikely event of a runaway reactor they may be subjected to damage claims which have been estimated in the testimony before the committee at sums ranging from several hundred thousand dollars for large reactors to sums up to a billion dollars, and somewhat beyond in a few estimates.

S. Rep. 296 85th Cong., 1st Sess. 1957, reprinted in 1957 U.S.C.C.A.N. at 1804. See also Duke Power, 438 U.S. at 63-64 ("Private industry and the AEC were confident that such a disaster

would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. Thus, while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation.").

As a result, hearings before the Joint Committee in 1956 and 1957 focused upon two overarching concerns: reactor safety and the insurability of reactor operations. See, e.g., S. Rep. 296 85th Cong., 1st Sess. 1957, reprinted in 1957 U.S.C.C.A.N. 1803, at 1811 ("[T]he Commission has a continuing duty to make available for industrial study as much of the information it now has, or will accumulate, which bears on the problems of safe operation and insurability of reactors."); id. at 1814 ("In order to promote the insurability of such enterprises and increase insurance capacity, it is believed absolutely necessary that the present Reactor Safeguards Committee, or similar committee, continue to function and that stringent safety standards be maintained as a condition precedent to licensing under the 1954 Act.").

Consequently, the Act's legislative history shows convincingly that, by defining "public liability" in terms of a "nuclear incident," it was Congress' intent to provide indemnification for uninsurable risks related to unexpected nuclear reactor failures, malfunctions, and the like, rather than general medical malpractice claims related to the practice of nuclear medicine. The many references to reactor "accidents" or "incidents" (the terms are used interchangeably), "runaway reactors," "inadvertent" exposures, and "undetected" leaks, bear this out. See, e.g., S. Rep. 296 85th Cong., 1st Sess. 1957, reprinted in 1957 U.S.C.C.A.N. at 1817 ("While most incidents will be happenings which can be pinpointed in time -- such as a runaway reactor or an inadvertent

exposure to radiation -- it was not thought that an incident would necessarily have to occur within any relatively short period of time. For instance, the steady exposure to radiation, such as from an undetected leak of radioactive materials from a storage bin, could constitute an incident.").[8]

Conversely, the legislative history is devoid of any similar reference or suggestion that Congress was considering coverage for harms from misjudgments or malpractice in the medical uses of radiological materials where no reactor malfunction is involved. Indeed, inclusion of coverage of medical decisions and treatment would fly in the face of congressional concern about the cost to the Government of the indemnification provisions, which necessarily depended upon the extraordinarily remote likelihood of occurrence. For example, Congress could not have had in mind the type of medical applications presented in Heinrich, with its much greater possibilities for misdiagnosis, misapplication or other malpractice, else it could not have cited with confidence a Commission finding "that most pessimistic of the probabilities involved lead to the estimate there would be less than 1 chance in 50 million of any one person getting killed in any year in a reactor incident." See S. Rep. 296 85th Cong., 1st Sess. 1957, reprinted in 1957 U.S.C.C.A.N. at 1804 (emphasis added).

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[8] See also id. at 1803 (quoting testimony of AEC Chairman Strauss regarding "Commission's continuing effort on a broad front to understand and resolve this problem of possible reactor hazards so that we may proceed with an expanding atomic-energy industry with full confidence that there will be few reactor accidents . . ."); at 1804 (noting that the "estimates of experts on the occurrence of nuclear incidents at major reactors varied from those who were unable to be expressed in numbers to a range between 1 chance in 100,000 per year to 1 chance in a billion per year for such accidents; and that "[t]here was no disagreement that the probability of major reactor accidents was exceedingly low."); at 1813 ("[I]t was felt that the Congress should not only try to give financial protection to innocent members of the public who might suffer in the unexpected case of a runaway reactor, but that the Congress should also provide all possible statutory requirements for assuring that reactors should be as safe as possible.")

Indeed, Congress recognized it was the scant likelihood of a nuclear event, but the magnitude of injury were it to occur, that made it impossible to purchase adequate insurance in the marketplace. See id. at 1810 ("The chance that a reactor will run away is too small and the foreseeable possible damages of the reactor are too great to allow the accumulation of [an insurance] fund which would be adequate."). Had Congress contemplated covering physicians, hospitals, and other deliverers of medical services, it likely would have similarly explored in hearings the availability and cost of medical malpractice insurance. Yet no such consideration appears and we know of no notion that was ever advanced that medical malpractice insurance was unavailable and therefore ought to be included in within the Price-Anderson scheme in order to make medical uses a practical possibility. These and other portions of legislative history demonstrate beyond doubt that the Price-Anderson Act was never intended to apply to situations involving the contained application of nuclear medicine. See In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995).[9]

In sum, defendant is entitled to summary judgment upon Dr. Sweet's indemnification

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[9] For example, In re Cincinnati involved allegations that, between 1960 and 1972, two Cincinnati hospitals conducted human radiation experiments upon terminal cancer patients without the patients' informed consent. 874 F. Supp. at 803-04. The complaint had alleged in one count that the experiments constituted "nuclear incidents" causing injury, actionable under the Price-Anderson Act. Id. at 830-31. The court noted, however, that "liability under the Price-Anderson Act turns on the existence of a 'nuclear incident,' which does not occur when there is no unintended escape or release of nuclear energy." Id. at 832. The experiments, the court explained, involved the application of nuclear medicine, namely the operation of a "Cobalt-60 Teletherapy Unit," which "was employed as intended and cannot give rise to a claim under the Price-Anderson Act." Id. It was thus held that the allegations failed to state "the existence of a nuclear incident or occurrence that fits within the legislative history of the Price-Anderson scheme." Id. at 832. Here, as in In re Cincinnati, the BNCT trials were employed as intended and thus cannot give rise to a claim for Price-Anderson indemnification. Cf. Acuna v. Brown & Root, 200 F.3d 335, 340 (5th Cir. 2000) (citing In re Cincinnati for the proposition that radiation injuries resulting from medical experimentation do not constitute "nuclear incident").

claim regarding the amounts for which he was found liable in Heinrich because, as a matter of law, the claims asserted in Heinrich were not claims arising out of or resulting from a "nuclear incident" and thus did not constitute claims for "public liability" for which Federal indemnification is required.[10]

IV. Defendant Is Entitled To Summary Judgment Upon Plaintiffs' Indemnification Claims For The Costs Of Investigating And Defending The Heinrich Suit

In addition to his claim for public liability indemnification, Dr. Sweet seeks an award of damages for his "defense costs in the Heinrich Civil Action". Sweet Compl., Prayer for Relief ¶¶ A-C. Similarly, MIT seeks an award of damages for its "reasonable costs of investigating and defending the claims" plus interest. MIT Compl., Prayer for Relief ¶¶ C-D. In both instances, plaintiffs rely upon Article III, paragraph 3, of the MIT indemnity agreement, which, in its original form, provided as follows:

> The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from the reasonable costs of investigating, settling and

[10] Even assuming that Dr. Sweet's liability in Heinrich was premised upon some type of "occurrence," the occurrence must nevertheless take place "at the location" of the reactor and the damage in question must stem from the hazardous properties of "radioactive material". DPFUF ¶ 9; Sweet Exh. C at 1; MIT Exh. B at 1 (emphasis added). The experiments covered by the Heinrich complaint, however, included "experiments where patients were injected with boron, or some other potential neutron capturing substance, but were not exposed to slow neutron radiation . . . ." DPFUF ¶ 30; Sweet Exh. D at 26 (emphasis added). In this regard, the complaint alleged that, in addition to receiving BNCT, George Heinrich received two intravenous boron injections on December 15, 1960. DPFUF ¶ 25; Sweet Exh. D at 8-9. These treatments occurred at Mass General, not the MIT reactor, and did not involve BNCT. Id. Because the boron was not alleged to be radioactive, it follows that any injuries caused to Mr. Heinrich from the injections could not arise out of or result from radioactive material. Moreover, the boron injections were performed at Mass General and cannot satisfy the requirement that the occurrence take place "at the location" of the MIT reactor. Thus, in addition to the reasons detailed above, Dr. Sweet's indemnification claim must also fail to the extent that the his liability in Heinrich was based upon conduct solely involving injections of non-radioactive substances.

defending claims for public liability.

DPFUF ¶ 7; Sweet Exh. C at 4; MIT Exh. B at 4. As shown below, however, defendant is entitled to summary judgment upon this issue because the claims asserted in the Heinrich suit did not constitute claims for public liability and, in any event, Article III, paragraph 3, is no longer a valid and enforceable contractual term.

A. The Claims Asserted In The Heinrich Suit Did Not Constitute Claims For Public Liability

As an initial matter, by its terms, Article III, paragraph 3, provides for indemnification only with respect to the reasonable costs of investigating, settling and defending "claims for public liability." As shown above, however, the claims asserted in the Heinrich suit did not constitute claims for public liability. Plainly, because plaintiffs have not shown their responsibility for "public liability," they cannot demonstrate entitlement to indemnification for the costs of defending such claims.

B. Article III, Paragraph 3, Of The MIT Indemnity Agreement Is Unenforceable As A Matter Of Law

In any event, even assuming plaintiffs have demonstrated some degree of "public liability," their claims still fail insofar as Article III, paragraph 3, is no longer a valid and enforceable contractual term.

As explained more fully above, in 1975, Congress extended the Price-Anderson Act with several amendments designed to "provide for the phaseout of governmental indemnity as a source of funds for public remuneration in the event of a nuclear incident." Pub. L. 94-197, 89 Stat. 1111 (December 31, 1975). Toward this end, the 1975 amendments modified sections 170(c), (d) and (k) of the Act to exclude the "cost of investigating and settling claims and

defending suits for damage" from the "aggregate indemnity for all persons indemnified in connection with each nuclear incident . . . ." Pub. L. 94-197, §§ 4(b), 5(b), 10(b), 89 Stat. at 1113-14. The purpose of the so-called "Hathaway Amendments" was to "ensure that government indemnity money ended up in the hands of victims of nuclear incidents, and was not diverted to attorney's fees and other costs." In re Regents of the University of California, CLI-97-5, 45 NRC 358, 362 (1997) (citing Damage Claims Under the Atomic Energy Act, 1 U.S. Op. OLD 157 (1977)) (Hathaway Amendments exclude the "costs of investigation, settlement, and defense of claims under the remaining Federal indemnity."); DA30-33, 34, 36. The Hathaway Amendments thus withdrew the authority for Article III, paragraph 3, and the provision itself was deleted from the standard form indemnity agreement applicable to nonprofit educational licensees. See, e.g., 10 C.F.R. § 140.95 (1985); compare DA21 with DA21.[11]

A review of NRC records to date does not indicate that the parties similarly deleted Article III, paragraph 3, from the MIT indemnity agreement. Nevertheless, even if the parties did not undertake that formality, such a ministerial act occurred by operation of law since, pursuant to Article V of the agreement, the parties agreed that they would "enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission." DPFUF ¶13; Sweet Exh. C at 5; MIT Exh. B at 5 (derived from 27 Fed. Reg. at 2888; 10 C.F.R.

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[11] See also 49 Fed. Reg. at 11148 ("although the cost of investigating the settling liability claims and defending suits for damage is retained as part of financial protection, i.e., both primary and secondary insurance, the final rule modifies certain sections of 10 CFR Part 140 in conformance with Pub. L. 94-197 to exclude these costs from government indemnity. . . ."); 6 Am. Jur. 2d Atomic Energy § 5 (1963 & Supp. 1998) (Pub. L. 94-197 "designed to accomplish its purposes, among other things, excluding the costs of investigating and settling claims and defending suits for damage from those matters for which indemnification is furnished.").

§ 140.79 (1963) (Appendix E)). Otherwise, Article III, paragraph 3, would be rendered void and unenforceable because it conflicts with the statutory requirement that the cost of investigating, settling, and defending claims be excluded from the Federal layer of indemnity. See American Airlines, Inc. v. Austin, 75 F.3d 1535, 1538 (Fed. Cir. 1996) ("Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void.") (citing Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1150-53 (Fed. Cir.1983); Yosemite Park v. United States, 217 Ct. Cl. 360, 582 F.2d 552, 560 (1978)).

Moreover, the 1988 amendments to the Price-Anderson Act do not change this result. Although those provisions amended the Act to include "such legal costs of the licensee as are approved by the Commission" within the "aggregate indemnity for all persons indemnified in connection with each nuclear incident . . . ." Pub. L. 100-408, § 8, 102 Stat. at 1074 (42 U.S.C. § 2014(k)(1)), this provision applies only "with respect to nuclear incidents occurring on or after" August 20, 1988 (i.e., the effective date of the amendments). Thus, the 1988 amendments do not apply to the allegations contained in the Heinrich suit. See Pub. L. 100-408, § 20, 102 Stat. at 1084. In any event, no party has submitted its legal bills to the Commission for approval, a statutory prerequisite to any payments of legal costs. See In re Regents of the University of California, 45 NRC at 364-66; DA34, 37-38.

Defendant is thus entitled to summary judgment upon plaintiffs' indemnification claims for the costs of investigating and defending the Heinrich suit because such claims did not constitute claims for "public liability" and, in any event, Article III, paragraph 3, is no longer a valid and enforceable contractual term.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss, in part, and motion for partial summary judgment should be granted.

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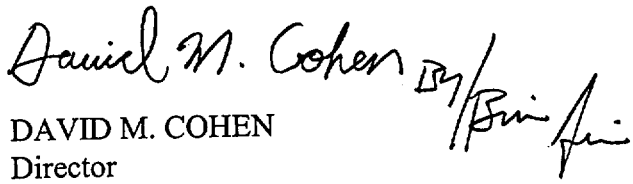
Assistant Attorney General



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January 12, 2001

APPENDIX

THE NATIONAL ARCHIVES OF THE UNITED STATES 1934

FEDERAL REGISTER

VOLUME 22 NUMBER 175

Washington, Wednesday, September 11, 1957

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TITLE 2—THE CONGRESS

ACTS APPROVED BY THE PRESIDENT

CROSS REFERENCE: A listing of current public laws approved by the President appears at the end of this issue.

TITLE 3—THE PRESIDENT

PROCLAMATION 3199

AMERICAN EDUCATION WEEK, 1957

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS education has advanced the national welfare by enriching our culture, by providing a surer foundation for our freedoms, and by helping to prepare our citizens for the demands of each new age; and

WHEREAS our educational institutions have lifted the people of each generation to higher levels of personal living and have trained them for greater service to their fellow men; and

WHEREAS Americans are proud of their educational system and have shown their determination to widen the road to opportunity by maintaining the highest standards of scholarship:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby designate the period from November 10 to November 16, 1957, as American Education Week, and I urge our people to enter fully into its observance. Let them demonstrate their appreciation of the work of our Nation's teachers, and let them show their active support for every program designed to improve our schools and colleges, which are firmly engaged in building a better and a stronger Nation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this sixth day of September in the year of our Lord nineteen hundred and fifty-seven, and of the Independence of the United States of America the one hundred and eighty-second. [SEAL]

DWIGHT D. EISENHOWER

By the President:

JOHN FOSTER DULLES,
Secretary of State.

[F. R. Doc. 57-7489; Filed, Sept. 10, 1957; 10:38 a. m.]

EXECUTIVE ORDER 10728

ESTABLISHING THE PRESIDENT'S COMMITTEE ON FUND-RAISING WITHIN THE FEDERAL SERVICE

WHEREAS it has been the traditional policy of the executive branch of the United States Government to permit certain national voluntary health and welfare agencies and certain other voluntary agencies to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations; and

WHEREAS such solicitations should be conducted so as to afford an opportunity for true voluntary giving to such agencies for charitable and other purposes; and

WHEREAS it is essential that solicitations for these voluntary agencies be conducted in such manner as will occasion minimum interruption of Government functions; and

WHEREAS it is desirable that solicitations be conducted on a basis of uniform standards:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

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SEPTEMBER 11

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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[B. A. I. Order 383, Revised, Amdt. 94]

PART 76—HOG CHOLERA, SWINE PLAGUE, AND OTHER COMMUNICABLE SWINE DISEASES

SUBPART B—VESICULAR EXANTHEMA

CHANGES IN AREAS QUARANTINED

Pursuant to the provisions of sections 1 and 3 of the act of March 3, 1905, as amended (21 U. S. C. 123, 125), sections 1 and 2 of the act of February 2, 1903, as amended (21 U. S. C. 111–113, 120), and section 7 of the act of May 29, 1884, as amended (21 U. S. C. 117), § 76.27, as amended, Subpart B, Part 76, Title 9, Code of Federal Regulations (22 F. R. 3005, 4377, 6753, 6910), which quarantines certain areas because of vesicular exanthema, a contagious, infectious, and communicable disease of swine, is hereby further amended in the following respects:

1. Subdivision (iii) of subparagraph (2) of paragraph (c), relating to Bristol County in Massachusetts, is deleted.

2. Subdivisions (i), (ii), and (iii), of subparagraph (3) of paragraph (c), relating to Essex County in Massachusetts, are deleted.

3. Subdivision (i) of subparagraph (4) of paragraph (c), relating to Hampden County in Massachusetts, is amended to read:

(i) That part of the town of Agawam lying north of Suffield Street, south and west of Springfield and Miller Streets, and east of Cooper Street.

4. Subdivisions (iii) and (iv) of subparagraph (4) of paragraph (c), relating to Hampden County in Massachusetts, are deleted.

5. Subdivision (iv) of subparagraph (5) of paragraph (c), relating to Middlesex County in Massachusetts, is deleted.

6. Subdivisions (i), (ii), and (iii), of subparagraph (6) of paragraph (c), relating to Norfolk County in Massachusetts, are deleted.

7. Subdivision (i) of subparagraph (7) of paragraph (c), relating to Plymouth County in Massachusetts, is deleted.

8. Subdivision (ii) of subparagraph (7) of paragraph (c), relating to Plymouth County in Massachusetts, is amended to read:

(ii) That part of the Town of Rockland lying north of Summer Street, south of Centre Street, east of Plymouth Street (Abington), and west of Spring Street.

9. Subdivisions (ii) and (viii) of subparagraph (8) of paragraph (c), relating to Worcester County in Massachusetts, are deleted.

10. Subdivision (v) of subparagraph (8) of paragraph (c), relating to Worcester County in Massachusetts, is amended to read:

(v) That part of the Town of Leicester lying north of Hemlock Street, east of Whittemore Street, and west of Marshall Street.

Effective date. The foregoing amendment shall become effective upon issuance.

The amendment excludes certain areas in Massachusetts from the areas heretofore quarantined because of vesicular exanthema. Hereafter, the restrictions pertaining to the interstate movement of swine, and carcasses, parts and offal of swine, from or through quarantined areas, contained in 9 CFR, 1956 Supp., Part 76, Subpart B, as amended, will not apply to such areas. However, the restrictions pertaining to such movement from nonquarantined areas, contained in said Subpart B, as amended, will apply thereto.

The amendment relieves certain restrictions presently imposed, and must be made effective immediately to be of maximum benefit to persons subject to the restrictions which are relieved. Accordingly, under section 4 of the Administrative Procedure Act (5 U. S. C. 1003), it is found upon good cause that notice and other public procedure with respect to the amendment are impracticable and contrary to the public interest, and the amendment may be made effective less than 30 days after publication in the FEDERAL REGISTER.

(Sec. 2, 32 Stat. 792, as amended, 21 U. S. C. 111. Interprets or applies secs. 4, 5, 23 Stat. 32, sec. I, 32 Stat. 791; 21 U. S. C. 120)

Done at Washington, D. C. this 6th day of September 1957.

[SEAL] M. R. CLARKSON,
Acting Administrator,
Agricultural Research Service.

[F. R. Doc. 57-7455; Filed, Sept. 10, 1957; 8:54 a. m.]

TITLE 10—ATOMIC ENERGY

Chapter I—Atomic Energy Commission

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

On September 2, 1957, Public Law 256 (85th Congress) was signed by the President and became effective as an amendment to the Atomic Energy Act of 1954 (68 Stat. 919). Public Law 256 provides a means for protecting the public from financial loss from a nuclear incident.

To implement the indemnity provisions of the law the Atomic Energy Commission is issuing the following regulations which will be effective until definitive regulations are issued. In connection with the development of such more definitive regulations, the Commission intends to solicit the views of representatives of all affected groups and to furnish full opportunity for public comment.

At the present time there are no licenses in effect under section 103 of the act, and a relatively small number under section 104, authorizing operation of facilities. With one exception, all the licenses authorizing operation of facilities were issued under section 104 c. for the operation of nuclear reactors at relatively low power for research and development, or at nominal power for critical experiments. The exception is a license issued under section 104 b. for the operation of a reactor in California for the generation of electrical energy.

The regulation requires each licensee authorized to operate a nuclear reactor to maintain financial protection in the amount of $150,000 per thousand kilowatts of thermal capacity authorized by his license. This amount is established as a temporary basis for determining financial protection required. Public Law 256, 85th Congress, requires financial protection equal to the total amount of private liability insurance available (expected to be approximately $60,000,000) for all power reactors with a capacity of 100,000 electrical kilowatts or more. Such a relationship applied to all reactors needs to be expressed in thermal capacity since many reactors will not be used in connection with the generation of electricity. The ratio of thermal to electrical capacity varies somewhat among different types of reactors. For the purpose of this regulation, this ratio has been assumed as four to one. Therefore, a capacity of 400,000 thermal kilowatts would require $60,000,000 of private insurance, or $150,000 per thousand kilowatts of thermal capacity.

While this formula is deemed appropriate during the interim period for power reactors and the larger research and test reactors, it is not meaningful for those operating at very low power which will produce correspondingly small amounts of fission products. The principal hazard and potential public liability arising from such reactors will be the possibility of exposing to radiation persons in the immediate vicinity of the reactor, such as students, trainees, visitors and persons working on cooperative research projects. There is a remote possibility that a number of such persons might be injured resulting in fairly substantial claims. This type of hazard is present in reactors of any size and the extent to which it varies with different reactors is not readily subject to measurement. For the purpose of this temporary regulation, therefore, it has been determined that $250,000 is a minimum reasonable amount in view of the potential liability.

It is particularly important to note that the amounts of financial protection required by this regulation are not necessarily indicative of those that will be required by the more definitive regulations. The provisions of the latter for determination of these amounts will be based on more thorough consideration of such criteria as cost and terms of private insurance; type, size and location of the licensed activity and other factors pertaining to hazard; and the nature and purpose of the licensed activity, as provided by section 4 of Public Law 256. It should be emphasized, therefore, that the amounts of financial protection required by the more definitive regulations may vary substantially from those in this regulation.

Preparation of the form of indemnity agreement which the Commission will enter into under Public Law 256 has not

been completed. Section 140.18 of the regulation, however, is intended to make it clear that such agreements will be issued in due course; and that the Government's obligation to indemnity will take effect at the time established in the section and will not be affected by the time of execution or issuance of such agreements. This will assure maximum financial protection to the public and licensees.

Because these regulations are expected to be replaced at an early date by more definitive regulations, and because it is the purpose of these regulations to carry out the requirements of Public Law 256 with respect only to such types of licensees as are presently authorized to operate facilities, this part does not include many types of provisions which will be included in later revisions; and does not apply to certain kinds of licensees who may be subject to such future regulations.

In light of the foregoing, the Atomic Energy Commission has found that general notice of proposed rule-making and public procedure thereon are unnecessary and would be contrary to the public interest; and that good cause exists why these rules should be made effective after less than the customary 30 days' prior notice. These findings are based particularly on the desirability of making the Federal indemnity available on reasonable terms for protection of the public as promptly as is practicable.

The following rules are published as a document subject to codification, effective 15 days after publication in the FEDERAL REGISTER.

Sec.
140.1 Purpose.
140.2 Scope.
140.3 Definitions.
140.4 Interpretations.
140.5 Communications.
140.11 Amount of financial protection required.
140.12 Types of financial protection.
140.13 Proof of financial protection.
140.14 Special provisions applicable to licensees furnishing financial protection in whole or in part in the form of liability insurance.
140.15 Commission review of proof of financial protection.
140.16 Reports by certain licensees asserting immunity from liability.
140.17 Indemnity agreements.
140.18 Specific exemptions.

AUTHORITY: §§ 140.1 to 140.18 issued under sec. 161, 68 Stat. 948; 42 U. S. C. 2201. Interpret or apply sec. 4, Public Law 256, 85th Cong.

§ 140.1 *Purpose.* The regulations in this part are issued to provide appropriate procedures and requirements for determining the financial protection required of licensees and for the indemnification and limitation of liability of certain licensees and other persons pursuant to section 170 of the Atomic Energy Act of 1954 (68 Stat. 919), as amended.

§ 140.2 *Scope.* (a) The regulations in this part apply to each person who has authority under a license issued pursuant to Part 50 of this chapter, to operate a nuclear reactor. To the extent provided in paragraph (b) of this section, this part applies also to applicants for such licenses.

(b) Each applicant for license under Part 50 authorizing operation of a nuclear reactor shall (prior to issuance of such license) furnish the proof of financial protection specified in § 140.13, and if appropriate shall furnish the information specified in § 140.16.

§ 140.3 *Definitions.* As used in this part,

(a) "Act" means the Atomic Energy Act of 1954 (68 Stat. 919) including any amendments thereto.

(b) "Atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(c) "Byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(d) "Commission" means the Atomic Energy Commission or its duly authorized representatives.

(e) "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.

(f) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(g) "Licensee" means any person who is the holder of a license issued under the regulations in Part 50 of this chapter authorizing such person to operate a nuclear reactor.

(h) "Licensed activity" means an activity authorized by a license described in § 140.2.

(i) "Nuclear incident" means any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for 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.

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

(k) "Person" means (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 thereof, 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.

(l) "Person indemnified" means the person with whom an indemnity agreement is executed and any other person who may be liable for public liability.

(m) "Public liability" means any legal liability arising out of or resulting from a nuclear incident, except 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 except for 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 the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(n) "Source material" means source material as defined in the regulations contained in Part 40 of this chapter.

(o) "Special nuclear material" means (1) plutonium, uranium 233, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 of the act, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(p) "United States" when used in a geographical sense, includes all Territories and Possessions of the United States, the Canal Zone, and Puerto Rico.

§ 140.4 *Interpretations.* Except as specifically authorized by the Commission in writing, no interpretations of the meaning of the regulations in this part by any officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission.

§ 140.5 *Communications.* All communications concerning the regulations in this part should be addressed to the Atomic Energy Commission, Washington 25, D. C., Attention: Division of Civilian Application.

§ 140.11 *Amount of financial protection required.* Each licensee is required to have and maintain financial protection for each nuclear reactor in the amount of $150,000 per thousand kilowatts of thermal energy capacity authorized by his license: *Provided*, That in no event shall the amount be less than $250,000 for each nuclear reactor.

§ 140.12 *Types of financial protection.* (a) The amounts of financial protection required under this part may, at the option of the licensee, be furnished and maintained in the form of:

(1) An effective policy of liability insurance from private sources for which the premiums have been paid; or

(2) Adequate resources to provide the financial protection required by § 140.11; or

(3) Such other type of financial protection as the Commission may approve. The Commission may permit licensees, such as Government agencies, for whom none of the above means of establishing protection is feasible, to furnish proof of financial protection in some other appropriate form; or

(4) Any combination of the foregoing.

(b) In any case where the Commission has approved proof of financial protection filed by a licensee pursuant to

§ 140.13, the licensee shall not substitute one type of financial protection for another type without first obtaining the written approval of the Commission.

§ 140.13 *Proof of financial protection.* (a) Each person, who, on the effective date of this part, is the holder of a license described in § 140.2, shall, within 30 days after the effective date of this part, file with the Commission eight copies of proof of financial protection. The Commission may, upon good cause shown, grant extensions of such period.

(b) Proof of financial protection in the case of licensees who maintain financial protection in whole or in part in the form of liability insurance shall (with respect to such insurance) consist of a copy of the liability policy (or policies) together with a certificate by the issuing organization or organizations stating or undertaking:

(1) That said copy is a true copy of a currently effective policy issued to the licensee;

(2) The period of time for which premiums on the policy have been paid;

(3) That the issuing organization or organizations agree that they will not (for any reason whatever, including any act or failure to act of the licensee) modify, amend, terminate, or suspend said policy, or do any other act affecting such organization's or organizations' obligations under said policy, unless they shall have filed with the Commission a written notice thereof prior to the effective date of such act or action: *Provided,* That nothing in such undertaking shall be deemed to require such organization or organizations to furnish notice to the Commission of the expiration of such policy at the end of the period of time specified in the policy as the term thereof.

(c) Proof of financial protection in the case of licensees who maintain financial protection in whole or in part in the form specified in § 140.12 (a) (2) shall consist of a showing that the licensee has adequate resources to provide the financial protection required under this part.

(d) The Commission may require any licensee to file with the Commission such additional proof of financial protection or other financial information as the Commission determines to be appropriate for the purpose of determining whether the licensee has or is maintaining financial protection as required under this part.

(e) The licensee shall notify the Commission of any material change in proof of financial protection or in other financial information filed with the Commission under this part.

§ 140.14 *Special provisions applicable to licensees furnishing protection in whole or in part in the form of liability insurance.* In any case where a licensee undertakes to maintain financial protection in the form of liability insurance for all or part of the financial protection required by this part,

(a) The Commission may require that the licensee demonstrate that the organization or organizations which have issued such policies are legally authorized to issue them and do business in the United States and have clear ability to meet their obligations; and

(b) The licensee shall notify the Commission, at least 30 days prior to the expiration of any such policy, of the renewal of such policy or of arrangements made by the licensee to maintain financial protection in some other form.

§ 140.15 *Commission review of proof of financial protection.* (a) The Commission will promptly review proof of financial protection filed by any licensee pursuant to § 140.13. If the Commission finds that the licensee is maintaining financial protection in compliance with the requirements of this part, the licensee will be notified that his proof of financial protection has been approved. In the case of licensees maintaining all or part of their financial protection in a form other than liability insurance such notice of approval may designate the times upon which the licensee shall thereafter furnish to the Commission additional financial information for the purpose of determining whether the licensee is maintaining financial protection as required by this part.

(b) In any case where a licensee has not furnished to the Commission satisfactory proof of financial protection within the period allowed by the Commission pursuant to § 140.13, the Commission may suspend or terminate the license in accordance with the procedures provided in Subpart B, Part 2 of this chapter.

§ 140.16 *Reports by certain licensees asserting immunity from liability.* (a) Within 60 days after the effective date of this part, each licensee who believes that he is wholly or partially immune from public liability under any provision of State or Federal law shall file with the Commission eight copies of an opinion of Counsel containing the following information:

(1) The nature and extent of any such immunity possessed by the licensee;

(2) Whether or not employees of the licensee when engaged in the licensed activity are immune from public liability under any provision of State or Federal law and, if so, the nature and extent of such immunity;

(3) Whether or not the licensee has authority to waive such immunity;

(4) Whether or not the licensee has authority to purchase liability insurance.

(b) Reports filed under this section should include appropriate references to legal authorities. The Commission may, upon good cause shown, grant extensions of the period within which reports may be filed under this section.

§ 140.17 *Indemnity agreements.* (a) The Commission will, in due course, execute and issue agreements of indemnity pursuant to the regulations in this part of such other regulations as may be issued by the Commission. Each such agreement shall contain such provisions as are required by law and such additional provisions as may be incorporated therein by the Commission pursuant to regulation. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of this part; or

(2) The effective date of the license authorizing the licensee to operate the nuclear reactor involved, whichever is later.

(b) Each licensee shall pay a fee to the Commission at the rate of $30 per year per thousand kilowatts of thermal capacity authorized in its license: *Provided,* That no fee shall be less than $100 per annum for any nuclear reactor. Such fee shall be due for the period beginning with the date on which the applicable indemnity agreement will be effective under paragraph (a) of this section; and shall be paid in accordance with billing instructions received from the Commission.

§ 140.18 *Specific exemptions.* The Commission may, upon application by any interested person, grant such exemptions from the requirements of this part as it determines are authorized by law and are otherwise in the public interest.

Dated at Washington, D. C., this 5th day of September 1957.

For the Atomic Energy Commission.

R. W. COOK,
Acting General Manager.

[F. R. Doc. 57-7451; Filed, Sept. 10, 1957; 8:53 a. m.]

TITLE 14—CIVIL AVIATION

Chapter II—Civil Aeronautics Administration, Department of Commerce

[Amdt. 206]

PART 608—RESTRICTED AREAS

ALTERATIONS

The restricted area alterations appearing hereinafter have been coordinated with the civil operators involved, the Army, the Navy and the Air Force, through the Air Coordinating Committee, Airspace Panel, and are adopted to become effective when indicated in order to promote safety of the flying public. Since a military function of the United States is involved, compliance with the notice, procedure and effective date, provisions of section 4 of the Administrative Procedure Act is not required.

Part 608 is amended as follows:

1. Section 608.12, the Ft. Huachuca, Arizona area (R-181 formerly D-181), amended July 14, 1956 in 21 F. R. 5260, is further amended by changing the "Controlling Agency" column to read: "Commanding General, Ft. Huachuca, Arizona".

2. Section 608.12, the Yuma, Arizona area (R-284 formerly D-284), amended June 10, 1952 in 17 F. R. 5216, is further amended by changing the "Controlling Agency" column to read: "Commanding Officer, Yuma Tests Station, Yuma, Arizona".

3. Section 608.14, the Ft. Ord, California area (R-284), amended December 22, 1955, in 20 F. R. 9856, is further amended by changing the "Controlling Agency" column to read: "Commanding General, Ft. Ord, California".

4. Section 608.14, the Hunter Liggett, California area (R-285 formerly D-285), amended October 31, 1951, in 16 F. R. 11066, is further amended by changing the "Controlling Agency" column to

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(Continued on next page)

APRIL 22

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10. Article III, paragraph 2, has been revised essentially by adding subparagraphs (c) and (d). These subparagraphs were added further to implement the exception in subsection 11u of the Act for "property which is located at the site of and used in connection with the activity where the nuclear incident occurs."

Changes have also been made in the definition of public liability to exclude indemnity coverage for employees on the transporting vehicle when an incident occurs in the course of transportation.

11. The following amendments also add a provision to Subpart A (§ 140.9) applicable to all indemnity agreements subject to Part 140 providing that the Commission will publish at least a fifteen-day prior notice in the FEDERAL REGISTER of its intent to enter into an indemnity agreement which differs from the applicable form set forth in the appendices in Part 140.

The form indemnity agreements do not affect contractual obligations of suppliers to reactor licensees to repair or replace components furnished by such suppliers.

The form indemnity agreement in § 140.77 *Appendix C*, applies to licensees who furnish financial protection in the form of their own resources. That form is essentially similar to that in § 140.76 *Appendix B*, except for changes required by the difference in the form of financial protection.

The Commission has entered into temporary indemnity agreements with licensees pending adoption of the forms contained in these amendments. After the effective date of these amendments, the Division of Licensing and Regulation will tender to each licensee subject thereto a definitive indemnity agreement. These definitive agreements will, upon due execution, supersede the temporary indemnity agreements.

Notice is hereby given that the Commission has adopted the following amendments to Part 140, 10 CFR, "Financial Protection Requirements and Indemnity Agreements" to be effective ninety days after publication in the FEDERAL REGISTER.

1. The following section is added:

§ 140.9 Modifications of indemnity agreements.

The Commission will publish in the FEDERAL REGISTER a notice of its intent to enter into an indemnity agreement, or agreement amending an indemnity agreement, which contains provisions different from the form of the applicable indemnity agreement set forth in the appendices to this part, as such appendices may be amended from time to time. Such notices will provide at least a fifteen-day period following the date of publication in the FEDERAL REGISTER in which interested persons may file petitions for leave to intervene with respect to the proposed agreement.

§ 140.20 [Amendment]

2. Amend § 140.20(b) to read as follows:

(b) (1) The general form of indemnity agreement to be entered into by the Commission with licensees who furnish financial protection in the form of the nuclear energy liability insurance policy set forth in Appendix **A** is contained in § 140.76 *Appendix B*. The general form of indemnity agreement to be entered into by the Commission with licensees who furnish financial protection in the form specified in § 140.14(a)(2) is set forth in § 140.77 *Appendix C*.

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this subpart shall contain such modifications of the applicable form in §§ 140.76 and 140.77, Appendices B and C, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

3. The following § 140.76 *Appendix B*, is added:

§ 140.76 Appendix B.

This indemnity agreement ---------- is entered into by and between the ---------- (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170c of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

ARTICLE I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2. Except where otherwise specifically provided, "amount of financial protection" means the amount specified in Item 2 a and b, of the Attachment annexed hereto, as modified by paragraph 6, Article II, with respect to common occurrences.

3(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement, or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation

shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

4. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by pre-determination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

5. "Person indemnified" means the licensee and any other person who may be liable for public liability.

6. "Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use or transfer of the radioactive material; and (2) claims arising out of an act of war.

7. "The location" means the location described in Item 4 of the Attachment hereto.

8. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

9. "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

ARTICLE II

1. At all times during the term of the license or licenses designated in Item 3 of the Attachment hereto, the licensee will maintain financial protection in the amount specified in Item 2 of the Attachment and in the form of the nuclear energy liability insurance policy designated in the Attachment. If more than one license is designated in Item 3 of the Attachment, the licensee agrees to maintain such financial protection until the end of the term of that license which will be the last to expire. The licensee shall, notwithstanding the expiration, termination, modification, amendment, suspension or revocation of any license or licenses designated in Item 3 of the Attachment, maintain such financial protection in effect until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has been completed as provided in paragraph 4, Article I, or until the Commission authorizes the termination or the modification of such financial protection. The Commission will not unreasonably withhold such authorization.

2(a) In the event of any payment by the insurer or insurers under a policy or policies specified in Item 5 of the Attachment hereto which reduces the aggregate limit of such policy or policies below the amount of fi-

44. Amend § 927.53(d) by adding the words "and pool bulk tank units" after the word "plant".

§ 927.65 [Amendment]

45. Amend § 927.65(a) by adding at the end thereof the words "or pool bulk tank unit;".

46. Amend § 927.65(c) by adding the words "or bulk tank unit" after the word "plant" in each place where such word appears.

47. Amend § 927.65(d) to read as follows:

(d) Deduct, in the case of each plant or bulk tank unit nearer than the 201–210-mile zone, and add, in the case of each plant or bulk tank unit farther than the 201–210-mile zone, the sum obtained by multiplying the milk received from producers at plants by the zone differential set forth in column B of the schedule in § 927.42(c) applicable at the plant, and for milk in bulk tank units, by the weighted average column B differential computed pursuant to § 927.42(d) applicable to the bulk tank unit.

48. Amend § 927.65(g) to read as follows:

(g) add together the handler's net pool obligation for all plants and bulk tank units.

§ 927.70 [Amendment]

49. Amend § 927.70 by adding after the first proviso therein the following: "*Provided further*, That for milk received in a bulk tank unit there may be no charge to the producer for service incident to moving the milk off the farm if such charge reduces the net price to the farmer below that specified in this section."

§ 927.71 [Amendment]

50. Amend § 927.71(a) by changing the section reference from "927.42" to "927.42(c)" and adding to the paragraph (a) the following: "or, in the case of bulk tank units, the zone of the farm at which the milk is received."

51. Amend § 927.71(b)(1) preceding the proviso to read as follows:

(1) A zone for each farm within the nearby differential area shall be computed as specified in § 927.42(b):

52. Amend § 927.71(c) by changing that portion preceding the table to read as follows:

(c) *Direct delivery differentials.* For milk received from producers, and from cooperative associations pursuant to § 927.24(a)(2), at plants located in the areas specified in the following table, the handler shall pay, in addition to that required by other provisions of this section, the amounts set forth below:

§ 927.83 [Amendment]

52a. Add at the end of the caption of § 927.83 the words "and nonpool bulk tank units."

53. Amend § 927.83(a)(1) to read as follows:

(1) It was derived from milk received at a plant or at farms in a bulk tank unit from dairy farmers not defined as producers pursuant to § 927.6 or received from a handler designated as a producer-handler pursuant to § 927.15.

54. Amend § 927.83(b)(2) by deleting that portion prior to the words "is not regulated" and by substituting the following: "If the first plant which received the milk from which the milk or milk product is derived is located in the 401–425 mile zone or in some zone nearer the marketing area, and the handling of such milk * * *".

55. Amend § 927.83(b)(3) by deleting that portion prior to the words "is not regulated", and by substituting the following: "If the first plant which received the milk from which the milk or milk product is derived is located farther from the marketing area than the 401–425-mile zone, and the handling of such milk * * *".

§ 927.90 [Amendment]

56. Amend § 927.90 by adding the words "or at farms in a bulk tank unit" after the first word "plants".

Issued at Washington, D.C., April 19, 1961.

ROY W. LENNARTSON,
Deputy Administrator.

[F.R. Doc. 61-3681; Filed, Apr. 21, 1961; 8:51 a.m.]

ATOMIC ENERGY COMMISSION

[10 CFR Part 140]

FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

Notice of Proposed Rule Making

The following proposed amendments are intended to establish the form of indemnity agreement which the Commission will execute with Federal agencies and non-profit educational institutions subject to Part 140. Except for changes made because Federal agencies and non-profit educational institutions are not required to furnish financial protection, the forms of these proposed indemnity agreements are similar to those adopted by the Commission for execution with licensees who furnish financial protection.

Publication of these proposed indemnity agreements has been delayed pending adoption of forms of indemnity agreements to be entered into with licensees who furnish financial protection. The forms of indemnity agreements which the Commission will execute with such licensees are set forth in a notice of rule-making published in this issue of the FEDERAL REGISTER.

Notice is hereby given that the Commission is considering adoption of the following amendments. All interested persons who desire to submit written comments and suggestions for consideration in connection with the proposed amendments should send them to the Secretary, U.S. Atomic Energy Commission, Washington 25, D.C., within sixty days after publication of this notice in the FEDERAL REGISTER. Comments received after that period will be considered if it is practicable to do so, but assurance of consideration cannot be given except as to comments filed within the period specified.

1. Amend § 140.52 to read as follows:

§ 140.52 Indemnity agreements.

(a) The Commission will execute and issue agreements of indemnity with each Federal agency subject to this subpart pursuant to the regulations in this part or such other regulations as may be issued by the Commission. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of the license (issued pursuant to Part 50 of this chapter) authorizing the licensee to operate the nuclear reactor involved;

(2) The effective date of the license (issued pursuant to Part 70 of this chapter) authorizing the licensee to possess and store special nuclear material at the site of the nuclear reactor for use as fuel in operation of the nuclear reactor after issuance of an operating license for the reactor,

whichever is earlier. No such agreement, however, shall be effective prior to September 26, 1957.

(b)(1) The general form of indemnity agreement to be entered into with licensees subject to this subpart is contained in § 140.78 *Appendix D.*

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this subpart shall contain such modifications of the form in § 140.78, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

2. Section 140.72 is amended to read as follows:

§ 140.72 Indemnity agreements.

(a) The Commission will execute and issue agreements of indemnity with each non-profit educational institution subject to this subpart pursuant to the regulations in this part or such other regulations as may be issued by the Commission. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of the license (issued pursuant to Part 50 of this chapter) authorizing the licensee to operate the nuclear reactor involved;

(2) The effective date of the license (issued pursuant to Part 70 of this chapter) authorizing the licensee to possess and store special nuclear material at the site of the nuclear reactor for use as fuel in operation of the nuclear reactor after issuance of an operating license for the reactor,

whichever is earlier. No such agreement, however, shall be effective prior to September 26, 1957.

(b)(1) The general form of indemnity agreement to be entered into with licensees subject to this subpart is contained in § 140.79 *Appendix E.*

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this

subpart shall contain such modifications of the form in § 140.79 *Appendix E*, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

3. The following Appendix D is added:

§ 140.78 Appendix D.

This indemnity agreement #------ is entered into by and between the ---------- (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170 c. of the Atomic Energy Act of 1954, as amended, (hereinafter referred to as "the Act").

Article I

As used in this agreement,

1. "Nuclear reactor," "by product material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement, or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation

shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by pre-determination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

4. "Person indemnified" means the licensee and any other person who may be liable for public liability.

5. "Public liability" means any legal liability 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 location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use or transfer of the radioactive material; and (2) claims arising out of an act of war.

6. "The location" means the location described in Item 3 of the Attachment hereto.

7. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

8. "United States" when used in a geographical sense include all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

Article II

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligations of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

3. The Commission agrees to indemnify and hold harmless the licensee, and other persons indemnified as their interest may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

4. With respect to a common occurrence, the obligations of the Commission under this Article shall apply only with respect to such public liability such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article), and to such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

7. Bankruptcy or insolvency of any person indemnified or of the estate of any person indemnified shall not relieve the Commission of any of its obligations hereunder.

Article III

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

Article IV

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

Article V

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

Article VI

The terms of this agreement shall commence as of the date and time specified in Item 4 of the attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has been completed as provided in paragraph 4. Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. ------

Attachment

Item 1—Licensee ----------
Address ----------
Item 2—License number or numbers ------
Item 3—Location ----------

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ----- m., on the ------ day of ----------, 19---.

For the United States Atomic Energy Commission.

By ----------
For the ----------
(Name of licensee)
By ----------

Dated at Germantown, Md., the -- day of ----------, 19---.

4. The following Appendix E is added:

§ 140.79 Appendix E.

This indemnity agreement ------ is entered into by and between the ---------- (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170k of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

Article I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement; or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation

shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by pre-determination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

4. "Person indemnified" means the licensee and any other person who may be liable for public liability.

5. "Public liability" means any legal liability arising out of or resulting from a nuclear incident, except (1) claims under state or Federal Workmen's Compensation Act of employees of persons indemnified who are employed at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and in connection with the licensee's possession, use or transfer of the radioactive material; and (2) claims arising out of an act of war.

6. "The location" means the location described in Item 3 of the Attachment hereto.

7. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

8. "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

Article II

1. Any obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability shall not in the aggregate exceed $250,000 with respect to any nuclear incident.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligation of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

The obligation of the Commission under this paragraph 2 does not apply to property damage due to neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident.

3. The Commission agrees to indemnify and hold harmless the licensee, and other persons indemnified as their interest may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

4 (a) The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000.

(b) With respect to a common occurrence, the obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and to such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed whichever of the following is lower: (1) Sum of the amounts of financial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph, "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence".

5. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

6. If the licensee is immune from public liability because it is a state agency, the Commission shall make payments under this agreement in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a state agency.

7. Obligations of the Commission under this Article, except to the licensee for damage to property of the licensee, shall not be affected by any failure on the part of the licensee to fulfill its obligations under this agreement. Bankruptcy or insolvency of the licensee or any other person indemnified or of the estate of the licensee or any other person indemnified shall not relieve the Commission of any of its obligations hereunder.

Article III

1. When the Commission determined that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

Article IV

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

Article V

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

Article VI

The term of this agreement shall commence as of the date and time specified in

Item 4 of the Attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has been completed as provided in paragraph 4, Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. ------

Attachment

Item 1—Licensee ----------
Address ----------
Item 2—License number or numbers-------
Item 3—Location ----------

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ------ m., on the ------ day of ----------, 19 ---.

For the United States Atomic Energy Commission.

By ----------
For the ----------
(Name of licensee)

Dated at Germantown, Md., the ------ day of ----------, 19 ---.

Dated at Germantown, Md., this 14th day of April 1961.

For the Atomic Energy Commission.

WOODFORD B. MCCOOL,
Secretary.

[F.R. Doc. 61-3638; Filed, Apr. 21, 1961; 8:45 a.m.]

Part II begins on page 2957 of this issue.

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PART I

FEDERAL REGISTER

THE NATIONAL ARCHIVES OF THE UNITED STATES 1934

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MARCH 29

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§ 72.2 Splenetic or tick fever in cattle in Texas, Puerto Rico, and the Virgin Islands of the United States; restrictions on movement of cattle.

Notice is hereby given that the contagious, infectious, and communicable disease known as splenetic or tick fever exists in cattle in portions of the State of Texas and in Puerto Rico and the Virgin Islands of the United States. Therefore, portions of the State of Texas and Puerto Rico and the Virgin Islands of the United States are hereby quarantined as set forth in §§ 72.3, 72.4, and 72.5, and the movement of cattle therefrom into any other State or Territory or the District of Columbia shall be made only in accordance with the provisions of this part and Part 71 of this chapter.

§ 72.5a [Deletion]

2. Section 72.5a is deleted.

(Secs. 1–4, 33 Stat. 1264, as amended, 1265, as amended, secs. 1, 2, 32 Stat. 791, as amended, 792, as amended, secs. 4–7, 23 Stat. 32, as amended; 21 U.S.C. 111–113, 115, 117, 120, 121, 123–126; 19 F.R. 74, as amended)

Effective date. The foregoing amendments shall become effective upon issuance.

The amendments remove the designation as a regulated area of certain premises in Palm Beach County, Florida, known as "Africa U.S.A." Hereafter, the restrictions pertaining to the interstate movement of livestock and pine straw and other litter from quarantined areas contained in 9 CFR Parts 71 and 72, will not apply to such premises. However, the restrictions pertaining to such movement from nonquarantined areas, contained in said Part 71 and Part 72, will apply thereto.

The amendments relieve certain restrictions presently imposed, and must be made effective immediately to be of maximum benefit to persons subject to the restrictions which are relieved. Accordingly, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that notice and other public procedure with respect to the amendments are impracticable and contrary to the public interest, and the amendments may be made effective less than 30 days after publication in the FEDERAL REGISTER.

Done at Washington, D.C., this 26th day of March 1962.

M. R. CLARKSON,
Acting Administrator,
Agricultural Research Service.

[F.R. Doc. 62-3054; Filed, Mar. 28, 1962; 8:52 a.m.]

Title 10—ATOMIC ENERGY

Chapter I—Atomic Energy Commission

PART 30—LICENSING OF BYPRODUCT MATERIAL

Agreement State; Correction

In the document amending Part 30 of Chapter I of Title 10, of the Code of Federal Regulations, published at 27 F.R. 1350, the following correction is made: The paragraph added to § 30.4 and identified as paragraph "(t)" should be identified as paragraph "(u)".

Dated at Germantown, Md., this 21st day of March 1962.

For the Atomic Energy Commission.

WOODFORD B. MCCOOL,
Secretary.

[F.R. Doc. 62-2969; Filed, Mar. 28, 1962; 8:45 a.m.]

PART 140—FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

Miscellaneous Amendments

On April 22, 1961, the Commission published in the FEDERAL REGISTER the form of indemnity agreement which it would execute with licensees furnishing insurance policies as proof of financial protection and the form of indemnity agreement which it would enter into with licensees furnishing proof of financial protection in the form of the licensee's resources. On the same date a proposed amendment to 10 CFR Part 140 was issued for public comment. That proposed amendment contained the forms of indemnity agreement which the Commission would execute with federal agencies and nonprofit educational institutions subject to Part 140. Except for changes made because federal agencies and nonprofit educational institutions are not required to furnish financial protection, the forms of these proposed indemnity agreements were similar to those adopted for execution with licensees who furnish financial protection. Except for changes indicated below, the following amendments substantially adopt these proposed forms.

On November 22, 1961, the Commission issued for public comment a proposed amendment to Part 140 implementing Public Law 87-206, effective September 6, 1961. This statute contains a provision amending the definition of "public liability" in section 11u. of the Atomic Energy Act of 1954, as amended. Prior to enactment of the 1961 statute, the definition of "public liability" included coverage of liability for damage to certain on-site property used in connection with the licensed activity. Public Law 87-206 eliminated indemnity coverage of liability for damage to such on-site property. The following amendments include changes in the forms of indemnity agreement to effectuate the provisions of Public Law 87-206.

No substantive comments were received on either of the proposed amendments.

Opportunity is also taken at this time to correct minor typographical and editorial errors; to clarify §§ 140.52 and 140.72 appropriately to reference the form of indemnity agreement and to revise the language of these sections to conform with § 140.20; to add titles to Appendices "A," "B," "C," "D," and "E" which are policy and indemnity agreement forms; and to revise the provisions of Appendices "C" and "E" to make them consistent with similar provisions in the other indemnity agreement forms.

The principal changes in the form of indemnity agreement contained in § 140.76 *Appendix B*, are as follows:

1. As of 12:01 a.m., September 6, 1961, Paragraph 6 of Article I (definition of "public liability") is amended to delete indemnity coverage for on-site property.

2. As of 12:01 a.m., September 6, 1961, Paragraph 2 of Article II is amended by deleting the "(a)" after the 2 and by deleting the (b) paragraph in its entirety. Paragraph 2(b) required the licensee to indemnify and hold harmless all persons indemnified from public liability for damage to on-site property. Since there is no longer any public liability for on-site property, this provision is deleted.

3. As of 12:01 a.m., September 6, 1961, Paragraph 3 of Article II is amended by deleting the phrase "under paragraph 2(b) of this Article, and". The deletion of paragraph 2(b) requires that this reference also be deleted.

4. As of 12:01 a.m., September 6, 1961, the second paragraph of paragraph 6(c) of Article II is amended by deleting "under paragraph 2(b) of this Article II, and ". The deletion of 2(b) also requires that this reference to paragraph 2(b) be deleted.

5. Paragraph 4(a) of Article III is amended by deleting the comma after the word "property". The insertion of this comma was inadvertent.

The principal changes in the form of indemnity agreements contained in § 140.77 *Appendix C*, are as follows:

6. As of 12:01 a.m., September 6, 1961, Paragraph 6, Article I (definition of "public liability") is amended to delete indemnity coverage for on-site property.

7. Paragraph 4(a) of Article III is amended by adding, between the comma and the word "incident" in the fifth line, the following parenthetical phrase: "(other than such property described in the proviso to paragraph 2 of this Article)". This amendment conforms this paragraph with the corresponding paragraphs in the other form indemnity agreements. The omission was inadvertent.

The only principal change in the form of indemnity agreement contained in § 140.78 *Appendix D*, is the amendment, effective as of 12:01 a.m., September 6, 1961, of Paragraph 5, Article I (definition of "public liability") to delete indemnity coverage for on-site property.

The principal changes in the form of indemnity agreements contained in § 140.79 *Appendix E*, are as follows:

8. As of 12:01 a.m., September 6, 1961, Paragraph 5, Article I (definition of "public liability") is amended to delete indemnity coverage for on-site property.

9. Paragraph 1, Article II is amended by deleting the number 1. See Paragraph 13 for reason.

10. Article II is amended by adding "Article III" immediately after Paragraph 1 of old Article II and by adding a Paragraph 1 immediately after the new Article III to read as follows:

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

See Paragraph 13 for reason.

11. Paragraph 2 of old Article II is amended by deleting the last sentence.

12. Old Article II is amended by changing the numbers of Paragraphs 5, 6, and 7 to 6, 7, and 8 of new Article III, respectively, and by adding a Paragraph 5 to new Article III to read as follows:

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

See Paragraph 13 for reason.

13. Appendix "E" is amended by renumbering Articles III, IV, V and VI to Articles IV, V, VI and VII, respectively. Two new paragraphs (Paragraphs 1 and 5 of new Article III) are added. Opportunity is also taken to separate the provisions pertaining to obligations of the licensee (new Article II) from those pertaining to obligations of the Commission (new Article III) which necessitates the renumbering of old Articles III, IV, V and VI.

Pursuant to the Administrative Procedure Act and the Atomic Energy Act of 1954, as amended, notice is hereby given that the following amendments to Title 10, Chapter I, Part 140 "Financial Protection Requirements and Indemnity Agreements" are adopted to be effective upon publication in the FEDERAL REGISTER, except as otherwise specified below or in Part 140.

1. Section 140.52 is amended to read as follows:

§ 140.52 Indemnity agreements.

(a) The Commission will execute and issue agreements of indemnity with each Federal agency subject to this subpart pursuant to the regulations in this part or such other regulations as may be issued by the Commission. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of the license (issued pursuant to Part 50 of this chapter) authorizing the licensee to operate the nuclear reactor involved; or

(2) The effective date of the license (issued pursuant to Part 70 of this chapter) authorizing the licensee to possess and store special nuclear material at the site of the nuclear reactor for use as fuel in operation of the nuclear reactor after issuance of an operating license for the reactor,

whichever is earlier. No such agreement, however, shall be effective prior to September 26, 1957.

(b)(1) The general form of indemnity agreement to be entered into with licensees subject to this subpart is contained in § 140.78 *Appendix D*.

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this subpart shall contain such modifications of the form in § 140.78, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

2. Section 140.72 is amended to read as follows:

§ 140.72 Indemnity agreements.

(a) The Commission will execute and issue agreements of indemnity with each non-profit educational institution subject to this subpart pursuant to the regulations in this part or such other regulations as may be issued by the Commission. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of the license (issued pursuant to Part 50 of this chapter) authorizing the licensee to operate the nuclear reactor involved; or

(2) The effective date of the license (issued pursuant to Part 70 of this chapter) authorizing the licensee to possess and store special nuclear material at the site of the nuclear reactor for use as fuel in operation of the nuclear reactor after issuance of an operating license for the reactor,

whichever is earlier. No such agreement, however, shall be effective prior to September 26, 1957.

(b)(1) The general form of indemnity agreement to be entered into with licensees subject to this subpart is contained in § 140.79 *Appendix E*.

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this subpart shall contain such modifications of the form in § 140.79 *Appendix E*, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

§ 140.75 [Amendment]

3. Section 140.75 is amended by adding, after the words "Appendix A", the following: "Form of nuclear energy liability policy for facilities."

§ 140.76 [Amendment]

4. Section 140.76 is amended by adding, after the words "Appendix B", the following: "Form of indemnity agreement with licensees furnishing insurance policies as proof of financial protection."

5. Effective as of 12:01 a.m., September 6, 1961, § 140.76 *Appendix B*, Article I, paragraph 6, is amended to read as follows:

6. "Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b) if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

6. Effective as of 12:01 a.m., September 6, 1961, § 140.76 *Appendix B*, Article II, paragraph 2, is amended to read as follows:

2. In the event of any payment by the insurer or insurers under a policy or policies specified in Item 5 of the Attachment hereto which reduces the aggregate limit of such policy or policies below the amount of financial protection, the licensee will promptly apply to his insurers for reinstatement of the amount specified in Item 2a of the Attachment (without reference to paragraph b of Item 2) and will make all reasonable efforts to obtain such reinstatement. In the event that the licensee has not obtained reinstatement of such amount within ninety days after the date of such reduction, and in the absence of good cause shown to the contrary, the Commission may issue an order requiring the licensee to furnish financial protection for such amount in another form.

7. Effective as of 12:01 a.m., September 6, 1961, § 140.76 *Appendix B*, Article II, paragraph 3, is amended to read as follows:

3. Any obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability, together with any public liability satisfied by the insurers under the policy or policies designated in the Attachment hereto, shall not in the aggregate exceed the amount of financial protection with respect to any nuclear incident, including the reasonable costs of investigating and settling claims and defending suits for damage.

8. Effective as of 12:01 a.m., September 6, 1961, § 140.76 *Appendix B*, Article II, second paragraph of paragraph 6(c), is amended to read as follows:

As used in this paragraph 6, Article II, and subparagraph 4(b), Article III, "other applicable agreements" means each other agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence." As used in this paragraph 6, Article II, "the obligations of the licensee" means the obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability, together with any public liability satisfied by the insurers under the policy or policies designated in the Attachment, and the reasonable costs of investigating and settling claims and defending suits for damage.

9. Section 140.76 *Appendix B*, Article III, paragraph 4(a) is amended to read as follows:

4(a) The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article), and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed the amont of financial protection.

§ 140.77 [Amendment]

10. Section 140.77 is amended by adding, after the words "Appendix C", the following: "Form of indemnity agreement with licensees furnishing proof of financial protection in the form of licensee's resources."

11. Effective as of 12:01 a.m., September 6, 1961, § 140.77 *Appendix C*, Article I, paragraph 6 is amended to read as follows:

6. "Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b), if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

12. Section 140.77 *Appendix C*, Article III, paragraph 4(a), is amended to read as follows:

4(a) The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article), and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed the amount of financial protection.

13. Section 140.77 *Appendix C*, Article VII, is amended to read as follows:

The term of this agreement shall commence as of the date and time specified in Item 6 of the attachment and shall terminate at the time of expiration of that license specified in Item 3 of the attachment, which is last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 4b, Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

14. The following Appendix D is added:

§ 140.78 Appendix D—Form of indemnity agreement with Federal agencies.

This indemnity agreement No. D-____ is entered into by and between the _____ (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170c of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

ARTICLE I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement, or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by predetermination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

4. "Person indemnified" means the licensee and any other person who may be liable for public liability.

5. During the period 12:01 a.m., _____ to 12:01 a.m., September 6, 1961, inclusive:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; and (2) claims arising out of an act of war.

From 12:01 a.m., September 6, 1961:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b) if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

6. "The location" means the location described in Item 3 of the Attachment hereto.

7. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) is produced as the result of operation of said reactor(s).

8. "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone, and Puerto Rico.

ARTICLE II

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligation of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

3. The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

4. With respect to a common occurrence, the obligations of the Commission under this Article shall apply only with respect to such public liability such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article), and to such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

7. Bankruptcy or insolvency of any person indemnified or of the estate of any person indemnified shall not relieve the Commission of any of its obligations hereunder.

ARTICLE III

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the

licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

ARTICLE IV

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

ARTICLE V

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

ARTICLE VI

The term of this agreement shall commence as of the date and time specified in Item 4 of the attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 3(b), Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. D- ------

ATTACHMENT

Item 1—Licensee ----------
Address ----------
Item 2—License number or numbers ------
Item 3—Location ----------

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ----- m., on the ------ day of ----------, 19--.

For the United States Atomic Energy Commission.

By ----------
For the ----------
(Name of licensee)
By ----------

Dated at Germantown, Md., the -- day of ----------, 19--.

15. The following Appendix E is added:

§ 140.79 Appendix E—Form of indemnity agreement with nonprofit educational institutions.

This indemnity agreement No. E-------- is entered into by and between the ---------- (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170k of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

ARTICLE I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement; or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation

shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by predetermination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

4. "Person indemnified" means the licensee and any other person who may be liable for public liability.

5. During the period 12:01 a.m., ---------- to 12:01 a.m., September 6, 1961, inclusive:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war.

From 12:01 a.m., September 6, 1961:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b), if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

6. "The location" means the location described in Item 3 of the Attachment hereto.

7. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

8. "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

ARTICLE II

Any obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability shall not in the aggregate exceed $250,000 with respect to any nuclear incident.

ARTICLE III

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligation of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

3. The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

4(a) The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000.

(b) With respect to a common occurrence, the obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and to such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph, "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incidence is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

7. If the licensee is immune from public liability because it is a state agency, the Commission shall make payments under this agreement in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a state agency.

8. The obligations of the Commission under this Article, except to the licensee for damage to property of the licensee, shall not be affected by any failure on the part of the licensee to fulfill its obligations under this agreement. Bankruptcy or insolvency of the licensee or any other person indemnified or of the estate of the licensee or any other person indemnified shall not relieve the Commission of any of its obligations hereunder.

ARTICLE IV

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

ARTICLE V

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

ARTICLE VI

The licensee agrees to pay to the Commission such fees as are established by the Commission pursu[illegible] to regulations or orders of the Com[illegible]

ARTICLE VII

The term of this agreement shall commence as of the date and time specified in Item 4 of the Attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 3(b), Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. E- ----

ATTACHMENT

Item 1—Licensee ----------
Address ----------
Item 2—License number or numbers--------
Item 3—Location ----------

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ------ m., on the ------ day of ----------, 19 ---.

For the United States Atomic Energy Commission.

By ----------
For the ----------
By ----------
(Name of licensee)

Dated at Germantown, Md., the ------ day of ----------, 19 ---.

(Sec. 161, 66 Stat. 948; 42 U.S.C. 2201. Interpret or apply sec. 4, Public Law 85-256; Public Law 85-744; sec. 2, Public Law 85-602; sec. 3, Public Law 87-206)

Dated at Germantown, Md., this 21st day of March 1962.

For the Atomic Energy Commission.

WOODFORD B. MCCOOL,
Secretary.

[F.R. Doc. 62-2968; Filed, Mar. 28, 1962; 8:45 a.m.]

Title 14—AERONAUTICS AND SPACE

Chapter III—Federal Aviation Agency

SUBCHAPTER C—AIRCRAFT REGULATIONS

[Reg. Docket No. 1120; Amdt. 56]

PART 514—TECHNICAL STANDARD ORDERS FOR AIRCRAFT MATERIALS, PARTS, PROCESSES AND APPLIANCES

TSO—C23b Parachutes

Technical Standard Order C23a published in the FEDERAL REGISTER of January 12, 1961, as § 514.33 of the regulations of the Administrator (26 F.R. 219), contains the minimum performance standards for parachutes for use on civil aircraft. This TSO also contained a footnote concerning surplus military parachutes which was added for informational purposes only. Such footnote states that surplus military parachutes identified by an NAF, AAF or AN drawing number, an AAF order number, or other military designation or specification numbers are also eligible for use in all civil aircraft.

It has recently come to the attention of this Agency that this footnote has created some misunderstanding because of its location in a regulation establishing standards for approval of parachutes under the Technical Standard Order system. Thus, the footnote has been taken as meaning that surplus military parachutes are approved for use on civil aircraft under the TSO system merely on the basis that they are identified by a military designation or specification number. This, of course, is not the case. Any parachute, military or otherwise, must be found to meet the standards set forth in the applicable TSO and a certification to this effect filed with the FAA before it can be considered for approval under the TSO system. The fact that a military parachute is identified with a military designation or specification does not, in and of itself, serve to establish that such a parachute meets the applicable TSC standards. Therefore, in order to eliminate this source of misunderstanding, TSO C23a has been superseded by a new Technical Standard Order designated as TSO C23b which is published without the subject footnote. In all other respects, this TSO is the same as TSO C23a.

Since this regulatory action is for the purpose of clarification and imposes no additional burden on any person, notice and public procedure hereon are unnecessary and good cause exists for making it effective on less than 30 days' notice.

In consideration of the foregoing, and pursuant to the authority delegated to me by the Administrator (25 F.R. 6489), § 514.33 of Part 514 of the regulations of the Administrator (14 CFR Part 514) is hereby revised to read as follows:

§ 514.33 Parachutes—TSO C23b.

(a) *Applicability*—(1) *Minimum performance standards.* Minimum performance standards are hereby established for parachutes which are to be used in civil aircraft of the United States. New models of parachutes manufactured for use in civil aircraft of the United States on or after the effective date of this section shall meet the minimum performance standards of National Aircraft Standards Specification 804 dated August 24, 1949,[1] with the exceptions covered in subparagraph (2) of this paragraph. Parachutes approved prior to the effective date of this section may continue to be manufactured under the provisions of the original approval.

(2) *Exceptions.* (i) The auxiliary parachute used in combination with a standard parachute shall be designed for use in combination with the specific main parachute.

[1] Copies may be obtained from the National Standards Association, 616 Washington Loan and Trust Building, Washington 4, D.C.

CODE

OF FEDERAL

REGULATIONS

13

1.

TITLES 10–11

Revised as of January 1, 1963

CONTAINING A CODIFICATION OF DOCUMENTS OF GENERAL APPLICABILITY AND FUTURE EFFECT AS OF JANUARY 1, 1963

With Ancillaries

Published by the Office of the Federal Register, National Archives and Records Service
General Services Administration, as a Special Edition of the Federal Register
Pursuant to Section 11 of the Federal Register Act as Amended

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§ 140.72 Indemnity agreements.

(a) The Commission will execute and issue agreements of indemnity with each non-profit educational institution subject to this subpart pursuant to the regulations in this part or such other regulations as may be issued by the Commission. Such agreements, as to any licensee, shall be effective on:

(1) The effective date of the license (issued pursuant to Part 50 of this chapter) authorizing the licensee to operate the nuclear reactor involved; or

(2) The effective date of the license (issued pursuant to Part 70 of this chapter) authorizing the licensee to possess and store special nuclear material at the site of the nuclear reactor for use as fuel in operation of the nuclear reactor after issuance of an operating license for the reactor,

whichever is earlier. No such agreement, however, shall be effective prior to September 26, 1957.

(b)(1) The general form of indemnity agreement to be entered into with licensees subject to this subpart is contained in § 140.79 *Appendix E*.

(2) The form of indemnity agreement to be entered into by the Commission with any particular licensee under this subpart shall contain such modifications of the form in § 140.79 *Appendix E*, as are provided for in applicable licenses, regulations or orders of the Commission.

(3) Each licensee who has executed an indemnity agreement under this subpart shall enter into such agreements amending such indemnity agreement as are required by applicable licenses, regulations or orders of the Commission.

[27 F.R. 2885, Mar. 29, 1962]

Appendixes

§ 140.75 Appendix A—Form of nuclear energy liability policy for facilities.

(FACILITY FORM)

The undersigned members of ---------- hereinafter called the "companies," each for itself, severally and not jointly, and in the respective proportions hereinafter set forth, agree with the insured, named in the declarations made a part hereof, in consideration of the premium and in reliance upon the statements in the declarations and subject to the limit of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. *Coverage A—Bodily injury and property damage liability.* To pay on behalf of the insured:

(1) All sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by the nuclear energy hazard, and the companies shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy; but the companies may make such investigation, negotiation and settlement of any claim or suit as they deem expedient;

(2) Costs taxed against the insured in any such suit and interest on any judgment therein;

(3) Premiums on appeal bonds and on bonds to release attachments in any such suit, but without obligation to apply for or furnish such bonds;

(4) Reasonable expenses, other than loss of earnings, incurred by the insured at the companies' request.

Coverage B—Damage to property of an insured away from the facility. With respect to property damage caused by the nuclear energy hazard to property of an insured which is away from the facility, to pay to such insured those sums which such insured would have been legally obligated to pay as damages therefor, had such property belonged to another.

Coverage C—Subrogation—Offsite employees. With respect to bodily injury sustained by any employee of an insured and caused by the nuclear energy hazard, to pay to the workmen's compensation carrier of such insured all sums which such carrier would have been entitled to recover and retain as damages from another person or organization, had such person or organization alone been legally responsible for such bodily injury, by reason of the rights acquired by subrogation by the payment of the benefits required of such carrier under the applicable workmen's compensation or occupational disease law. An employer who is a duly qualified self-insurer under such law shall be deemed to be a workmen's compensation carrier within the meaning of this coverage. This Coverage C does not apply to bodily injury sustained by any person who is employed at and in connection with the facility. This Coverage C shall not constitute workmen's compensation insurance as required under the laws of any state.

II. *Definition of insured.* The unqualified word "insured" includes (a) the named insured and (b) any other person or organization with respect to his legal responsibility for damages because of bodily injury or property damage caused by the nuclear energy hazard.

Subdivision (b) above does not include as an insured the United States of America or any of its agencies.

cial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

7. Bankruptcy or insolvency of any person indemnified or of the estate of any person indemnified shall not relieve the Commission of any of its obligations hereunder.

ARTICLE III

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

ARTICLE IV

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

ARTICLE V

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

ARTICLE VI

The term of this agreement shall commence as of the date and time specified in Item 4 of the attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 3(b), Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. D- _____

ATTACHMENT

Item 1—Licensee _____
Address _____
Item 2—License number or numbers _____
Item 3—Location _____
_____
_____
Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of _____ m., on the _____ day of _____, 19__.

For the United States Atomic Energy Commission.

By _____
For the _____
(Name of licensee)
By _____

Dated at Germantown, Md., the __ day of _____, 19__.

[27 F.R. 2886, Mar. 29, 1962]

§ 140.79 Appendix E—Form of indemnity agreement with nonprofit educational institutions.

This indemnity agreement No. E-_____ is entered into by and between the _____ (hereinafter referred to as the "licensee") and the United States Atomic Energy Commission (hereinafter referred to as the "Commission") pursuant to subsection 170k of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

ARTICLE I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2(a) "Nuclear incident" means any occurrence or series of occurrences at the location or in the course of transportation causing 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 the radioactive material.

(b) Any occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also arising out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement; or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "In the course of transportation" means in the course of transportation within the United States, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by predetermination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

4. "Person indemnified" means the licensee and any other person who may be liable for public liability.

5. During the period 12:01 a.m., ---------- to 12:01 a.m., September 6, 1961, inclusive:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; and (2) claims arising out of an act of war.

From 12:01 a.m., September 6, 1961:

"Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b), if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

6. "The location" means the location described in Item 3 of the Attachment hereto.

7. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

8. "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

Article II

Any obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability shall not in the aggregate exceed $250,000 with respect to any nuclear incident.

Article III

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligation of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

3. The Commission agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from the reasonable costs of investigating, settling and defending claims for public liability.

4(a) The obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed $250,000.

(b) With respect to a common occurrence, the obligations of the Commission under this Article shall apply only with respect to such public liability, such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) and to such reasonable costs described in paragraph 3 of this Article as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) $60,000,000. As used in this paragraph, "applicable agreements" means each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incidence is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not in the aggregate exceed $500,000,000 with respect to any nuclear incident.

7. If the licensee is immune from public liability because it is a state agency, the Commission shall make payments under this agreement in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a state agency.

8. The obligations of the Commission under this Article, except to the licensee for damage to property of the licensee, shall not be affected by any failure on the part of the licensee to fulfill its obligations under this agreement. Bankruptcy or insolvency of the licensee or any other person indemnified or of the estate of the licensee or any other person indemnified shall not relieve the Commission of any of its obligations hereunder.

Article IV

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

Article V

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

Article VI

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

Article VII

The term of this agreement shall commence as of the date and time specified in Item 4 of the Attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 3(b), Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES ATOMIC ENERGY COMMISSION

Indemnity Agreement No. E- ----

ATTACHMENT

Item 1—Licensee ----------
Address ----------
Item 2—License number or numbers-------
Item 3—Location ----------

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ------ m., on the ------ day of ----------, 19 --.

For the United States Atomic Energy Commission.

By ----------
For the ----------
By ----------
(Name of licensee)

Dated at Germantown, Md., the ------ day of ----------, 19 --.

[27 F.R. 2887, Mar. 29, 1962]

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES UNDER SECTION 274

GENERAL PROVISIONS

Sec.
150.1 Purpose.
150.2 Scope.
150.3 Definitions.
150.4 Communications.
150.5 Interpretations.

EXEMPTIONS IN AGREEMENT STATES

150.10 Persons exempt.
150.11 Critical mass.

CONTINUED COMMISSION REGULATORY AUTHORITY IN AGREEMENT STATES

150.15 Persons not exempt.

RECIPROCITY

150.20 Recognition of State licenses.

ENFORCEMENT

150.30 Violations.

AUTHORITY: §§ 150.1 to 150.30 issued under secs. 161, 274, 68 Stat. 948, 73 Stat. 688; 42 U.S.C. 2201, 2021.

SOURCE: §§ 150.1 to 150.30 appear at 27 F.R. 1352, Feb. 14, 1962.

GENERAL PROVISIONS

§ 150.1 Purpose.

The regulations in this part provide certain exemptions to persons in agreement States from the licensing requirements contained in Chapters 6, 7, and 8 of the Act and from the regulations of the Commission imposing requirements upon persons who receive, possess, use or transfer byproduct material, source, or special nuclear material in quantities not sufficient to form a critical mass; and to define activities in agreement States over which the regulatory authority of the Commission continues. The provisions of the Act, and regulations of the Commission apply to all persons in agreement States engaging in activities over which the regulatory authority of the Commission continues.

§ 150.2 Scope.

The regulations in this part apply to all States that have entered into agreements with the Commission pursuant to subsection 274b of the Act.

§ 150.3 Definitions.

As used in this part:

(a) "Act" means the Atomic Energy Act of 1954 (68 Stat. 919) including any amendments thereto;

(b) "Agreement State" means any State with which the Commission has entered into an effective agreement under subsection 274b of the Act;

(c) "Byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(d) "Commission" means the Atomic Energy Commission or its duly authorized representatives;

(e) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(f) "Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, any State or any political subdivision of any political entity within a State, and any legal successor, representative, agent, or agency of the foregoing other than Government agencies;

(g) "Production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and

87121 O-63—18

Food Safety and Inspection Service

9 CFR Part 327

[Docket No. 83-029F]

Imported Products; Restoration of Czechoslovakia to the List of Countries Eligible for Importation of Meat Food Products into the United States

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: On December 30, 1983, the Food Safety and Inspection Service (FSIS) published an immediately effective interim rule relisting the country of Czechoslovakia as one from which meat food products may be imported into the United States under the Federal Meat Inspection Act (FMIA). The interim rule set forth the reasons for Czechoslovakia's initial delistment and outlined the steps taken by the Czechoslovakian government to prevent the export of products containing PCB above the permitted tolerance. FSIS solicited comments on the interim rule. No comments were received. FSIS has determined that the interim rule shall be made a final rule.

EFFECTIVE DATE: April 25, 1984.

FOR FURTHER INFORMATION CONTACT: Dr. Grace Clark, Director, Foreign Programs Division, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-6971.

SUPPLEMENTARY INFORMATION:

Executive Order 12211

The Food Safety and Inspection Service has determined that this interim final rule is not a major rule under Executive Order 12291. It will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies or geographic regions; or significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Effects on Small Entities

The Administrator, Food Safety and Inspection Service, has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, Pub. L. 96-354 (5 U.S.C. 601) since there is currently only one domestic importer of Czechoslovakian meat products.

Background

On December 30, 1983, FSIS published in the **Federal Register** (48 FR 57475) an interim final rule, effective immediately, relisting Czechoslovakia as a country from which meat food products may be imported into the United States. In April 1983, Czechoslovakia was removed from the list of countries from which meat products might be imported into the United States as a result of polychlorinated biphenyl (PCB) residue violations in exported pork products (48 FR 19358). The Czechoslovakian government subsequently took steps to locate the source of the problem and implemented controls to prevent the export of products containing PCB above the permitted tolerance. The Administrator, FSIS, subsequently determined that the Czechoslovakian meat inspection system is in compliance with the FMIA's requirement that foreign inspection systems be at least equal to that of the United States.

Comments on the Interim Rule

FSIS did not receive any comments in response to the interim final rule.

Final Rule

After careful consideration of all relevant information available to FSIS, the Administrator has determined that the interim rule should be published as a permanent regulation as set forth below.

List of Subjects in 9 CFR Part 327

Meat inspection, Imported products.

PART 327—[AMENDED]

1. The authority citation for Part 327 is as follows:

Authority: 34 Stat. 1260, 79 Stat. 903, as amended, 81 Stat. 584, 84 Stat. 91, 438; 21 U.S.C. 71 *et seq.*, 601 *et seq.*, 33 U.S.C. 1254.

§ 327.2 [Amended]

2. Section 327.2(b) of the Federal meat inspection regulations (9 CFR 327.2(b)) is amended by adding Czechoslovakia in alphabetical order to the list of countries eligible to export products into the United States.

Done at Washington, DC, on March 14, 1984.

Donald L. Houston,

Administrator, Food Safety and Inspection Service.

[FR Doc. 84-7999 Filed 3-23-84; 8:45 am]

BILLING CODE 3410-DM-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 140

Financial Protection Requirements and Indemnity Agreements; Facility Form Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is adding statements to its regulations that would indicate that the text of the Facility Form policy, including any codified amendatory endorsement or change to the policy, is an example of a contract that has been "accepted" as evidence of financial protection but that other variations on the text would be considered by the Commission. This action, which is discussed in Section 1, is intended to remove the misimpression that the Commission requires its nuclear power reactor licensees to maintain financial protection containing the exact language presented in the text of the Facility Form policy. Section 2 of the Notice contains two amendatory endorsements that modify certain definitions in the Facility Form policy. Section 3 contains the standard secondary master policy form which is published for codification and which certain licensees are maintaining as secondary financial protection. Finally, Section 4 contains other minor changes to conform certain sections of 10 CFR Part 140 both to Pub. L. 94-197 and the Atomic Energy Act of 1954, as amended.

DATE: This amendment becomes effective April 23, 1984.

FOR FURTHER INFORMATION CONTACT: Ira Dinitz, Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone (301) 492-9884.

SUPPLEMENTARY INFORMATION: *Section 1*—In a proposed rule published on October 19, 1983 (48 FR 48474), the Commission sought comment on its decision to continue to publish Appendices A through H to 10 CFR Part 140 with certain clarifying statements made to Appendix A. (Appendix A is the Facility Form policy furnished by certain licensees as evidence of financial protection; Appendices B through H, except for Appendix F, are standard form indemnity contracts executed by the Commission and its licensees). This new language would state that the codified text of the Facility Form policy and amendatory endorsements to the policy were merely

Furthermore, the deferred premium should not be interpreted as establishing a responsibility by one licensee for a liability or debt of another. The potential deferred premiums are considered by the Joint Committee to have fundamentally the same status as any other such insurance premium. The bill authorizes the Commission to establish a maximum limit on the amount of deferred premiums which can be charged to a facility in any one year. The purpose of this provision is to clarify the status of the premiums and to ensure that they cannot be construed as the lending of credit by any licensee and thus raise constitutional problems for some publicly owned utilities.[1]

Section 4—Finally, although the cost of investigating the settling liability claims and defending suits for damage is retained as part of financial protection, i.e., both primary and secondary insurance, the final rule modifies certain sections of 10 CFR Part 140 in conformance with Pub. L. 94-197 to exclude these costs from government indemnity. The amendments to Part 140 also include clarifying modifications, that were not in the proposed rule, to the definitions of the terms "financial protection" and "in the course of transportation" as used in the forms of indemnity agreements.

Paperwork Reduction Act Statement

This effective rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number 3150-0039.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule affects in part two named nuclear liability insurance underwriting pools. These two pools are the only ones in the United States writing nuclear liability policies, and do not fall within the definition of a small business found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards set forth in 13 CFR Part 121.

List of Subjects in 10 CFR Part 140

Extraordinary nuclear occurrence, Insurance, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and sections 552 and 553 of Title 5 of the United States Code, the following amendments to Title 10, Chapter I, Part 140, Code of Federal Regulations, are published as a document subject to codification.

The authority citation for this document is:

Authority: Secs. 161, 170, 68 Stat. 948, 71 Stat. 576, as amended (42 U.S.C. 2201, 2210); secs. 201, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 140.11(a), 140.12(a), 140.13 and 140.13a are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); and § 140.6 is issued under sec. 161o, 68 Stat. 905, as amended (42 U.S.C. 2201(o)).

PART 140—[AMENDED]

1. Section 140.15(a)(1) is revised to read as follows:

§ 140.15 Proof of financial protection.

(a)(1) Licensees who maintain financial protection in whole or in part in the form of liability insurance shall provide proof of financial protection that consists of a copy of the liability policy (or policies) together with a certificate by the insurers issuing the policy stating that the copy is a true copy of the currently effective policy issued to the licensee. The licensee may furnish proof of financial protection in the form of the nuclear energy liability insurance policy set forth in § 140.91 or in any other form acceptable to the Commission.

* * * * *

2. An introductory paragraph is added to § 140.91 to read as follows:

§ 140.91 Appendix A—Form of nuclear energy liability policy for facilities.

While the text of the policy which follows is exemplary of a contract acceptable to the Commission as evidence of the financial protection required of the licensee by section 170 of the Atomic Energy Act of 1954, as amended, variations on this text submitted by the licensee also will be considered by the Commission in determining whether the licensee meets the financial protection requirements of the Act. The full text of the policy is published solely for the purpose of completeness. Publication of this text should not be construed as a Commission endorsement of any particular provision pertaining solely to the business relationship between the insurers and the insureds or to any other matter not within the Commission's statutory jurisdiction under the Atomic Energy Act:

* * * * *

3. Section 140.91, Appendix A, is amended by adding the following endorsements to read as follows:

NE-5C (1/1/80), Amendatory Endorsement (Indemnified Nuclear Facility)

It is agreed that:

I. In Insuring Agreement III:

"DEFINITIONS"

A. The first sentence of the definition of "nuclear facility" is amended to read: "nuclear facility" means "the facility" as defined in any Nuclear Energy Liability Policy (Facility Form) issued by Nuclear Energy Liability Insurance Association or by Mutual Atomic Energy Liability Underwriters.

B. The definition of "indemnified nuclear facility" is replaced by the following: "indemnified nuclear facility" means

(1) "the facility" as defined in any Nuclear Energy Liability Policy (Facility Form) issued by Nuclear Energy Liability Insurance Association or by Mutual Atomic Energy Liability Underwriters, or

(2) any other nuclear facility, if financial protection is required pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, with respect to any activities or operations conducted thereat;

C. Solely with respect to an "insured shipment" to which this policy applies as proof of financial protection required by the Nuclear Regulatory Commission. Subdivision (2) of the definition of "nuclear energy hazard" is amended to read:

(2) The nuclear material is in an insured shipment which is away from any other nuclear facility and is in the course of transportation, including the handling and temporary storage incidental thereto, within

(a) The territorial limits of the United States of America, its territories or possessions, or Puerto Rico; or Canal Zone; or

(b) International waters or airspace, provided that the nuclear material is in the course of transportation between two points located within the territorial limits described in (a) above and there are no deviations in the course of the transportation for the purpose of going to any other country, state or nation, except a deviation in the course of said transportation for the purpose of going to or returning from a port or place of refuge as the result of an emergency.

D. The definition of "insured shipment" is replaced with the following:

"insured shipment" means shipment of source material, special nuclear material, spent fuel or waste, or tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, herein called "material," (1) to the facility from any location except an indemnified nuclear facility, but only if the transportation of the material is not by predetermination to be interrupted by removal of the material from a transporting conveyance for any purpose other than the continuation of its transportation, or (2) from the facility to any other location, but only until the material is removed from a transporting conveyance for any purpose

[1] Joint Committee on Atomic Energy, Report No. 94-648, November 10, 1975, p.11.

to the location or from the location provided that:

* * * * *

23. In § 140.95, Appendix E, Article I, paragraph 6 is revised to read as follows:

6. "Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b) if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

24. In § 140.95, Appendix E, Article III, paragraph 3, is removed.

25. In § 140.95, Appendix E, Article III, paragraph 4, is revised to read as follows:

4(a) The obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed $250,000.

(b) With respect to a common occurrence, the obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) an amount equal to the sum of $160,000,000 and the amount available as secondary financial protection. As used in this Article "applicable agreements" mean each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence."

26. In § 140.95, Appendix E, Article IV, paragraph 1, is revised to read as follows:

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim (provided that no government indemnity that would otherwise be available to pay public liability claims is used for these purposes) and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

27. In § 140.107, Appendix G, Article I, the prefatory language of paragraph 4 is amended to read as follows:

4. "In the course of transportation" means in the course of transportation within the United States, or in the course of transportation outside the United States and any other nation, and moving from one person licensed by the Commission to another person licensed by the Commission, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

28. In § 140.107, Appendix G, Article II, paragraph 6(d), is revised to read as follows:

(d) As used in this paragraph 6, Article II and in Article III, "other applicable agreements" means each other agreement entered into by the Commission pursuant to subsection 170c. of the Act in which agreement the nuclear incident is defined as a "common occurrence." As used in this paragraph 6, Article II, "the obligations of the licensee" means the obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability, together with any public liability satisfied by the insurers under the policy or policies designated in the Attachment, and the reasonable costs incurred by the insurers in investigating and settling claims and defending suits for damage.

29. In § 140.107, Appendix G, Article III, paragraph 3, is removed.

30. In § 140.107, Appendix G, Article III, paragraph 4 is revised to read as follows:

4(a) The obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed the amount of financial protection.

(b) With respect to a common occurrence, the obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed $160,000,000.

31. In § 140.107, Appendix G, Article IV, paragraph 1, is revised to read as follows:

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim (provided that no government indemnity that would otherwise be available to pay public liability claims is used for these purposes) and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

§ 140.108 [Amended]

32. In § 140.108, Appendix H, Article I, the prefatory language of paragraph 4 is revised to read as follows:

4. "In the course of transportation" means in the course of transportation within the United States, or in the course of transportation outside the United States and any other nation, and moving from one person licensed by the Commission to another person licensed by the Commission, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

33. In § 140.108, Appendix H, Article II, paragraph 3, is revised to read as follows:

3. Any obligations of the licensee under paragraphs 1 and 2 of this Article, and subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability shall not in the aggregate exceed the amount of financial protection with respect to any nuclear incident.

34. In § 140.108, Appendix H, Article III, paragraph 3, is removed.

35. In § 140.108, Appendix H, Article III, paragraph 4 is revised to read as follows:

4(a) The obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable

or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

ARTICLE IV

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

ARTICLE V

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

ARTICLE VI

The term of this agreement shall commence as of the date and time specified in Item 4 of the attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in paragraph 4(b), Article I of this section. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES NUCLEAR REGULATORY COMMISSION

Indemnity Agreement No. D———

ATTACHMENT

Item 1—Licensee ————————————
Address ————————————
Item 2—License number or numbers ———
Item 3—Location ————————————
————————————
————————————

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ——— m., on the ——— day of ————, 19—.

For the United States Nuclear Regulatory Commission.

By ————————
For the ————————
(Name of licensee)
By ————————

Dated at Bethesda, Md., the —— day of ————, 19—.

[27 FR 2886, Mar. 29, 1962, as amended at 30 FR 14780, Nov. 30, 1965; 33 FR 16002, Oct. 31, 1968; 34 FR 706, Jan. 17, 1969; 36 FR 21581, Nov. 11, 1971; 37 FR 3423, Feb. 16, 1972]

EDITORIAL NOTE: For additional FEDERAL REGISTER citations affecting § 140.94, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 140.95 Appendix E—Form of indemnity agreement with nonprofit educational institutions.

This indemnity agreement No. E——— is entered into by and between the ———— (hereinafter referred to as the "licensee") and the United States Nuclear Regulatory Commission (hereinafter referred to as the "Commission") pursuant to subsection 170k of the Atomic Energy Act of 1954, as amended (hereinafter referred to as "the Act").

ARTICLE I

As used in this agreement,

1. "Nuclear reactor," "byproduct material," "person," "source material," and "special nuclear material" shall have the meanings given them in the Atomic Energy Act of 1954, as amended, and the regulations issued by the Commission.

2. (a) "Nuclear incident" means any occurrence including an extraordinary nuclear occurrence or series of occurrences at the location or in the course of transportation causing bodily injury, sickness, disease, or death, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of the radioactive material.

(b) Any occurrence including an extraordinary nuclear occurrence or series of occurrences causing 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

i. The radioactive material discharged or dispersed from the location over a period of days, weeks, months or longer and also aris-

ing out of such properties of other material defined as "the radioactive material" in any other agreement or agreements entered into by the Commission under subsection 170 c or k of the Act and so discharged or dispersed from "the location" as defined in any such other agreement; or

ii. The radioactive material in the course of transportation and also arising out of such properties of other material defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act as "the radioactive material" and which is in the course of transportation shall be deemed to be a common occurrence. A common occurrence shall be deemed to constitute a single nuclear incident.

3. "Extraordinary nuclear occurrence" means an event which the Commission has determined to be an extraordinary nuclear occurrence as defined in the Atomic Energy Act of 1954, as amended.

4. "In the course of transportation" means in the course of transportation within the United States, or in the course of transportation outside the United States and any other nation, and moving from one person licensed by the Commission to another person licensed by the Commission, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:

(a) With respect to transportation of the radioactive material to the location, such transportation is not by predetermination to be interrupted by the removal of the material from the transporting conveyance for any purpose other than the continuation of such transportation to the location or temporary storage incidental thereto;

(b) The transportation of the radioactive material from the location shall be deemed to end when the radioactive material is removed from the transporting conveyance for any purpose other than the continuation of transportation or temporary storage incidental thereto;

(c) "In the course of transportation" as used in this agreement shall not include transportation of the radioactive material to the location if the material is also "in the course of transportation" from any other "location" as defined in any other agreement entered into by the Commission pursuant to subsection 170 c or k of the Act.

5. "Person indemnified" means the licensee and any other person who may be liable for public liability.

6. "Public liability" means any legal liability 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 (a) at the location or, if the nuclear incident occurs in the course of transportation of the radioactive material, on the transporting vehicle, and (b) in connection with the licensee's possession, use, or transfer of the radioactive material; (2) claims arising out of an act of war; and (3) claims for loss of, or damage to, or loss of use of (a) property which is located at the location and used in connection with the licensee's possession, use, or transfer of the radioactive material, and (b) if the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle, containers used in such transportation, and the radioactive material.

7. "The location" means the location described in Item 3 of the Attachment hereto.

8. "The radioactive material" means source, special nuclear, and byproduct material which (1) is used or to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) which is produced as the result of operation of said reactor(s).

9. "United States" when used in a geographical sense includes Puerto Rico and all territories and possessions of the United States.

ARTICLE II

1. Any obligations of the licensee under subsection 53e(8) of the Act to indemnify the United States and the Commission from public liability shall not in the aggregate exceed $250,000 with respect to any nuclear incident.

2. With respect to any extraordinary nuclear occurrence to which this agreement applies, the Commission, and the licensee 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 or 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 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 waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified.

3. The waivers set forth in paragraph 2 of this article:

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

(b) 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;

(c) 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: *Provided, however,* That with respect to an extraordinary nuclear occurrence occurring at the facility, a claimant who is employed at the facility in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Nuclear Regulatory Commission shall not be considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) The claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) No operating license has been issued by the NRC with respect to the nuclear reactor, and

(3) The claimant is not employed in connection with the possession, storage, use, or transfer of nuclear material at the facility;

(d) 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;

(e) Shall be effective only with respect to those obligations set forth in this agreement;

(f) 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 (1) the limit of liability provisions under subsection 170e of the Atomic Energy Act of 1954, as amended, and (b) the terms of this agreement.

ARTICLE III

1. The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

2. With respect to damage caused by a nuclear incident to property of any person legally liable for the nuclear incident, the Commission agrees to pay to such person those sums which such person would have been obligated to pay if such property had belonged to another; provided, that the obligation of the Commission under this paragraph 2 does not apply with respect to:

(a) Property which is located at the location and used in connection with the licensee's possession, use or transfer of the radioactive material;

(b) Property damage due to the neglect of the person indemnified to use all reasonable means to save and preserve the property after knowledge of a nuclear incident;

(c) If the nuclear incident occurs in the course of transportation of the radioactive material, the transporting vehicle and containers used in such transportation;

(d) The radioactive material.

3. [Reserved]

4(a) The obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed $250,000.

(b) With respect to a common occurrence, the obligations of the Commission under this agreement shall apply only with respect to such public liability and such damage to property of persons legally liable for the nuclear incident (other than such property described in the proviso to paragraph 2 of this Article) as in the aggregate exceed whichever of the following is lower: (1) The sum of the amounts of financial protection established under all applicable agreements; or (2) an amount equal to the sum of $160,000,000 and the amount available as secondary financial protection. As used in this Article "applicable agreements" mean each agreement entered into by the Commission pursuant to subsection 170c of the Act in which agreement the nuclear incident is defined as a "common occurrence."

5. The obligations of the Commission under this agreement shall apply only with respect to nuclear incidents occurring during the term of this agreement.

6. The obligations of the Commission under this and all other agreements and contracts to which the Commission is a party shall not with respect to any nuclear incident, in the aggregate exceed which ever of the following is the lower: (a)

$500,000,000 or (b) with respect to a common occurrence, $560,000,000 less the sum of the amounts of financial protection established under all applicable agreements.

7. If the licensee is immune from public liability because it is a state agency, the Commission shall make payments under the agreement in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a state agency.

8. The obligations of the Commission under this agreement, except to the licensee for damage to property of the licensee, shall not be affected by any failure on the part of the licensee to fulfill its obligations under this agreement. Bankruptcy or insolvency of the licensee or any other person indemnified or of the estate of the licensee or any other person indemnified shall not relieve the Commission of any of its obligations hereunder.

ARTICLE IV

1. When the Commission determines that the United States will probably be required to make indemnity payments under the provisions of this agreement, the Commission shall have the right to collaborate with the licensee and other persons indemnified in the settlement and defense of any claim (provided that no government indemnity that would otherwise be available to pay public liability claims is used for these purposes) and shall have the right (a) to require the prior approval of the Commission for the settlement or payment of any claim or action asserted against the licensee or other person indemnified for public liability or damage to property of persons legally liable for the nuclear incident which claim or action the licensee or the Commission may be required to indemnify under this agreement; and (b) to appear through the Attorney General of the United States on behalf of the licensee or other person indemnified, 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 the Commission, the licensee shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

2. Neither this agreement nor any interest therein nor claim thereunder may be assigned or transferred without the approval of the Commission.

ARTICLE V

The parties agree that they will enter into appropriate amendments of this agreement to the extent that such amendments are required pursuant to the Atomic Energy Act of 1954, as amended, or licenses, regulations or orders of the Commission.

ARTICLE VI

The licensee agrees to pay to the Commission such fees as are established by the Commission pursuant to regulations or orders of the Commission.

ARTICLE VII

The term of this agreement shall commence as of the date and time specified in Item 4 of the Attachment and shall terminate at the time of expiration of that license specified in Item 2 of the Attachment, which is the last to expire; provided that, except as may otherwise be provided in applicable regulations or orders of the Commission, the term of this agreement shall not terminate until all the radioactive material has been removed from the location and transportation of the radioactive material from the location has ended as defined in subparagraph 4(b), Article I. Termination of the term of this agreement shall not affect any obligation of the licensee or any obligation of the Commission under this agreement with respect to any nuclear incident occurring during the term of this agreement.

UNITED STATES NUCLEAR REGULATORY COMMISSION

Indemnity Agreement No. E——— —

ATTACHMENT

Item 1—Licensee ——————————— —
Address ——————————— ————
Item 2—License number or numbers ——— —
Item 3—Location ——————————— —

——————————————————

——————————————————

Item 4—The indemnity agreement designated above, of which this Attachment is a part, is effective as of ——— m., on the ——— day of ——————, 19—.

For the United States Nuclear Regulatory Commission.

By ——————————
For the ——————————
By ——————————
(Name of licensee)

Dated at Bethesda, Md., the —— day of ——————, 19—.

[27 FR 2887, Mar. 29, 1962, as amended at 30 FR 14780, Nov. 30, 1965; 33 FR 16002, Oct. 31, 1968; 34 FR 706, Jan. 17, 1969; 36 FR 21581, Nov. 11, 1971; 37 FR 3423, Feb. 16, 1972]

EDITORIAL NOTE: For additional FEDERAL REGISTER citations affecting § 140.95, see the List of CFR Sections Affected in the Finding Aids section of this volume.

a position of having dealings with a bank he could examine, and this would serve to guarantee the examiner's unbiased objectivity in the performance of his duties. We would caution, however, that 18 U.S.C. § 213 would still prohibit any dealings with a bank that the examiner has already "examined."

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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June 23, 1977

77-40 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NUCLEAR REGULATORY COMMISSION

Damage Claims Under the Atomic Energy Act

This is in response to your request for our opinion concerning the effect of a floor amendment proposed by Senator Hathaway (Hathaway Amendment), and included in the Act of December 31, 1975, Pub. L. 94-197, 89 Stat. 1111 (1975 Act), amending the Atomic Energy Act of 1954, as amended. The provisions of that Act involved here are known as the Price-Anderson Act, 71 Stat. 576 (Sept. 2, 1957), incorporated in sections 2, 11, 53, and 170 of the Atomic Energy Act, 42 U.S.C. §§ 2012(i), 2014(j)-(u), 2073(e)(8), 2210 (Act).

You suggest that the Hathaway Amendment should be read to eliminate all provisions of the Price-Anderson Act that allow the reasonable costs of investigation, settlement, and defense of damage claims (costs) resulting from a nuclear incident to be absorbed from the various sources of funds that the Act makes available. For the reasons given below, we believe that costs are properly excludable only from the Nuclear Regulatory Commission's (NRC) indemnity amount.

The Act establishes a complex scheme for meeting public liability claims arising out of accidents at nuclear reactor facilities. First, the Act limits the maximum aggregate liability for any single incident to $560 million. § 170(e); 42 U.S.C. § 2210(e) (Supp. V, 1975). Second, the Act requires each licensee to maintain "financial protection," usually insurance, in an amount determined by the NRC, currently $125 million. Third, the Act provides that for awards in excess of the "financial protection" coverage up to the aggregate liability limit described above, the NRC will indemnify the licensee for the excess over the "financial protection" coverage. § 170(c); 42 U.S.C. § 2210(c) (Supp. V, 1975). Because the maximum aggregate liability is $560 million, and the currently required financial protection is $125 million, the maximum indemnity presently payable by the NRC is $435 million.

The Price-Anderson Act was extended and amended by the 1975 Act. The 1975 Act provides for the establishment of a deferred premi-

um scheme that, over the course of time, will replace the NRC indemnity with one funded by the nuclear power industry.[1] Thus, when the 1975 Act is implemented, the funds available for paying public liability claims will be composed of (1) "financial protection" (insurance); (2) the deferred premium insurance scheme; and (3) the NRC indemnity. On the floor of the Senate, Senator Hathaway introduced an amendment to the 1975 Act that provided, with respect to the NRC indemnity, that costs were to be excluded in calculating the indemnity amount. Prior to this, the Act clearly provided that the costs of investigating, settling, and defending claims were included in the amount charged against the maximum liability—$560 million. No amendment was proposed expressly to exclude costs from the amount required to be covered by the financial protection provided by licensees and, indeed, the previous statutory language expressly including such costs was reenacted in the 1975 Act. Further, the provisions of the 1975 Act that added the deferred premium scheme to the Act, expressly included costs within the sum to be made up by deferred premium payments. Finally, no amendment was proposed to exclude costs from the maximum liability limits established under the Act. The Hathaway Amendment was adopted by the Senate and enacted into law.[2]

The literal result of the Hathaway Amendment is to provide that costs are to be excluded from that part of the maximum aggregate liability payable by the NRC and included for purposes of the financial protection and deferred premium plans. Thus, as the NRC's exposure declines as the deferred premium plan assumes a greater part of the exposure, the aggregate amount payable to the public will decline, because a greater portion of the amounts available within the aggregate liability limitation will be exposed to the payment of costs, which, as a result of the Hathaway Amendment, are not included in that portion of the aggregate liability limitation attributable to the NRC indemnity.

Although the words of the Hathaway Amendment changed the treatment of "costs" only with respect to the NRC indemnity, Senator Hathaway may well have intended this change to apply to all elements of the Act. In introducing his amendment, he described it as follows:

> Quite simply, what this amendment does is to require that the entire resources of the $560 million fund—or whatever limit is established through the retrospective premium system—be used only for the purpose of compensating people who are injured or sustain damages as a result of a nuclear accident. It amends several provisions of the Price-Anderson Act which at present permit the payment of investigative costs, settlement fees, and defense costs out of the overall liability limit. My amendment specifically excludes these costs from any determination as to when the overall liability limitation has been reached. 121 Cong. Rec. S. 40966 (1975).

However, in a later colloquy with Senator Baker, the comanager of the bill, Senator Hathaway indicated that his amendment was not intended to change the existing practice of including costs within the amounts to be provided by financial protection (insurance).[3]

It is difficult to reconcile the inconsistency between Senator Hathaway's statements about what he intended. An intent to exclude costs entirely from the liability limit is incompatible with including them in one of the three elements of that limit. In addition, the intent to exclude costs is incompatible with the pre-1975 language of § 170(e), which expressly included reasonable costs in the limit on liability. Yet the same language was reenacted by the very bill to which Senator Hathaway's proposal was directed. § 170(e) of the Act. *See also* 121 Cong. Rec. 40959 (1975). If Congress desired to require that costs might not be deducted from the limit on liability, it had only to strike from § 170(e) the language that authorized such deduction; instead, the same authorization was included in the revised § 170(e), which Senator Hathaway did not amend.

Still a third inconsistency is evident. The deferred premium scheme, the heart of the 1975 revision of the Price-Anderson Act, makes costs an element of the premiums themselves. Act, § 170(b). *See also* 121 Cong. Rec. 40958–9 (1975). As with revised § 170(e), this language, too, was included in the bill both before and after adoption of the Hathaway Amendment. Finally, the 1975 extension continues in effect the existing definition of "financial protection," specifically including the costs of investigation, settlement, and defense of claims. Act § 11(k); 42 U.S.C. § 2014(k).

Whatever may have been Senator Hathaway's intention, Congress went forward and enacted the bill expressly excluding costs from the indemnity provision (as per the Hathaway Amendment) and expressly including costs in the deferred premium and financial protection provisions. Thus, even were it clear that the subjective congressional intent was to completely eliminate costs, it is unmistakably clear that its objective manifestation and the language chosen was insufficient to achieve the intended result; "legislative intention, without more, is not legislation" *Train* v. *City of New York*, 420 U.S. 35, 45 (1975). As the Supreme Court noted in that case, legislative action can simply be

[1] Under the deferred premium scheme, in the event of a nuclear accident that exhausts the licensees' financial protection coverage, all licensees will, in effect, be assessed up to $5 million per facility as the deferred premium feature of the 1975 Act takes effect. § 170(b) of the Act; 42 U.S.C. § 2210(b) (Supp. V, 1975).

[2] The amendment itself amended, *inter alia*, five sections of the Act: § 170(c), 42 U.S.C. § 2210(c) (Supp. V, 1975); § 170(d), 42 U.S.C. § 2210(d) (Supp. V, 1975); § 170(h), 42 U.S.C. § 2210(h) (Supp. V, 1975); § 170(k), 42 U.S.C. § 2210(k) (Supp. V, 1975); and § 170(l), 42 U.S.C. § 2210(l) (Supp. V, 1975).

[3] Mr. Baker: "The cost of the investigation ordinarily is charged against the insurance before it ever gets to the indemnity side. Is there anything in your [amendment] that changes that relationship?"
Mr. Hathaway: "No." 121 Cong. Rec. 40967 (1975).

"inadequate" to its ends *id.* at 44, and, in our view, that is the case here, as the following review of the principles of statutory construction indicates.

The language of a statute is the prime indicator of legislative intent. Chief Justice Marshall, in one of his earliest opinions, said that a "law is the best expositor of itself" *Pennington* v. *Coxe,* 6 U.S. (2 Cranch) 33, 52 (1804), a rule that he stated more completely in *The Paulina* v. *United States,* 11 U.S. (7 Cranch) 52, 60 (1812):

> In construing [a statute] it has been truly stated to be the duty of the court to effect[uate] the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it.

Accord, United States v. *Wiltberger,* 18 U.S. (5 Wheat.) 76, 94–95 (1820) (Marshall, C. J.). The rule no more than states the obvious. In interpreting a statute one must first look to the language that Congress employed. *E.g., Flora* v. *United States,* 357 U.S. 63, 65 (1958); *A. Magnano Co.* v. *Hamilton,* 292 U.S. 40, 46–47 (1934); *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920); *United States* v. *Union Pacific R. Co.,* 91 U.S. 72, 79 (1875).

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *United States* v. *American Trucking Ass'ns Inc.,* 310 U.S. 534, 543 (1940).

This is not to say that other meanings may not be attributed to ambiguous or contradictory statutory phrases. Where that is the case, resort to the rules of construction or to implications which may be found in legislative history are of course appropriate. But "[w]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. . . ." *Burns* v. *Alcala,* 420 U.S. 572, 580–81 (1975).

Applying this rule, we note that the language of the revised Price-Anderson Act is clear and unambiguous concerning "costs" and the limit on liability; § 170(e) of the amended Act includes costs within that limit in unmistakable terms. To impose a contrary interpretation on the Act, despite the words of § 170(e), would amount to a finding that the section has been amended by necessary implication from the indemnity portions of the Act that were more directly changed by Senator Hathaway's amendments. Repeal and amendments by implication are strongly disfavored. *Amell* v. *United States,* 384 U.S. 158, 165–166 (1966); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963); *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555, 565 (1963); *United States* v. *Borden Co.,* 308 U.S. 188, 198–99 (1939). A new statute will not be treated as amending portions of an older one, not mentioned in

the former, unless there is a positive repugnancy between the two, *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974), and it cannot be suggested that the various provisions of the revised Price-Anderson Act cannot be harmonized. We find no irreconcilable inconsistencies or absurdities of result if the Act be taken on its face and given its open and obvious meaning.

It is a "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 633 (1973); *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307–308 (1961); *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932). To accept your view of the revised Price-Anderson Act would mean that not only would such sections of its text as, for example, the definition of "financial protection," be given no force, but that many of its provisions must be read directly contrary to their terms. Where the statute sets an upper limit on all public liability from a nuclear incident, we would see only a limit on payments to claimants, disregarding all costs.

So drastic a reversal of the ordinary meaning of the statutory language cannot be supported by the meager evidence of a single statement by the proponent of an amendment, itself at odds with his later words and the terms of his amendment. We have been unable to discover in the legislative record any showing of a congressional—as distinct from individual—purpose to change the inclusion of costs within the limit on liability. Upon the available record, we simply cannot conclude that Congress, by accepting Senator Hathaway's amendment concerning the treatment of costs under the Governmental indemnity, intended to make a similar change in their separate treatment under the limit on public liability.[4]

Nor do we find support for the view that costs are now excluded from financial protection insurance and deferred-premium payments, despite the explicit statutory language that includes costs in those amounts. It could not be contended, for example, that the inclusion of costs in financial protection insurance was an obscure or hidden matter. It is evident on a single reading of the definition of "financial protection," § 11(k), 42 U.S.C. § 2014(k), and is accepted by insurers, licensees, and the Commission alike. Reenactment of a statute that has acquired a settled significance ordinarily adopts that meaning in the absence of a plain indication to the contrary. *Heald* v. *District of Columbia,* 254 U.S. 20, 23 (1920). We should point out that with respect to financial protection, even Senator Hathaway's own intent is ambiguous. His reply to Senator Baker, *supra,* denies any purpose to alter the existing relationship between indemnity and financial protection, in

[4]You suggest that the trade press and certain staff members of the Joint Committee on Atomic Energy understood the Hathaway Amendment to exclude costs from all parts of the Price-Anderson scheme. Such "sources" for determining legislative intent hardly suffice to enable one to decide that when Congress used the word "including" it really meant "excluding."

which "costs" were subtracted from that insurance coverage before the indemnity could be reached.

Thus, we find no basis for concluding that Congress has altered the meaning of § 11(k)—including costs as an element of the term "financial protection"—or that Congress intended to abrogate existing insurance contracts that, we understand, similarly provide that the insurer's liability for costs and claims is limited to the required amount of financial protection.

We are likewise unable to conclude that the 1975 revision to the Price-Anderson Act has mandated an exclusion of costs from the deferred-premium element of its system. To do so would be to contradict the explicit language of § 3 of the 1975 Act. Section 3 expressly includes costs in ascertaining the amount of deferred premiums against nuclear licensees.

It is suggested that somehow the Supreme Court's recent decision in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), provides a basis for concluding that when Congress used the word "including" it intended the word "excluding." In that case, the Supreme Court held that the words "radioactive material" in the Federal Water Pollution Control Act did not include source, byproduct, or special nuclear materials, all of which were already regulated under the Atomic Energy Act, and that the courts could properly consider traditional legislative history materials in construing the words of a statute, even where the statutory words themselves may seem to be clear on superficial examination.[5] In that case, however, the House report, the Senate debates, and the conference report all indicated clearly that source, byproduct, and special nuclear materials were not intended to be within the statutory definition of "radioactive material." Thus, the available legislative materials in that case were substantially different from the inconsistent statements of Senator Hathaway here present. Moreover, a determination that "radioactive materials" does not mean "all radioactive materials," is substantially different from a determination that "including" means "excluding."

Finally, it is suggested that "policy" considerations support the view that the Hathaway Amendment should apply even to the unamended portions of the Act. The policy principle cited to support this view is that the licensee is to be responsible for providing financial protection to the public. Unfortunately, the Price-Anderson Act attempts to reconcile several conflicting policies, of which the principle noted above is only one. Others include providing protection to the public and a financial source from which damage awards may be paid, and the perceived need to protect the nuclear power industry from unlimited or "unaffordable" liability—a policy evidenced in the maximum liability limitations of the Act. That policy perhaps supports the view that, at least with respect to that portion of the maximum exposure that is the

Train, supra, at 9–11, 24–25.

responsibility of the licensees, costs were intended to be included so that the maximum exposure could be determined with certainty.

In short, we conclude that the Price-Anderson Act, as amended, excludes the costs of investigation, settlement, and defense of claims under the remaining Federal indemnity. The 1975 revision of that Act did not change the treatment of those costs under either the overall limit on public liability arising from a single nuclear incident, the financial protection insurance required of licensees, or the industry-funded deferred-premium elements of the statutory compensation system.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

Cite as 45 NRC 358 (1997) CLI-97-6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of

REGENTS OF THE UNIVERSITY OF CALIFORNIA
(Indemnity Claim)

May 29, 1997

The Commission denies the Regents' claim for the NRC's payment of attorney's fees and expenses incurred in the Regents' defense of two private tort suits against it (subsequently settled) for alleged harm caused by radioactive releases from the NRC-licensed Argonaut nuclear test reactor at the University of California at Los Angeles (UCLA).

The Commission finds that section 170 of the Atomic Energy Act (known as the Price-Anderson Act) bars the NRC's payment of licensee legal expenses incurred in connection with settlements. Furthermore, the Commission finds that even if it were permitted to pay such expenses under the Act, it would not approve the claim because by statute and under the Indemnity Agreement the Regents should have timely notified the NRC at the point where governmental indemnity arose and should have sought NRC approval of the settlement of the tort cases.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The Price-Anderson Act is best understood as barring Commission payment of licensee legal expenses incurred in connection with settlements. 42 U.S.C. § 2210(h).

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NRC: CONSIDERATION OF INDEMNITY CLAIMS

The Commission cannot authorize expenditures of government money without express statutory authority or in the face of a statutory prohibition against such payments. 31 U.S.C. §§ 1341, 1350.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

Section 170h of the AEA appeared in the original 1957 Price-Anderson Act. It provides the authority for the Commission, when it anticipates making indemnity payments for public liability claims, to collaborate with an indemnified person, approve payments of claims, take charge of such action, and settle or defend any such action.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The 1975 Hathaway Amendment altered section 170h of the AEA by providing that a Commission-approved settlement "shall not include expenses in connection with the claim incurred by the person indemnified."

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The 1988 Price-Anderson Act amendments loosened restrictions on government payment of legal costs and modified several of the Hathaway Amendment provisions, but did not alter section 170h in any respect; therefore, the bar against indemnifying a licensee's expenses in settlements remains in place.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The Commission believes that a lawsuit that is dismissed voluntarily after a negotiated arrangement in which a licensee, among other things, forfeits any right to seek costs from plaintiff qualifies as a "settlement" and not a "dismissal."

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The fact that a specific provision of the Price-Anderson Act other than section 170h was modified by the 1988 Amendments to contemplate government

payment of licensee legal costs in some situations does not mean that Congress repealed section 170h by implication.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The Price-Anderson Act contemplates that at the point where governmental indemnity arises in a public liability claim, the licensee will offer the government the opportunity to take over defense of the claims and manage the lawsuit. 42 U.S.C. § 2210(h).

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

By statute, a licensee is required both to notify the NRC that it has reached the point where government indemnification payments will be required under a public liability claim and to seek NRC's approval of the settlement of such a claim.

ATOMIC ENERGY ACT (AEA): INTERPRETATION OF SECTION 170h (PRICE-ANDERSON ACT)

The Price-Anderson Act provides for indemnification of expenses incurred defending claims against licensees, not reimbursement for expenses incurred in presenting claims to the government.

DECISION

I. INTRODUCTION

In a series of letters beginning on January 17, 1996, the Regents of the University of California have demanded that the Commission pay $91,375.22 in indemnification for attorneys' fees and expenses incurred in defending two private tort suits against the Regents.[1] The Regents seek indemnification under

[1] The Regents' initial letter, dated January 17, 1996, demanded NRC payment of $76,102.26. More recently, in a letter dated January 31, 1997, the Regents amended their claim to include an additional $15,272.96 in legal costs, an amount that apparently reflects attorneys' fees and costs the Regents have incurred in pursuing their indemnity claim with the NRC. The Regents' submissions do not make clear who bears the risk of loss in the event that the NRC rejects the indemnity claim. That presumably is a matter of contract among the Regents, their private insurer, and the law firm that has handled this matter.

section 170 of the Atomic Energy Act, 42 U.S.C. § 2210 (known as the Price-Anderson Act), and under their indemnity agreement with the Commission executed pursuant to that Act.

The two underlying tort suits, known as the *Miller* and *Redisch* cases, sought damages for harm to plaintiffs' persons allegedly caused by releases of radioactivity during normal operations of the NRC-licensed Argonaut nuclear test reactor at the University of California at Los Angeles (UCLA) between 1979 and 1984. By late October 1996, the Regents had settled both cases, which therefore were never tried or decided on the merits. The settlements resulted in the payment of no damages to plaintiffs. Under their terms, plaintiffs voluntarily dismissed their lawsuits, and the Regents relinquished all rights to seek legal costs from plaintiffs.

Under the Price-Anderson Act and under the Commission's indemnity agreement with the Regents, the Commission agreed to indemnify the Regents for "public liability" exceeding $250,000 when such liability arises from a "nuclear incident." *See* section 170k, 42 U.S.C. § 2210(k). The Regents' January 17, 1996 claim for indemnity asserted that expenses incurred in defending the *Miller* and *Redisch* cases exceeded the $250,000 threshold by roughly $76,000. The Regents' private insurer apparently paid the first $250,000 in legal costs.

In a letter dated August 6, 1996, the Commission's Office of the General Counsel advised lawyers for the Regents that it was disinclined to recommend payment of the indemnity claim. More than 6 months later, on January 31, 1997, the Regents replied and asked that their claim be presented directly to the Commission.

After reviewing the factual background of the Regents' indemnity claim, the relevant provisions of the Price-Anderson Act, and the Regents' letters and submissions to the NRC detailing their claim, we have decided to deny it — for two independent reasons. First, the Price-Anderson Act is best understood as barring Commission payment of licensee legal expenses incurred in connection with settlements. *See* section 170h, 42 U.S.C. § 2210(h). Second, even if we were able to construe the Act to permit Commission payment of such expenses as a general matter, we would not approve an indemnity payment in this case because the Regents failed to give the Commission reasonable notice of the extent of their expenses in time for the Commission to take protective measures. *See id.* Some of the expenses also appear unreasonably excessive or insufficiently related to defense of the underlying tort suits.

We detail the reasons for our decision below. We issue our decision as a formal opinion because the Regents specifically requested Commission consideration of their indemnity claim, and because our views may shed some light on seldom invoked provisions of the Price-Anderson Act.

II. DISCUSSION

The Commission plainly cannot authorize expenditures of government money without express statutory authority or in the face of a statutory prohibition against such payments. Both the Constitution (the Appropriations Clause, art. 1, § 9, cl. 7) and federal statute (31 U.S.C. §§ 1341, 1350) impose this restriction on Commission expenditures. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-30 (1990). Under the related "sovereign immunity" doctrine (*id.* at 432), a claimant may not pursue monetary relief against the government absent authority "unequivocally expressed in statutory text." *Lane v. Pena*, 116 S. Ct. 2092, 2096 (1996).

This background law requires the Commission to scrutinize the Regents' claim against the public treasury in this case with great care. We cannot discern the clear authority necessary to pay the claim. Nor would we find the claim otherwise payable even if we were able to answer the authority question differently.

1. Authority to Pay

Contrary to the Regents' view, we believe that section 170h of the Atomic Energy Act provides the governing law. That section appeared in the original 1957 Price-Anderson Act and to this day provides the authority for the Commission to collaborate with an indemnified person, approve payments of claims, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. Section 170h further provided, in its original form, that a settlement "may include reasonable expenses in connection with the claim incurred by the person indemnified."[2]

Section 170h has had only one substantive alteration. That came in 1975 as part of a series of changes presented as an amendment by Senator Hathaway. Senator Hathaway's aim was (at least in part) to ensure that government indemnity money ended up in the hands of victims of nuclear incidents, and was not diverted to attorney's fees and other costs. *See generally* Damage Claims Under the Atomic Energy Act, 1 U.S. Op. OLC 157 (1977).

The Hathaway Amendment altered a number of the Act's provisions, including section 170h, which as revised provided that a Commission-approved settlement "shall *not* include expenses in connection with the claim incurred by the person indemnified" (emphasis added). "Therefore," concluded the Comptroller General in a 1980 opinion, "the Act must be interpreted as follows: the government will not indemnify a person for his legal expenses." *See* "Interpretation of Price-Anderson Act," File B-197742, 1980 WL 16980, at *4 (C.G.).

[2] *See* H.R. Rep. No. 296, 85th Cong., 1st Sess. 23 (1957) (noting that the expenses "could include reasonable attorney's fees incurred by the person indemnified in examining any claims").

In 1988 amendments to the Price-Anderson Act, after revisiting the legal costs issue in cognizant committees, Congress loosened the across-the-board restrictions on government payment of legal costs and modified several of the Hathaway Amendment provisions, *but did not alter section 170h in any respect.* This leaves in place the section 170h bar against indemnifying a licensee's expenses in settlements and prevents the Commission from paying the legal expenses incurred by the Regents in settling the *Miller* and *Redisch* cases. Congress may have assumed that licensees' own insurance would be adequate to cover legal costs in such cases. *See* Damage Claims Under the Atomic Energy Act, 1 U.S. Op. OLC at 158 & n.3 (discussing legislative history of Hathaway Amendment).

The Regents argue that section 170h does not apply here because the *Miller* and *Redisch* lawsuits in actuality were dismissed, not settled. We find this argument wholly unpersuasive. The documents the Regents themselves have provided us show plainly that the two cases were dismissed voluntarily and only after the parties reached a negotiated arrangement in which the Regents, among other things, forfeited any right to seek costs from plaintiffs. By any standard, this qualifies as a "settlement."

The Regents' only other argument is that the section 170h bar must give way because it is less "specific" than another provision, section 170k, which applies to educational institutions and appears to contemplate government payment of licensee legal costs in some situations.[3] As noted above, the "legal costs" language currently found in section 170k (and in other Price-Anderson Act provisions) dates from the 1988 Amendments that modified some aspects of the 1975 Hathaway Amendment but made no changes in section 170h. Standard principles of statutory construction prevent us from assuming that Congress repealed section 170h by implication. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). On the contrary, we are obliged to give effect to all statutory provisions.

[3] Section 170k's applicability here is far from crystal clear by its own terms. That provision establishes that the Commission shall indemnify educational licensees "from public liability in excess of $250,000 for nuclear incidents," and says that the "aggregate indemnity" in connection with each nuclear incident may not exceed $500,000,000, "including such legal costs as are approved by the Commission." But in this case the aggregate indemnity limit was never approached. And no public liability payment was made, much less one in excess of $250,000. By definition, "public liability" does not include legal costs; by contrast, licensees' own "financial protection" is defined as including damages and legal costs. *See* sections 11k, 11w, 42 U.S.C. §§ 2014(k), (w). For educational institutions the financial protection requirement was waived and instead the requirement for exceeding $250,000 in public liability was established as the trigger for governmental indemnity. *See* section 170k, 42 U.S.C. § 2210(k).

Id. See Bennett v. Spear, 117 S. Ct. 1154, 1166 (1997).[4] We cannot, therefore, accept the Regents' invitation simply to ignore the section 170h prohibition.

We see no basis, in sum, for disregarding section 170h's apparent prohibition against paying licensee legal expenses incurred in settling cases. The Regents themselves have offered us none. We therefore decline to approve their indemnity claim.

2. *Prior Notice and Reasonableness of Indemnity Claim*

Even if section 170h did not bar Commission reimbursement of licensee legal costs in settled cases, as we think it does, we would not approve payment of the Regents' indemnity claim in this case. The Price-Anderson Act, and the NRC's indemnity agreement with the Regents, indisputably contemplate Commission "approval" of claims for legal costs. Such a right of approval implies Commission review for reasonableness. Here, we cannot find the Regents' claim reasonable.

a. As a matter of procedure, the Price-Anderson Act contemplates that at the point where governmental indemnity arises, here at the $250,000 threshold, the licensee will offer the government the opportunity to take over defense of the claims and manage the lawsuit. *See* section 170h, 42 U.S.C. § 2210(h). One purpose of this provision, presumably, is to allow the government to take over representation or active management of the case with a view toward minimizing public expenses.

Here, a series of letters from counsel for the Regents did alert the NRC Staff to the existence of the *Miller* and *Redisch* cases, and to the possibility of exceeding the $250,000 limit. But the Regents' letters also indicated that plaintiffs' merits claims were insubstantial and that the case would be "tendered" to the NRC if expenses reached the $250,000 limit. *See, e.g.*, Letter dated August 10, 1995. No "tender" ever occurred until the two cases ended, after the Regents had exceeded the $250,000 limit by nearly $80,000. The lack of timely tender prejudiced the NRC.

Eight days before the parties agreed on the settlement in *Redisch*, with the *Miller* suit having already been dismissed, the Regents' insurer sent the NRC a letter reporting $28,534.08 in remaining "available financial protection" from the private insurer and indicating that tender to NRC was expected "in the very near future since [the *Redisch* case] is still unresolved." *See* Letter from Boehner, dated October 18, 1995. But it now appears that in actuality the Regents' law

[4] Our reading of section 170h does not nullify the "legal costs" authorization found in section 170k or in other provisions of the Price-Anderson Act. Those provisions remain applicable in the absence of a settlement. Moreover, even in connection with a settlement, the Commission could approve payment of *plaintiffs'* legal costs. *See* section 11jj, 42 U.S.C. § 2014(jj). Section 170h simply prevents Commission payment of licensees' legal costs in settling a case.

firm at that time already had incurred additional billable hours amounting to more than $30,000 and already had paid out additional expenses in excess of $20,000 (many apparently incurred much earlier). In other words, the Regents already had entirely consumed and substantially exceeded the $28,534 that supposedly remained as "available financial protection."

Thus, if the Regents were correct that their legal expenses were payable by the NRC after $250,000 (*but see* note 3, *supra*), they had reached an appropriate tender time and passed it before they negotiated the *Redisch* settlement. By statute, they not only ought to have notified the NRC but they also should have sought NRC approval of the settlement. *See* section 170h, 42 U.S.C. § 2210(h). As part of the settlement, however, and without NRC approval, they relinquished any right to claim legal costs against plaintiffs or monetary sanctions under Rule 11 of the Federal Rules of Civil Procedure. Had the NRC been given presettlement notice that the $250,000 limit had been reached, it might have insisted on some recompense from plaintiffs or their lawyers for the substantial expenses their insubstantial lawsuit had caused. The government almost surely would have limited any further expenditures by the private lawyers.

Even the Regents' letter reporting termination of the case indicated that there still remained $3,654.94 of the insurance money. That letter suggested only that "some expense in excess" of $250,000 might be expected. *See* Letter dated December 6, 1995. By then, of course, there was no case for the government to take over and no opportunity to minimize government costs. In addition, when read in conjunction with the prior letter's reference to $28,000 in remaining financial protection, the close-out letter's language raised no expectation of more than a *de minimis* exceeding of the $250,000 limit. The NRC therefore was quite surprised a few weeks later, when counsel for the Regents demanded $76,000 from the Commission. The substantial excess, one-third again over the insurance amount, apparently occurred in some measure because of late-arriving bills for earlier-performed services.

In these circumstances, the government was not given a timely opportunity to take over these cases and minimize public costs. The Regents have since suggested that the NRC Staff ought to have been aware that experts' fees would be high and that pretrial preparation would be expensive; however, the people in the best position to make that assessment were the defendants' counsel themselves. The Regents' correspondence did not call attention to the apparently lengthy lag time between incurring obligations for expenses and notification of them as expenditures. And, as we stressed above, the Regents did not make its tender in time for the NRC to monitor and approve the ultimate settlement or otherwise to take action in an attempt to minimize the potential costs to the U.S. government.

In short, given the Regents' failure to timely tender the case to the NRC, we do not find it reasonable for the government to pick up the bill for the Regents' expenses.

b. In addition, some of the expenses incurred by the Regents in reaching and exceeding the $250,000 limit appear questionable substantively. To begin with, we see no basis in the Price-Anderson Act to approve the Regents' claim for approximately $15,000 in attorney's fees and costs incurred *after* termination of the underlying tort suits, apparently as part of the Regents' effort to persuade the NRC to make indemnity payments. *See* note 1, *supra.* The Act provides for indemnification of expenses incurred defending claims against licensees, not reimbursement for expenses incurred in presenting claims to the government.

The Regents' fee claim raises a number of additional questions. For example, the billing records' descriptions of law firm hours are often vague and insufficiently segregated as to tasks as well as being chronologically out of order — with significant expenses for billed hours appearing considerably later than previous invoices represented as being "for services rendered through" a specified date. Moreover, the billing records indicate that counsel incurred substantial expenses on matters not directly related to defense of the tort cases, such as correspondence with the insurer-client and organizing what were apparently disorganized UCLA files. Finally, the records show that high-priced law firm partners, rather than associates or paralegals, conducted such fairly mundane tasks as document and privilege reviews and also that they traveled extensively to meet with experts rather than conduct conferences by telephone, at significantly less expense.

The Regents might be able to provide adequate answers to some or all of our substantive questions. But we need not resolve these questions definitively in view of our decision on other grounds not to pay Price-Anderson Act indemnity in this case.

III. CONCLUSION

For the foregoing reasons, the Commission declines to approve the Regents' indemnity claim.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of June 1997.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Richard F. Cole
Frederick J. Shon

In the Matter of

Docket No. 70-3070-ML
(ASLBP No. 91-641-02-ML)
(Special Nuclear Material License)

LOUISIANA ENERGY SERVICES, L.P.
(Claiborne Enrichment Center)

May 1, 1997

In this Final Initial Decision in the combined construction permit–operating license proceeding for the Claiborne Enrichment Center, the Licensing Board (1) determines that a thorough NRC Staff investigation of the facility site selection process is essential to determine whether racial discrimination played a role in that process, thereby ensuring compliance with the nondiscrimination directive contained in Executive Order 12898; (2) resolves in favor of the Intervenor portions of the contention concerning the adequacy of the Staff's treatment in the final environmental impact statement of the impacts of relocating the parish road connecting the African American communities of Forest Grove and Center Springs and the economic impacts of the facility on properties in those communities; and (3) denies the Applicant's requested authorization for a license.

NEPA: ENVIRONMENTAL JUSTICE

On February 11, 1994, the President issued Executive Order 12898, 3 C.F.R. 859 (1995), titled "Federal Actions to Address Environmental Justice in Minority

PACER session date: Tuesday November 21, 2000 01:21:10 PM EST

Docket as of January 21, 2000 11:59 pm

Proceedings include all events.
0:95cv3845 Heinrich, et al v. Sweet, et al CLOSED

CLOSED

U.S. District Court
New York Eastern (Hauppauge)

CIVIL DOCKET FOR CASE #: 95-CV-3845

Heinrich, et al v. Sweet, et al
Assigned to: Judge Denis Hurley
Referred to: Magistrate Viktor V. Pohorelsky
Demand: $0,000
Lead Docket: None
Dkt# in other court: None.

Filed: 09/21/95
Jury demand: Plaintiff
Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 28:1331 Fed. Question: Civil Rights Violation

EVELYN HEINRICH, on behalf of her husbaand, George Heinrich, plaintiff	Raymond J. Heslin [COR LD NTC] Gold Farrell & Marks 41 Madison Ave. New York, NY 10010 212-481-1700
HENRY M. SIENKEWICZ, JR., on behalf of his mother, Eileen Rose Sienkewicz, and all others similarly situated, plaintiff	Raymond J. Heslin (See above) [COR LD NTC]

v.

WILLIAM H. SWEET, M.D. defendant	Mark A. Newcity [COR LD NTC] Martin, Maqnuson, McCarthy & Kenney 101 Merrimac Street Boston, MA 02114 617-227-3240
LEE HOWARD FARR, M.D. defendant	Kevin T. VanWart [COR LD NTC] Jerome A. Karnick [COR LD NTC] Marc J. Zwillinger [COR LD NTC] Kirkland & Ellis 200 East Randolph Drive Chicago, IL 60601-6636 (312) 861-2130

Proceedings include all events.
0:95cv3845 Heinrich, et al v. Sweet, et al CLOSED

6/21/96	38	LETTER dated 6/17/96 from Kevin Van Wart to Judge Hurley in response to letter dtd. 6/12/96 from pltffs counsel-Chambers has confirmed with defts' counsel MR. Van Wart that defts Associated Universities and Farr are withdrawing their joinder submission that bears the docket number 32-M. Sladek, Law Clerk to Judge Hurley 6/21/96 (pw) [Entry date 06/21/96]
9/20/96	39	Letter MOTION by Evelyn Heinrich, Henry M. Sienkewicz Jr. for Stanley B. Siegel to appear pro hac vice, Motion hearing (map) [Entry date 09/23/96]
9/23/96	40	ORDER granting [39-1] motion for Stanley B. Siegel to appear pro hac vice (signed by Magistrate Viktor V. Pohorelsky) (map) [Entry date 09/23/96]
10/15/96	41	LETTER dated 10/7/96 from Anthony Roisman to Judge Hurley re pltffs request that the enclosed recent opinion of the USDC for the District of Oregon be accepted as a supplemntal citation in support of their to opposition to motion of MIT (pw) [Entry date 10/15/96]
10/21/96	42	Letter MOTION by Evelyn Heinrich, Henry M. Sienkewicz Jr. for Anthony Z. Roisman to appear pro hac vice, Motion hearing (map) [Entry date 10/23/96]
10/21/96	--	ORDER granting [42-1] motion for Anthony Z. Roisman to appear pro hac vice (signed by Magistrate Viktor V. Pohorelsky) (map) [Entry date 10/23/96]
10/25/96	43	LETTER dated 10/22/96 from Francis Lynch to Judge Hurley re deft MIT requests leave to submit this brief response to pltffs' supplemental citation of Bibeau v Pacific Northwest (pw) [Entry date 10/28/96]
11/21/96	44	ORDER dtd. 11/18/96, dismissing claims against estates of Shields Warren and Charles Dunham and for substitution of the USA as deft (signed by Judge Denis R. Hurley) c/m (jb) [Entry date 11/21/96]
1/10/97	45	NOTICE of attorney appearance for USA by Burke M. Wong (pw) [Entry date 01/10/97]
2/19/97	46	ORDER dtd. 2/18/97 US has to and including 3/28/97 to answer or respond to pltffs' first amended complaint (signed by Judge Denis R. Hurley) cm (pw) [Entry date 02/19/97]
3/18/97	48	MOTION by Evelyn Heinrich, Henry M. Sienkewicz Jr. for Martin H. Freeman, Esq. to appear pro hac vice, Motion hearing (tr) [Entry date 03/31/97]

Proceedings include all events.
0:95cv3845 Heinrich, et al v. Sweet, et al CLOSED

8/20/97	55	Calendar entry: Before Judge Hurley on 8/20/97 civil conf motion hearing. counsel present. Motions to dismiss venue under 28:1404,1406 (21) by MA Genl Hospital. Decision entered on the record. Ct finds this case should be heard in the District CT of MA. Motion granted. Remaining motions to be transferred with the case. All parties consent to substituting USA for defts Dr. Warren & Dr.Dunham. Ct orders the caption to be amended. Ct will issue order transferring case (pw) [Entry date 08/21/97]
9/18/97	56	TRANSCRIPT filed for [55-1] miscellaneous for dates of 8/20/97-transcript of bench decision (pw) [Entry date 09/18/97]
9/18/97	57	ORDER dtd. 9/17/97 transferring case to the US District Court for the District of Massachusetts (signed by Judge Denis R. Hurley) cm (pw) [Entry date 09/18/97]
9/18/97	--	Interdistrict transfer to District of MA (pw) [Entry date 09/18/97]
9/18/97	--	Letter dtd. 9/18/97 from USDC to transfer ct of above case-cert copy of docket and order and documents forwarded-ack enclosed (pw) [Entry date 09/18/97]
10/6/97	58	Received ack from the District of MA of above file consisting of documents 1-35,38-44,46,48-57,documents 36,37,45,47 & 54 missing (pw) [Entry date 10/06/97]

[END OF DOCKET: 0:95cv3845]

PACER session date: Tuesday November 21, 2000 12:51:47 PM EST
Case docket was last updated on: 11/09/00.

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

CLOSED

U.S. District Court
U.S. District Court - Massachusetts (Boston)

CIVIL DOCKET FOR CASE #: 97-CV-12134

Heinrich, et al v. Sweet, et al Filed: 09/25/97
Assigned to: Chief Judge William G. Young Jury demand: Both
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt # in USDC E. New York : is 95-cv-3845

Cause: 28:1331 Fed. Question: Civil Rights Violation

EVELYN HEINRICH, on behalf of her husband, George Heinrich
Plaintiff

Anthony Z. Roisman
[term 05/10/99]
[COR LD NTC]
Cohen, Milstein, Hausfeld & Toll
1100 New York Avenue, NW
West Tower, Suite 500
Washington, DC 20005
202-408-4600

John K. McGuire, Jr.
[COR LD NTC]
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45 Linden Street
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508-754-3291

Anthony Z. Roisman
[COR LD NTC]
84 East Thetford Road
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Martin H. Freeman
[COR NTC]
Mark A. Freeman
[COR NTC]
Freeman & Freeman, P.C.
One Church Street
Suite 200
Rockville, MD 20850
301-315-0200

John M. Clifford
[COR NTC]
Billie P. Garde
[COR NTC]
Clifford, Lyons, & Garde

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

9/7/99	208	Chief Judge William G. Young . Clerk's Notes: re: Conference held. Pltf. atty. Roisman is not present due to family illness. Due to this, Pltf. requests continuance of hearing on Motion for Summary Judgment until Thursday. With assent of all counsel Court grants such a continuance. Dft. Assoc. Univ. Motion for Separate Jury on Conspiracy issue - DENIED. Jury Trial Day one held. Jury of 11 empanelled. Court Reporter: D. Womack. (mlb) [Entry date 09/09/99] [1:97cv12134]
9/8/99	207	Proposed Jury instructions and special interrogatories on selected issues by Associated Universities, Inc. and the Lee Edward Farr Trust, filed. (mlb) [1:97cv12134]
9/9/99	209	Notice of appearance of attorney for William H. Sweet, Massachusetts Genera by Katharine S. Perry, filed. (efs) [Entry date 09/10/99] [1:97cv12134]
9/9/99	217	Chief Judge William G. Young . Clerk's Notes: re: motions denying [197-1] motion in limine to preclude defendants from calling Mrs. Sweet as a witness, denying [196-1] motion for sanctions against Associated Universities,Inc. for willful failure to disclose and its false and misleading disclosure, denying [195-1] motion in limine to preclude reference to plaintiff Evelyn Heinrich's bankruptcy and other actions brought by or against her, denying [193-1] motion in limine to preclude expert opinion testimony by expert witnesses outside their area of expertise granting in part, denying in part [144-1] motion for summary judgment on all remaining claims against them, granting in part, denying in part [142-1] motion for summary judgment in their favor on all remaining counts of the plaintiffs' Second Amended Complaint, granting in part, denying in part [139-1] motion for summary judgment on Counts I,II,VII,VIII,X and XI of the second amended complaint, denying [135-1] motion for summary judgment as to Count VII denying [174-1] motion to eliminate the plaintiffs remaining state law claims, pursuant to Fed. R. Civ. P. 16(c)(1), (4) and (14) and/or for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50 Court reviews trial details...opening remarks-15 minutes per dft and 45 minutes pltf. Plaintiffs VanDyke and Mayne are no longer part of this case. Court Reporter: Womack (efs) [Entry date 09/14/99] [1:97cv12134]
9/10/99	210	Exhibit and witness list by William H. Sweet, Massachusetts Genera , filed. (efs) [1:97cv12134]
9/10/99	211	Response by Lee Howard Farr, Associated Universit in opposition to [196-1] motion for sanctions against Associated Universities,Inc. for willful failure to disclose and its false and misleading disclosure , filed. (efs) [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

9/10/99	212	Notice of Change of Attorney Name by Raymond J. Heslin , filed. (mlb) [1:97cv12134]
9/10/99	218	Chief Judge William G. Young . Clerk's Notes:Conference prior to start of trial. Court rules Mayne and VanDyke are not part of this case. the versionof the wrongful death statute will be the more recent version. Pltf orally moves reconsideration re: judgment against VanDyke and Mayne. Court Denies Motion. re: Jury Trial Day 2 Jury of 11 SWORN. Court gives pretrialc harge. Opening remarks by pltf. Opening remarks by Mass General Hospital and MIT. Dft AUI andDr.Farr reserve opening. Plaintiff evidence commences. Court Reporter: Womack (efs) [Entry date 09/14/99] [1:97cv12134]
9/13/99	213	Motion by William H. Sweet, Massachusetts Genera in limine to preclude plaintiff from introducing testimony re: statements of deceased persons , filed. (efs) [1:97cv12134]
9/13/99	214	Memorandum by William H. Sweet, Massachusetts Genera in support of [213-1] motion in limine to preclude plaintiff from introducing testimony re: statements of deceased persons , filed. (efs) [1:97cv12134]
9/13/99	215	Motion by William H. Sweet, Massachusetts Genera to strike testimony of Marie Denning re: statements of deceased persons and instruct jurors to disregard , filed. (efs) [1:97cv12134]
9/13/99	216	Memorandum by William H. Sweet, Massachusetts Genera in support of [215-1] motion to strike testimony of Marie Denning re: statements of deceased persons and instruct jurors to disregard , filed. (efs) [1:97cv12134]
9/13/99	219	Chief Judge William G. Young . Clerk's Notes: re: Jury TrialDay 3 Plaintiff evidence continues Court Reporter: Womack (efs) [Entry date 09/14/99] [1:97cv12134]
9/14/99	220	Chief Judge William G. Young . Clerk's Notes: re: Jury Trial Day 4 Plaintiff evidence continues Court Reporter: Womack (efs) [1:97cv12134]
9/14/99	221	STIPULATION by Evelyn Heinrich, Henry M. Sienkewicz Jr., USA , filed. (efs) [1:97cv12134]
9/14/99	222	Notice of designation of deposition testimony by Lee Howard Farr, Associated Universit , filed. (efs) [1:97cv12134]
9/15/99	226	Chief Judge William G. Young . Clerk's Notes: re: hearing Cl request ruling on dft AUI remainder in the case. After hrg, the Court rules that Dr. Farr and AUI are still in the case.Court Reporter: Womack (efs) [Entry date 09/16/99] [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

9/27/99	--	Chief Judge William G. Young . Endorsed Order entered granting in part, denying in part [233-1] motion in limine to preclude testimony by Dr. Veatch as to dutues and liability of MIT, granting in part, denying in part [232-1] motion in limine to preclude expert and lay testimony re: patient release forms . See transcript of trial for more detailed ruling. [EOD Date 9/27/99] (efs) [1:97cv12134]
9/27/99	--	Civil Jury trial Day 9 held . (mlb) [Entry date 09/28/99] [1:97cv12134]
9/27/99	244	Chief Judge William G. Young . Clerk's Notes: re: Civil Jury Trial Day 9 held. Pltf's evidence continues. Jury question #1. Court conducts voir dire of juror. Court Reporter: D. Womack. (mlb) [Entry date 09/28/99] [1:97cv12134]
9/27/99	245	Chief Judge William G. Young . Clerk's Notes: re: Hearing out of presence of jury regarding Dft. AUI and Dr. Farr, as well as MIT for Directed Verdict. After hearing the Motions are Under Advisement. Court Reporter: D. Womack. (mlb) [Entry date 09/29/99] [1:97cv12134]
9/28/99	--	Civil Jury trial day 10 held . (mlb) [Entry date 09/29/99] [1:97cv12134]
9/28/99	246	Chief Judge William G. Young . Clerk's Notes: Hearing out of presence of jury re: Motions for Directed Verdict - Court rules as follows: With respect to MIT - Motion DENIED; as to Dr. Farr and AUI - ALLOWED. MIT and MGH orally move for Mistrial - Motions taken under advisement. Civil Jury Trial Day 10 held. Pltf's evidence continues; Court orally rules Motions for Mistrial are DENIED. Court Reporter: D. Womack. (mlb) [Entry date 09/29/99] [1:97cv12134]
9/28/99	247	Chief Judge William G. Young . Clerk's Notes: re: Hearing out of presence of the jury regarding Dfts. Renewed Motion for Directed Verdict. After hearing the Court takes the matter under advisement. Court Reporter: D. Womack. (mlb) [Entry date 09/29/99] [1:97cv12134]
9/29/99	248	Transcript of proceedings for held on proceeding date: 9/28/99 before Judge: Young. Court Reporter: Palanchian/Womack (efs) [1:97cv12134]
9/29/99	--	Civil Jury trial Day 11 held . (mlb) [Entry date 09/30/99] [1:97cv12134]
9/29/99	249	Chief Judge William G. Young . Clerk's Notes: re: Civil Jury Trial Day 11 held. Plaintiffs Rest. Subject to the offering of documents and publishing said documents. Dfts. evidence commences. Court Reporter: D. Womack. (mlb) [Entry date 09/30/99] [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

10/4/99	253	Motion by Massachusetts Instit for judgment as a matter of law on the grounds that the plaintiffs' claims are barred by the applicable statutes of limitations , filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	254	Motion by Massachusetts Instit for judgment as a matter of law with respect to negligent misrepresentation (Count XI) , filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	255	Motion by Massachusetts Instit for judgment as a matter of law with respect to informed consent (Count VII) , filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	256	Motion by Massachusetts Instit for judgment as a matter of law on the issue of punitive damages under Count VIII (Wrongful Death) of the Plaintiffs' Amended Complaint , filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	257	Motion by Massachusetts Instit for judgment as a matter of law on Count VIII (Wrongful Death) of the plaintiffs' Amended Complaint, filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	258	Motion by Massachusetts Instit for judgment as a matter of law on Count X (Negligence) of the plaintiffs' Amended Complaint, filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	259	Motion by Massachusetts Instit for judgment as a matter of law with respect to Boron Injections not based on Radiation Treatment Conduct, filed. c/s. (mlb) [Entry date 10/12/99] [1:97cv12134]
10/4/99	--	Civil Jury trial Day 12 held . (mlb) [Entry date 10/13/99] [1:97cv12134]
10/4/99	260	Chief Judge William G. Young . Clerk's Notes: re: Hearing out of presence of the jury re: dft's Motion to Redact the ACHRE Report. After hearing MIT Motion to Strike - DENIED. Motion to Redact - ALLOWED IN PART AND DENIED IN PART. Civil Jury Trial Day 12 held. Dfts' evidence continues. Hrg. out of presence of the jury re: Motion for Directed Verdict. After hrg. the Court rules that the Heinrich case as to wrongful death will go to the jury. The hrg. is cont'd. until Wed. on punitive damages, informed consent. Court Reporter: D. Womack. (mlb) [Entry date 10/13/99] [1:97cv12134]
10/5/99	250	The is sufficient evidence that defendants can be held liable for the wrongful death of the plaintiffs decedents. (mlb) [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

10/5/99	251	Response by Evelyn Heinrich, Henry M. Sienkewicz Jr., Rosemary Gualtieri, Walter Carl Van Dyke in opposition to , Motions of MIT and MGH filed pursuant to Rule 50(a) of the Fed. R. of Civ. P. (negligence, fraud, informed consent, statute of limitations),filed. c/s. (mlb) [1:97cv12134]
10/5/99	--	Civil Jury trial Day 13 held . (mlb) [Entry date 10/13/99] [1:97cv12134]
10/5/99	261	Chief Judge William G. Young . Clerk's Notes: re: Civil Jury Trial Day 13 held. Witness 0 Dr. Edward Koski; Video transmitted testimony of Dr. Edward Koski; witness - Dr. Solloway. Court makes rulings re: plaintiff's documentary submissions. Dft. Motion for Fraud and Neg. misrep. is ALLOWED; Claims for Inf. consent, wrongful death, and negligence will go to jury against both MGH/Sweet and MIT. Court Reporter: D. Womack. (mlb) [Entry date 10/13/99] [1:97cv12134]
10/6/99	252	Motion by Massachusetts Instit to strike Exhibit, filed. c/s. (mlb) [1:97cv12134]
10/6/99	--	Chief Judge William G. Young . Endorsed Order entered granting [252-1] motion to strike Exhibit. cc/cl. [EOD Date 10/6/99] (mlb) [1:97cv12134]
10/6/99	--	Civil Jury trial Day 14 held . (mlb) [Entry date 10/13/99] [1:97cv12134]
10/6/99	262	Chief Judge William G. Young . Clerk's Notes: re: Civil Jury Trial Day 14 held. Court rules that Dr. Grodin may be recalled; that character evidence re: Dr. Sweet may only be introduced if it bears on his capacity for truth or veracity; resumed testimony of Dr. Solloway; testimony by Dr. Fager; testimony by Dr. Carrion. Court Reporter: D. Womack. (mlb) [Entry date 10/13/99] [1:97cv12134]
10/7/99	--	Chief Judge William G. Young . Endorsed Order entered denying [253-1] motion for judgment as a matter of law on the grounds that the plaintiffs' claims are barred by the applicable statutes of limitations. cc/cl. [EOD Date 10/12/99] (mlb) [Entry date 10/12/99] [1:97cv12134]
10/7/99	--	Chief Judge William G. Young . Endorsed Order entered granting [254-1] motion for judgment as a matter of law respect to negligent misrepresentation (Count XI). cc/cl. [EOD Date 10/12/99] (mlb) [Entry date 10/12/99] [1:97cv12134]
10/7/99	--	Chief Judge William G. Young . Endorsed Order entered denying [255-1] motion for judgment as a matter of law with respect to informed consent (Count VII). cc/cl. [EOD Date 10/12/99] (mlb) [Entry date 10/12/99] [1:97cv12134]

(efs) [Entry date 12/27/99] [1:97cv12134]

12/22/99 306 Chief Judge William G. Young . Clerk's Notes: re: motion hearing granting [276-1] motion for leave to file Fourth Amended Complaint, denying [271-1] motion for class certification Court Reporter: Scott (efs) [Entry date 12/27/99] [1:97cv12134]

12/30/99 307 Response by Massachusetts Instit in opposition to [302-1] motion for reconsideration of dismissal of state law claims of Walter Van Dyke , filed. c/s. (mlb) [1:97cv12134]

12/30/99 308 Response by William H. Sweet, Massachusetts Genera in opposition to [302-1] motion for reconsideration of dismissal of state law claims of Walter Van Dyke , filed. c/s. (mlb) [Entry date 01/03/00] [1:97cv12134]

12/30/99 309 Notice of Filing by William H. Sweet, Massachusetts Genera , filed. (mlb) [Entry date 01/03/00] [1:97cv12134]

1/3/00 -- Chief Judge William G. Young . Endorsed Order entered re: [297-1] motion to strike scandalous matter. "Motion to Strike DENIED as MOOT." cc/cl. [EOD Date 1/4/00] (mlb) [Entry date 01/04/00] [1:97cv12134]

1/3/00 310 Response by Lee Howard Farr, Associated Universit in opposition to [302-1] motion for reconsideration of dismissal of state law claims of Walter Van Dyke , filed. c/s. (mlb) [Entry date 01/04/00] [1:97cv12134]

1/5/00 311 Chief Judge William G. Young . Notice of Hearing/conference: Motion hearing set for 2:00 2/3/00 for [279-1] motion for new trial, set for 2:00 2/3/00 for [277-1] motion for judgment as a matter of law . (efs) [1:97cv12134]

1/5/00 -- Chief Judge William G. Young . Endorsed Order entered denying [302-1] motion for reconsideration of dismissal of state law claims of Walter Van Dyke . [EOD Date 1/5/00] (efs) [1:97cv12134]

1/5/00 -- Chief Judge William G. Young . Endorsed Order entered denying [271-1] motion for class certification . [EOD Date 1/5/00] (efs) [1:97cv12134]

1/5/00 312 Transcript of proceedings for held on proceeding date: 12/15/99 before Judge: Young. Court Reporter: Scott (efs) [1:97cv12134]

1/5/00 313 Transcript of proceedings for held on proceeding date: 12/22/99 before Judge: Young. Court Reporter: Scott (efs) [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

3/8/00	336	Response by Evelyn Heinrich, Henry M. Sienkewicz Jr., Rosemary Gualtieri, Walter Carl Van Dyke, Marc Oddo in opposition to [326-1] motion to dismiss claims by Nicholas Oddo , filed. c/s. (mlb) [Entry date 03/09/00] [1:97cv12134]
3/15/00	337	Response by William H. Sweet in opposition to [332-1] motion for clarification of [0-0] endorsed order denying as moot Motion to Give Notice to Putative Class Members of the Pendency of this Action , filed. c/s. (mlb) [Entry date 03/16/00] [1:97cv12134]
3/20/00	341	Response by Massachusetts Instit in opposition to [335-1] motion for leave to file Fifth Amended Complaint , filed. c/s. (mlb) [Entry date 03/21/00] [1:97cv12134]
3/21/00	338	Motion by Massachusetts Genera for judgment as a matter of law upon the issue of charitable immunity/charitable limitation of liability , filed. (mlb) [1:97cv12134]
3/21/00	339	Memorandum by Massachusetts Genera in support of [338-1] motion for judgment as a matter of law upon the issue of charitable immunity/charitable limitation of liability , filed. (mlb) [1:97cv12134]
3/21/00	340	Certificate of service by Massachusetts Genera re: [338-1] motion for judgment as a matter of law upon the issue of charitable immunity/charitable limitation of liability, [339-1] support memorandum , filed. (mlb) [1:97cv12134]
3/22/00	--	Chief Judge William G. Young . Endorsed Order entered re: [335-1] motion for leave to file Fifth Amended Complaint. "Motion DENIED. Mr. Joseph must file his own related case." cc/cl.[EOD Date 3/23/00] (mlb) [Entry date 03/23/00] [1:97cv12134]
4/6/00	--	Motion hearing re: [326-1] motion to dismiss claims by Nicholas Oddo and [323-1] motion to dismiss claims by Nicholas Oddo hearing held. (mlb) [Entry date 04/07/00] [1:97cv12134]
4/6/00	342	Chief Judge William G. Young . Clerk's Notes: re: Motions to Dismiss hearing held. Pltf's file a certified copy of Administrator of the Estate. After the Court takes [326-1] motion to dismiss claims by Nicholas Oddo taken under advisement and, [323-1] motion to dismiss claims by Nicholas Oddo under advisement Court Reporter: Twomey (mlb) [Entry date 04/07/00] [1:97cv12134]
4/11/00	343	Motion by William H. Sweet for leave to file supplemental Memorandum in Support of his Motion to Dismiss claims by Nicholas Oddo , filed. c/s. (mlb) [Entry date 04/12/00] [1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al CLOSED

9/29/00	--	Terminated document: terminating [338-1] motion for judgment as a matter of law upon the issue of charitable immunity/charitable limitation of liability, terminating [315-1] motion for reduction of jury verdict in accordance with Mass. Gen. Laws c.229,Section 2(1958 ed) Requested by wgy. (efs) [Entry date 10/02/00] [1:97cv12134]
10/16/00	360	Motion by Plaintiffs in 1:97-cv-12134 to alter or amend [359-1] judgment order , filed. c/s. (mlb) [Entry date 10/18/00] [Edit date 10/18/00] [1:97cv12134]
10/16/00	361	Memorandum by Plaintiffs in 1:97-cv-12134 in support of [360-1] motion to alter or amend [359-1] judgment order , filed. c/s. (mlb) [Entry date 10/18/00] [1:97cv12134]
10/17/00	362	Motion by William H. Sweet in 1:97-cv-12134, Massachusetts Genera in 1:97-cv-12134 to extend Stay Proceedings to execute judgment and to extend time for filing supersedeas bond, filed. (Assented) (mlb) [Entry date 10/18/00] [1:97cv12134]
10/17/00	363	Notice of Filing by Massachusetts Genera in 1:97-cv-12134 , filed. (mlb) [Entry date 10/18/00] [1:97cv12134]
10/23/00	--	Chief Judge William G. Young . Endorsed Order entered granting [362-1] motion to extend Stay Proceedings to execute judgment and to extend time for filing supersedeas bond. cc/cl. [EOD Date 10/24/00] (mlb) [Entry date 10/24/00] [1:97cv12134]
10/24/00	364	Supplement to Memorandum by Evelyn Heinrich in 1:97-cv-12134, Henry M. Sienkewicz Jr. in 1:97-cv-12134, Rosemary Gualtieri in 1:97-cv-12134, Walter Carl Van Dyke in 1:97-cv-12134 in support of [360-1] motion to alter or amend [359-1] judgment order , filed. c/s. (mlb) [Entry date 10/25/00] [1:97cv12134]
10/30/00	365	Response by William H. Sweet in 1:97-cv-12134 in opposition to [360-1] motion to alter or amend [359-1] judgment order , filed. c/s. (mlb) [Entry date 10/31/00] [1:97cv12134]
11/6/00	366	Response by Massachusetts Genera in 1:97-cv-12134 in opposition to [360-1] motion to alter or amend [359-1] judgment order , filed. c/s. (mlb) [1:97cv12134]
11/7/00	--	Chief Judge William G. Young . Endorsed Order entered denying [360-1] motion to alter or amend [359-1] judgment order. cc/cl. [EOD Date 11/9/00] (mlb) [Entry date 11/09/00] [1:97cv12134]

[END OF DOCKET: 1:97cv12134]

Proceedings include all events.
1:97cv12134 Heinrich, et al v. Sweet, et al APPEAL

12/6/00	367	Notice of appeal by William H. Sweet in 1:97-cv-12134 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 27159 Appeal record due on 12/21/00. cc/cl. (mlb) [Entry date 12/07/00] [1:97cv12134]
12/6/00	369	Notice of appeal by Massachusetts Genera in 1:97-cv-12134 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 27162 Appeal record due on 12/21/00. cc/cl. (mlb) [Entry date 12/08/00] [1:97cv12134]
12/7/00	368	Notice of appeal by Evelyn Heinrich in 1:97-cv-12134, Henry M. Sienkewicz Jr. in 1:97-cv-12134, Rosemary Gualtieri in 1:97-cv-12134, Walter Carl Van Dyke in 1:97-cv-12134 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 27174 Appeal record due on 12/22/00. cc/cl. (mlb) [1:97cv12134]
12/8/00	--	Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals re: [368-1] appeal, [369-1] appeal, [367-1] appeal . (jr) [1:97cv12134]

[END OF DOCKET: 1:97cv12134]

PALMER & DODGE

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November 8, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Director of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Rockville, MD 20852

Re: Heinrich, et al. v. Sweet, et al.
United States District Court for the Eastern District of New York
Civil Action No. CV 95-3845

Dear Sir/Madam:

This letter constitutes notice of a claim against the Massachusetts Institute of Technology ("MIT") that is subject to indemnification under Indemnity Agreement E-39 between the Atomic Energy Commission and MIT and, perhaps, additional agreements that pertained to the treatments at Brookhaven National Laboratory. Enclosed is a copy of the Complaint above-referenced lawsuit.

Please call me if you have any questions concerning this matter.

Very truly yours,

Francis C. Lynch

FCL:mee
Enclosure

cc: Mr. Thomas R. Henneberry

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

February 16, 1996

Francis C. Lynch, Esq.
Palmer & Dodge
One Beacon Street
Boston, Massachusetts 02108

Dear ~~Mr. Lynch:~~ Fran

Re: Heinrich, et al. v. Sweet, et al.
United States District Court
for the Eastern District of New York
Civil Action No. CV 95-3845

This will respond both to your letter of November 8, 1995, providing to the Director of Nuclear Reactor Regulation of the Nuclear Regulatory Commission (NRC) notice that a claim was filed against your client Massachusetts Institute of Technology in the referenced case, Heinrich v. Sweet, and to your subsequent telephone call to me seeking confirmation that the claim is subject to indemnification by NRC.

After a review of the documents at our disposal and consultation with the Department of Justice and the Department of Energy, we are not prepared at this time to concede that NRC is bound to provide indemnification in this matter. Nonetheless, we are continuing to consider whether some portion of the claim may be covered under the indemnity agreement executed in connection with licensing your client's reactor. If you continue to believe that indemnification is required, I would find it helpful to receive a statement of your reasons why this should be so and also to be kept abreast of developments in the lawsuit. Please send me a copy of any dispositive motion or other substantive papers that you may have filed.

I would also note that with respect to the Fernald School cases (Beaulieu v. Belmont and Shattuck v. Massachusetts Institute of Technology) this office has been unable to discern a basis for indemnification of your client through the NRC.

Once again, thank you for making personal contact with me. I will be glad to discuss these matters with you and to offer any help that I can. When I am unavailable, please contact our Solicitor, John F. Cordes, whose number is 301-415-1600. We both receive faxes at 301-415-3200 and regular mail at the Office of the General Counsel, Mail Stop 15B18, United States Nuclear Regulatory Commission, Washington, D.C. 20555.

Sincerely,

Marjorie

Marjorie S. Nordlinger
Office of the General Counsel

cc: Lisa Schiavo Blatt, DOE
J. Patrick Glynn, DOJ

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ONE BEACON STREET, BOSTON, MA 02108-3190

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May 29, 1996

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: *Heinrich, et al. v. Sweet et al.*

Dear Marjorie:

Thank you for your letter of February 16, 1996. In response to your request in that letter, the following sets forth our reasons why the United States Nuclear Regulatory Commission ("NRC") is bound to provide indemnification to the Massachusetts Institute of Technology ("MIT") in the matter of *Heinrich, et al. v. Sweet, et al.*, currently pending in the Eastern District of New York.

As you are aware, this suit involves claims arising out of clinical trials of Boron Neutron Capture Therapy, a treatment for brain tumors, which were conducted at Brookhaven National Laboratory in the 1950s and early 1960s and at the MIT nuclear reactor in the early 1960s. With respect to MIT, the complaint alleges that patients received surgery to reopen their skull, were injected with boron, and

> Following the administration of the boron, the patient was elevated to the beam aperture [of the MIT reactor] by a hydraulic lift built into the floor. Once the patient was secured, everyone left the room and the built-in shutters were opened, allowing an intense beam of thermal neutrons to irradiate the open brain. The patients were irradiated for 45 min to 90 min.

Amended Complaint, ¶ 49. The complaint alleges that all of the patients who received this treatment at MIT suffered serious radiation injury, which was the cause of death of 10 of the 14 cases autopsied, Amended Complaint ¶ 50, including both of the named plaintiffs' decedents treated at MIT. Amended Complaint ¶¶ 9 and 12.

These claims are within the scope of Indemnity Agreement E-39, entered into by and between MIT and the Atomic Energy Commission[1] effective June 9, 1958 (the "Agreement"). That agreement provides:

> The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability.

Article III, para. 1. It also provides for indemnification from the reasonable costs of investigating, settling and defending such claims. Article III, para. 3. Under the agreement, and clearly derived from the Price Anderson Act, 42 U.S.C. § 2014(w), public liability is defined as "any legal liability arising out of or resulting from a nuclear incident," with limited exceptions inapplicable here.[2] Article I, para 5. "Nuclear incident" is defined as:

> any occurrence or series of occurrence[s] at the location or in the course of transportation causing 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 the radioactive material.

Article I, para. 2(a); *compare* 42 U.S.C. § 2014(q). "The radioactive material" is defined as "source, special nuclear and byproduct material which (1) is used to be used in, or is irradiated or to be irradiated by, the nuclear reactor or reactors subject to the license or licenses designated in the Attachment hereto, or (2) is produced as the result of operation of said reactor(s)."

It is evident that the claims against MIT arise from a "nuclear incident." First, the material that produced the thermal neutrons used in the BNCT therapy at MIT was uranium

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[1] Pursuant to Section 201(f) of the Energy Reorganization Act of 1974, the licensing and related regulatory functions of the Atomic Energy Commission were transferred to the Nuclear Regulatory Commission.

[2] These exceptions are: "(1) claims under state or Federal Workmen's Compensation Acts of employees of persons indemnified . . .; (2) claims arising out of an act of war; and [after September 6, 1961] (3) claims for loss of, or damage to, or loss of use of [specified property]." Article I, para. 5.

enriched with the isotope 235, a "special nuclear material" used to operate the MIT reactor and thus within the definition of "the radioactive material" under the agreement.[3]

Second, the complaint clearly alleges bodily injury or death resulting from the radioactive properties of that material. It states that both George Heinrich and Eileen Sienkewicz died from "extensive radiation necrosis of the brain" caused by their irradiation at the MIT reactor.

Third, the occurrences that are the subject of this complaint occurred at the specified "location." That "location", as set forth on the Attachment to the Agreement (previously provided to the NRC), includes the entire "Reactor Building with stack and cooling towers including the area circumscribed by a chain link fence on the north and south sides of said building; a concrete wall and chain link fence on the east side of said building; and a line coinciding with the east wall of the Nuclear Engineering Building." As reflected in the enclosed print, the medical therapy room where the treatments took place is located in the basement of the Reactor Building.

Finally, and contrary to the argument made by the plaintiffs in this case in opposition to MIT's motion to transfer for improper venue, this action alleges "occurrences" within the meaning of the Price Anderson Act and the Agreement at issue here.

The plaintiffs have argued that the Price Anderson Act, which contains a substantially identical definition of "nuclear incident," is not applicable to their claims since their claims involve "nuclear medicine," rather than an "unintended escape or release of nuclear energy." However, neither the Act nor the Agreement at issue here provides any basis for concluding that the Act only applies to accidental releases of radiation. Rather, both the Act and the Agreement provide broadly that, "[t]he term 'nuclear incident' means *any* occurrence" which results in injury arising out of the hazardous properties of radioactive materials. 42 U.S.C. § 2014(q) (emphasis supplied).

The plaintiffs' interpretation of the term "occurrence" to exclude all but accidental releases of radiation is not supported by the plain meaning of the term or by the use of the term in the insurance industry. The Price Anderson Act and the Agreement incorporate many standard insurance terms, including exclusions form workmen's compensation, war damage, and damage to the reactor property itself, and the use of bodily injury language was

---

[3] While this issue should not be in dispute, we have obtained an affidavit setting forth these facts from Lincoln Clark, Jr., the former Associate Director of the MIT Nuclear Reactor Laboratory, which was submitted with MIT's Motion to Dismiss or Transfer For Improper Venue. If you would like a copy of that affidavit, please let me know.)

expressly added to the Act to mirror standard insurance terminology. *Senate Rep. No. 296, 1957 U.S. Code Congressional and Admin. News 1803, 1811-13.* Reference to the insurance industry's use of the term "occurrence" may be made for guidance as to the intent of the legislature in its use of the term in the Act, and therefore for its use in the Agreement. See *McDermott International v. Wilander*, 498 U.S 337 342 (1991); *United States v. Newhall*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981).

As used in the insurance industry, the term "occurrence" means "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." 11 Couch on Insurance 2d § 44:285 at 437 (1982). It includes injury or damages which may result from injurious exposure over an extended period of time. *American Home Products v. Liberty Mutual Insurance Company*, 565 F. Supp. 1485, 1501 (s.D.N.Y. 1983), aff'd in relevant part and modified in part, 748 F.2d 760 (2d Cir. 1984). It also encompasses intentional conduct which results in unintended, although foreseeable, results. See, Couch, at 437-438; *Brooklyn Law School v. Aetna Casualty & Surety Co.*, 849 F.2d 788, 789 (2d Cir. 1988).

While the plaintiffs cited one case in support of their interpretation, *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio, 1995), that case is poorly reasoned, and its justification for excluding the claims at issue from the Price Anderson Act is simply wrong. The *Cincinnati* court argues that "all of the cases applying the Price Anderson Act have extended potential liability only to the unintended escape or release of nuclear energy," 874 F. Supp. at 832, a statement that is demonstrably false. *See Day v. NLO*, 831 F. Supp. 869 (S.D. Ohio 1994) (Price Anderson Act applies to claims of occupational exposure to radiation not alleged to have been caused by an accidental release of nuclear material as well as to claims of employee plaintiffs for intentional exposure); *Sawyer v. Commonwealth Edison*, 847 F. Supp. 96, 100 (N.D. Ill. 1994) (Claim for injuries allegedly resulting from on-going occupational exposure to radiation subject to Act); *Cooley v. Commonwealth Edison Co.*, 768 F. Supp. 625 626-28 (N.D. Ill. 1991) (Claim for occupational exposure to radiation subject to Act.); *Building and Const. Trades Dept. v. Rockwell Intern.*, 756 F. Supp. 492, 493 (D. Colo, 1991) (Intentional and negligence claims related to occupational exposure to radiation subject to Act).

I hope that this statement clarifies the obligation of the NRC under Indemnity Agreement E-39 to provide indemnification to MIT in connection with the lawsuit *Heinrich v. Sweet*. If you have any questions about this analysis, or dispute any of the conclusions set forth above, I would be happy to discuss them with you.

Finally, in response to your request, I enclose copies of the following motions and supporting memoranda filed by MIT in this case:

1. Massachusetts Institute of Technology's Notice of Motion to Dismiss or Transfer for Improper Venue;

2. Massachusetts Institute of Technology's Memorandum of Law in Support of Its Motion to Dismiss or Transfer for Improper Venue;

3. Massachusetts Institute of Technology's Notice of Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim; and

4. Massachusetts Institute of Technology's Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim.

Sincerely,

Francis C. Lynch

FCL/jml
Enclosures

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

August 29, 1996

Francis C. Lynch, Esq.
Palmer & Dodge LLP
One Beacon Street
Boston, MA 02108-3190

Re: *Heinrich v. Sweet*, No. CV95-3845(DRH)
(E.D.N.Y. filed September 25, 1995)

Dear Fran:

We have reviewed your May 29, 1996, response to my February 16 request for the reasoning underlying your contention that the Nuclear Regulatory Commission (NRC) is bound to indemnify Massachusetts Institute of Technology (MIT) in connection with the lawsuit *Heinrich v. Sweet*. After review of the relevant statutes along with their legislative histories and consideration of the facts underlying *Heinrich*, we remain firm in our opinion that NRC indemnity should not be invoked by this case. Our comments follow.

1. Contrary to your conclusion that it is evident that the claims against MIT arise from a "nuclear incident" and thus are subject to indemnity, we find substantial cumulative evidence that Congress never intended the term "nuclear incident" to cover the activities on which plaintiffs based this lawsuit. Plaintiffs' claims allegedly resulted from actions in a doctor-patient relationship in which NRC did not participate and the licensed nuclear reactor performed without incident and without unplanned releases of radioactivity and where government standards for occupational releases on site were not exceeded or not applicable. But the interest of Congress in enacting Price-Anderson liability provisions was to deal with such reactor accidents, malfunctions and the like, that were essentially uninsurable, the very occurrences that are not at issue in this case.

It is telling that in the myriad pages of legislative history replete with references to reactor accidents or nuclear incidents (the terms used interchangeably), runaway reactors, sabotaged reactors, accidents of terrorism, excessive releases, and the like, we have found no suggestion (nor have you referenced one) to show that Congress anticipated the kind of liability coverage that your client now seeks. From the outset of the Senate Report which you cite it is obvious that the original Price-Anderson amendment to the Atomic Energy Act was to provide government indemnity and grant limitation of liability for persons in the atomic energy program from liabilities arising from the operation of nuclear reactors in the nuclear energy program. *Senate Rep. No. 296, 1957 U.S. Code Congressional & Admin. News 1803.*

Congress's basic approach was to examine "the need to protect the public", and Congress saw the product not as "insurance", but as "indemnification" in the case of a "runaway reactor." *See id.* at 1810, 1811-13. Congress relied on a program of close and careful

regulation of reactor safety to assure that indemnification would not be costly. *See id.* at 1828. Congress did not, nor could it have had in mind, the type of medical application in question, with its possibilities for misdiagnosis, misapplication or other malpractice, else it could not have cited with confidence a Commission finding "that the most pessimistic of the probabilities would be less than 1 chance in 50 million of any one person getting killed in any year in a reactor incident." *Id.* at 1804 (emphasis added).

In sum, the Price-Anderson liability system did not cast the government as insurer for personal harms from medical administrations or from medical treatments without informed consent, but as indemnifier for unexpected but possible public dangers associated with the operation of nuclear reactors or materials used to fuel them.

2. We disagree with your criticism of the result in *In Re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio, 1995). The *Cincinnati Radiation* court correctly drew the basic distinction between intentional medical exposures and incidental exposures resulting from nuclear activities which are part of the energy program. Medical exposures for allegedly therapeutic reasons are unrelated to the nuclear energy program or the operation of a reactor as such. Such exposures are not "nuclear incidents." Both Congress and NRC have rejected proposals to cover such exposures under the Price-Anderson liability system. What is covered are exposures suffered as a result of nuclear accidents or releases related to malfunctions of reactors or to releases of radiation, whether intended or otherwise. These can properly be related to an aspect of the nuclear power fuel cycle. In that regard, it is notable that the series of cases you point to for the proposition that intentional exposures are covered are all distinguishable from the instant cases on the ground that the former are all occupational exposures.

In our view, then, injury to patients deliberately exposed to radiation would be covered by the Price Anderson liability system only if their injury were due to an explosion or other nuclear incident occurring at the MIT reactor while those patients were present for BNCT therapy, for example. Absent such a nuclear incident, Price-Anderson would not be available to limit liability or indemnify the medical program administered.

3. We note that no finding of an extraordinary nuclear occurrence has been made and thus no waiver of any applicable state statute of limitations has been required. It is therefore possible that any liability that may be currently incurred with respect to the alleged nuclear exposures would be time-barred but for a tolling of the limitations statute. Such a tolling presumably would occur only because of some form of fraudulent concealment. We are aware of no suggestion or possibility that NRC would be implicated in such a fraud. It is hardly imaginable that Congress would have intended to use government funds to insure against the consequences of private fraudulent activity.

In addition to the statute of limitations point, we are concerned that this office was not alerted to the dispute on removal to federal jurisdiction at the inception of this case. But in light of the position we take on indemnification, we have not explored any possible legal

implications of either of these circumstances. We certainly do not agree that any Price-Anderson Act jurisdictional ruling binds the government to recognize indemnification claims.

Sincerely,

Marjorie S. Nordlinger

cc: P. Glynn, DOJ
J. Sweeney, DOE

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March 26, 1999

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: *Heinrich, et al. v. Sweet, et al.*, United States District Court for the District of Massachusetts, Civil Action No. 97-CIV-12134-MLW

Dear Marjorie:

I am writing to provide notice to the United States Nuclear Regulatory Commission ("NRC") that it is currently under an obligation to indemnify the Massachusetts Institute of Technology ("MIT") in the above-referenced lawsuit.

As you are aware, MIT on November 8, 1995 provided the NRC with notice that a claim was filed against it in this case, which was then pending in the United States District Court for the Eastern District of New York. MIT asserted in correspondence with you that the claims in this case are within the scope of Indemnity Agreement E-39, entered into by and between MIT and the Atomic Energy Commission effective June 9, 1958 (the "Agreement").

The Agreement provides that the government is obligated to indemnify and hold harmless MIT for the "reasonable costs of investigating, settling and defending claims for public liability" for a nuclear incident where the reasonable costs "in the aggregate exceed $250,000." *See* Agreement, Article III, para. 3 and 4(a). With respect to this case, MIT has exhausted its $250,000 insurance coverage provided by Mutual Atomic Energy Underwriters for licensed research reactors operated by non-profit educational institutions. MIT's satisfaction of the first $250,000 of reasonable costs triggers the government's obligation to indemnify MIT.

As the NRC noted *In the Matter of Regents of the University of California*, 45 N.R.C. 358, 364 (1997), "the Price-Anderson Act contemplates that at the point where governmental indemnity arises, here at the $250,000 threshold, the licensee will offer the government the opportunity to take over defense of the claims and manage the lawsuit." In accordance with the NRC's construction of Price-Anderson in the *Regents* case, MIT hereby "tenders" the case to the NRC.

The Hathaway Amendment, 42 U.S.C. § 2210(h), does not bar the NRC from paying MIT's legal expenses, given the current status of this case. To the extent that the Hathaway

Amendment is applicable to this case, it only prohibits reimbursement of "reasonable expenses" incurred in connection with an NRC-approved settlement. 42 U.S.C. § 2210(h). Furthermore, the NRC has acknowledged that 42 U.S.C. § 2210(k) covers legal costs "in the absence of a settlement." *Regents*, 45 N.R.C. 364 n.4. MIT's legal costs at this juncture relate to its defense of the case on the merits.

Since MIT last corresponded with the NRC in 1996, the case has been transferred from the United States District Court in the Eastern District of New York to the District of Massachusetts. The plaintiffs filed a second amended complaint, copy enclosed, that added a new plaintiff and substituted two defendants. MIT filed a motion to dismiss for failure to state a claim. Argument on the motion took place on March 18, 1999, and the Court took the motion under advisement, while permitting defendants further briefing on the Bivins claim.

To assist in your review of this case, I have also enclosed copies of the following motions and supporting memoranda filed by MIT:

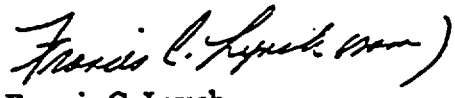
1. Massachusetts Institute of Technology's Motion to Dismiss Plaintiffs' Second Amended Complaint for Failure to State a Claim;

2. Massachusetts Institute of Technology's Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Second Amended Complaint for Failure to State a Claim;

3. Plaintiffs' Combined Opposition to (1) Brookhaven Defendants' Motion to Dismiss the Second Amended Complaint; (2) MIT's Motion to Dismiss Plaintiffs' Second Amended Complaint for Failure to State a Claim; (3) Motion of Defendants Sweet and Massachusetts General Hospital to Dismiss Claims in Plaintiffs' Second Amended Complaint and (4) Motion of Defendants Sweet and Massachusetts General Hospital for Judgment on the Pleadings; and

4. Massachusetts Institute of Technology's Reply in Support of Its Motion to Dismiss Plaintiff's Second Amended Complaint for Failure to State a Claim.

Sincerely,



Francis C. Lynch

FCL/ram
Enclosures

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

May 4, 1999

Francis C. Lynch, Esq.
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One Beacon Street
Boston, MA 02108-3190

Re: ***Heinrich et al. v. Sweet, et al.***, United States District Court for the District of Massachusetts, Civil Action No. 97-CIV-12134-MLW

Dear Fran:

Your letter, dated March 26, 1999, states your conclusion that the United States Nuclear Regulatory Commission (NRC) is currently obliged to indemnify the Massachusetts Institute of Technology (MIT) in *Heinrich v. Sweet*, referenced above. On that basis, you tendered the defense of that case to us.

Specifically, you recalled for us that on November 8, 1995, MIT provided to the NRC notice of the lawsuit, and that, in further correspondence with us, MIT asserted that the claims in this case are within the scope of Indemnity Agreement E-39 between MIT and the Atomic Energy Commission, to whose regulatory and licensing responsibilities NRC succeeded. Also, you reported that MIT had exhausted its $250,000 insurance coverage solely on legal fees, an event you assert to be the trigger for the government's obligation to indemnify MIT. You then pursue argument directed to distinguishing MIT's claims from those unsuccessfully asserted by UCLA and rejected by the Commission itself. See *In the Matter of Regents of the University of California*, 45 NRC 358 (1997).

We need not consider whether the distinctions you assert, if substantiated, would justify a finding now that MIT has met the statutory threshold for non profit reactors, i.e., "public liability in excess of $250,000." 42 U.S.C. 2210(k). This is so because, as you will recall, our 1996 correspondence ended with my August 29, 1996, letter affirming our opinion that Congress did not intend the mandatory Price-Anderson liability provisions for reactor incidents to include in their scope activities involving prescription of radiation doses within a doctor-patient relationship. To our knowledge, nothing has changed factually or materially that would cause us to alter that conclusion, nor did your recent letter provide us any reason to believe otherwise.

In that light, we believe your tender was mistaken and we decline it. I regret that I cannot be more helpful in this regard; however, if I can otherwise be of any assistance to you, please do not hesitate to call on me.

Sincerely,

Marjorie S. Nordlinger

Marjorie S. Nordlinger
Senior Attorney

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CHARLES J. O'MALLEY
(1965-1996)

August 10, 1999

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

RE: Evelyn Heinrich, et al v. William H. Sweet, M.D., et al
U.S. District Court C.A. No. 97-CIV-12134-WGY

Dear Ms. Nordlinger:

I represent William Sweet, a defendant in the above matter. I understand you are knowledgeable about this suit.

I would appreciate your help in determining whether the Nuclear Regulatory Commission or any other government agency owes defense or indemnity to Dr. Sweet in regard to the above claims. If you are aware of any insurance that may apply to Dr. Sweet, I would also appreciate it if you could advise me.

I recently received a copy of Indemnity Agreement E-39 between Massachusetts Institute of Technology (MIT) and the Atomic Energy Commission (AEC), and some of its amendments. A copy is enclosed. Does this provide indemnity for Dr. Sweet? The terminology throughout the agreement is difficult to understand. My first question is: who is covered by "any other person who may be liable for public liability" in the definition of "person indemnified". On its face the language appears broad enough to cover Dr. Sweet.

According to Plaintiffs' Second Amended Complaint Dr. Sweet used the MIT reactor for the surgery in the clinical trials on George Heinrich on January 18, 1961 (paragraph 9), and for Eileen Sienkewicz on November 15, 1960 (paragraph 11). According to the Second Amended Complaint Dr. Sweet used the Brookhaven National Laboratory reactor for the surgery in the clinical trial for Joseph Mayne on June 14, 1951 (paragraph 14). The Brookhaven reactor was the site for the BNCT surgery on Walter Carmen Van Dyke on March 6, 1957 (paragraph 18), and although Dr. Sweet did not treat Mr. Van Dyke (and perhaps never met Mr. Van Dyke) he is being sued for participating

in a "joint action" (paragraphs 37 and 86) with Lee Farr, M.D., the head of the Medical Department at Brookhaven (para. 23).

The language in the E-39 Agreement appears to cover Dr. Sweet, at least in regard to his work at MIT.

Article III, para. 1 states: "The Commission undertakes and agrees to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability."

Article I contains definitions:

"4. 'Person indemnified' means the licensee and any other person who may be liable for public liability."

It appears that Dr. Sweet is such a person.

"5. 'Public liability' means any legal liability arising out of or resulting from a nuclear incident . . . "

"2(a). 'Nuclear incident' means any occurrence or series of occurrences at the location . . . causing bodily injury, sickness, disease or death . . . arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of . . . 'radioactive material.'"

The language does not appear ambiguous but if it were ambiguous, of course, the ambiguity would be construed against the drafter.

The application of this language to provide indemnity to Dr. Sweet also appears appropriate based on strong, national public policy: to encourage the development of peaceful uses of nuclear energy to benefit society, specifically here to encourage a possible medical breakthrough that would save the lives of patients suffering from terminal brain cancer.

It seems to me highly likely that arrangements were made in the 1950s and early 1960s for this type of indemnity or for insurance or for both for this BNCT work for many reasons. Common sense would indicate that nuclear related work is risky, and the risk should be insured or otherwise spread before work is commenced. The entities and people involved in this program were sophisticated and would have understood this. In addition, Dr. Sweet's records contain a liability insurance policy obtained for him by Harvard University's Purchasing Department, and this Employers Liability Insurance Company policy includes a specific exclusion for treatment of

patients by a physician.

I would appreciate it if you could conduct a search - or direct me to the proper person to conduct a search - of the NRC's records for the grant agreements, and any indemnity or insurance agreements related to the AEC contracts and other government agreements that supported Dr. Sweet's work. Dr. Sweet's research and clinical trials were often conducted pursuant to a series of grants from the AEC to Massachusetts General Hospital. I have not been successful obtaining copies of the grant documents.

The identified contracts are:

AT(3-1) - 1093
AT (30-1) - 1093
AT (30-1) - 1242
AT (30-1) - 4212
AT (30-1) - 3267
AT (30-1) - 3685

U.S. Public Health Service Grants C-3174, B-2377 and NB-04512 and CA-07368, NS 05393.

U.S. National Institute of Health Grant GM00889.

I understand from Dr. Sweet's family that a longtime employee at Brookhaven, Carol Whitley, is probably a good resource for finding some of these records which the Department of Energy advises it has been unable to locate. Perhaps an inquiry directly to Ms. Whitley would be helpful.

Thank you for your assistance.

Sincerely,

James E. Harvey (eos)

James E. Harvey, Jr.

JEH/eos

Copy: Burt M. Wong, Esq.
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August 28, 1999

Certified Mail
Return Receipt Requested

Marjorie S. Nordlinger
Senior Attorney
Office of the General Counsel
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

RE: **Heinrich et al. v. Sweet, et al., United States District Court for the District of Massachusetts, Civil Action Number: 97-CIV-12134-WGY; Notice of Decision relating to the application of the Price-Anderson Act.**

Dear Attorney Nordlinger:

Please find enclosed a copy of the "Memorandum and Order" of Judge Young in the above matter dated August 16, 1999. This Memorandum deals in part with the allowance of Massachusetts Institute of Technology's (M.I.T.) motion for summary judgment under the Price-Anderson Act that was filed and argued by my predecessor counsel, Francis C. Lynch, Esq., of the firm of Palmer & Dodge.

Your office has previously been notified of the pendency of the above action and the position of the Massachusetts Institute of Technology (M.I.T.) that some or all of the claims are subject to Indemnity Agreement E-39. In particular, your attention is directed to your letter of May 4, 1999, to Mr. Lynch.

I do understand that the instant ruling by Judge Young as to the applicability of the Price-Anderson Act to particular claims in this action is not dispositive[1] of the indemnity claim existing between M.I.T. and the Nuclear Regulatory Commission (NRC), as successor in interest to the Atomic Energy Commission.

However, notwithstanding Judge Young's careful attention to avoid prejudicing the rights of the NRC in this proceeding, I suggest that his reasoning in concluding that Price-Anderson applies, warrants your agency reassessing and reconsidering its legal responsibilities *vis-a-vis* M.I.T.

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[1] See Memorandum p. 23.

For example, the assertion and reference in your letter of May 4, 1999, as to Congress' intent relating to radiation doses within the doctor-patient relationship, was argued by the plaintiffs in this case and the judge found the argument wanting.[2] Certainly, I understand that under Judge Young's ruling the NRC may contest this issue anew. However, a jury is going to be impaneled in this case on Tuesday, September 7, 1999. Thereafter, the action will be tried to a verdict. The demands made by plaintiffs' counsel in this case are substantial, to say the least. A fair reading of Judge Young's reasoning would lead one to believe that the NRC may well be become ultimately responsible for any adverse verdict against M.I.T.

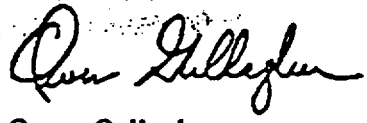
Therefore, without prejudice to the claims and rights of M.I.T., I am willing to cooperate with you to protect those interests that are common to M.I.T. and the NRC. Since I understand that you may not initially wish to involve your agency in the defense of this case, without more information, I suggest, again without waiving any claims or rights of M.I.T., that you might wish to consider contacting and consulting with the Justice Department attorney presently representing the United States in this action:

Burke M. Wong, Esq.
U.S. Department of Justice
Torts Branch, Civil Division
1331 Pennsylvania Avenue, NW - Rm. 8216 North
Washington, DC 20014
Tel: 202-616-4447 Fax: 202-616-4989

But, based upon Judge Young's reasoning in the Memorandum, and incorporating by reference, all prior notices and tenders that were previously proffered to you in this matter, I am formally renewing the request of M.I.T., that it be defended and indemnified pursuant to the terms and conditions of Indemnity Agreement E-39.

This request for indemnity is without prejudice to any other indemnities or rights, whether express or implied, direct or indirect, that M.I.T. may have against the Nuclear Regulatory Commission or any other person or entity. Any and all such indemnities or rights are expressly reserved. Thank you.

Very truly yours,



Owen Gallagher
OGALLAGHER@GALLAGHERLAW.COM

Enclosure (102 page Memorandum and Order)

cc: Burke Wong, Esq.
Francis C. Lynch, Esq.

08/28/1999

[2] See Memorandum, p. 22, fn.1.

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CHARLES J. O'MALLEY
(1965-1996)

September 7, 1999

VIA FEDERAL EXPRESS

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

RE: Evelyn Heinrich, et al v. William H. Sweet, M.D., et al
U.S. District Court C.A. No. 97-CIV-12134-WGY

Dear Ms. Nordlinger:

The jury trial in the above case began this morning with impanelment. I spoke at court with Burke Wong, the attorney for the United States and the Estate of Dr. Lee Farr. He advised me that you are preparing a response to my August 10 letter.

Enclosed are some additional materials that appear to strongly indicate that the Price Anderson Act, as in effect in 1960-1961, was intended to provide indemnity to persons such as Massachusetts General Hospital, Massachusetts Institute of Technology, and my client, William Sweet.

These materials from the Joint Committee on Atomic Energy are dated in 1965, so they are the best insight we have into Congressional intent in that period. The very first sentence of the report calls the Price Anderson "indemnity legislation", which had been in effect then for 8 years , "one of the most important pieces of legislation applicable to atomic energy".

Chapter 1, "AEC Study of the Price-Anderson Indemnity Act", states at page 2 that one of the two major Congressional objectives of the legislation was "to remove the deterrent to industrial activity in atomic energy presented by the threat of enormous liability claims if such an accident were to occur."

At page 18 the report states: "The protection extends to any person who may be legally liable for the incident, regardless of the identity of the person liable or his relationship to the licensed

activities or the nuclear incident."

Appendix I includes the text of Section 170 as it then existed. Paragraphs h and k appear to cover this case.

Page 112, the last full paragraph, sentences 5 and 6, also indicates Congressional intent to cover persons in Dr. Sweet's position.

I have rushed this material to you because the trial has already begun. I would be happy to analyze it with you more closely if you would like. I believe the conclusion is clear that the NRC should indemnify the above defendants in this matter.

Please advise me of the NRC's decision.

Thank you for your help on this.

Sincerely,

James E. Harvey, Jr.

JEH/eos
Enclosures

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CHARLES J. O'MALLEY
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JOHN D. CORRIGAN
OF COUNSEL

September 10, 1999

VIA FACSIMILE AND FEDERAL EXPRESS

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

RE: Evelyn Heinrich, et al v. William H. Sweet, M.D., et al
U.S. District Court C.A. No. 97-CIV-12134-WGY

Dear Ms. Nordlinger:

On September 9 the court entered a series of orders on summary judgment motions and on trial related motions in the above case. On September 10 we had opening statements and evidence. The trial is expected to last until early or mid-October.

As a result of the various rulings the "Bivens" claims have been dismissed and the trial is proceeding only on the negligence and fraud claims by the representatives of the estates of George Heinrich and Eileen Sienkewicz, both of whom were treated in the 1960-1961 trials.

If the NRC can definitively establish that there was no agreement to indemnify either William Sweet or Massachusetts General Hospital and therefore that the Price Anderson Act does not apply, I could present this to Judge Young and it could have a dramatic effect on this case. Specifically, it could cause Judge Young to rule that the Heinrich and Seinkewicz claims are barred by the statute of limitations. This is because if Price Anderson applies, then so does the Massachusetts statute of limitations, with a liberal discovery rule that saves these 35 year old claims (actions filed in 1996 for incidents in 1960 and 1961) from the statute's bar. If Price Anderson does not apply then the New York statute of limitations will apply and the Heinrich and Seinkewicz claims will be barred.

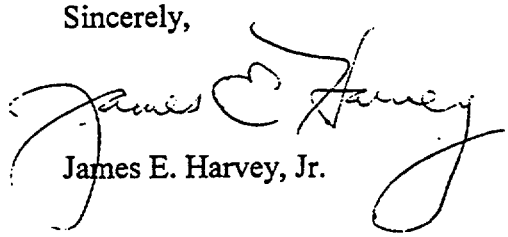
These issues are addressed in Judge Young's Memorandum and Order dated August 16, 1999, at pages 16-27. A copy is enclosed. In this order he preliminarily ruled that Price Anderson does apply. Is he wrong? Does the NRC take the opposite position, with supporting authority?

I believe there is indemnity owed by the NRC to Dr. Sweet - even if the specific 40 year old contracts cannot be found although we all know they existed - but if I am wrong on this we should inform the court immediately.

On the other hand, if the NRC agrees it owes indemnity to Dr. Sweet, whether from dollar one or only over $250,000, please advise me.

Thank you for your assistance on this.

Sincerely,



James E. Harvey, Jr.

JEH/eos
Enclosure

Copy: Burke Wong, Esq.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

September 15, 1999

Mr. James E. Harvey, Jr.
O'Malley & Harvey
160 Federal Street
12th Floor
Boston, Massachusetts 02110-1700

Re: Evelyn Heinrich, et al. v. William H. Sweet, M.D., et al
U.S. District Court C.A. No. 97 - CIV-121134-WGY

Dear Mr. Harvey,

Because I was not in the office Monday, I did not receive until yesterday your September 10 letter which you sent by overnight delivery and which propounded several questions related to the application of the Price Anderson Act to the current referenced lawsuit. I hasten to respond because of the urgency that you communicate. I am also prepared to respond at this time to the inquiry in your August 10, 1999 letter in which you requested us to search NRC records for six enumerated contracts as well as U.S. Public Health Service and National Institute of Health Grants.

First, as to the search, I passed your request on to the cognizant NRC staff member who has reported that his search for the materials you requested has been totally unavailing. A specialist in this area, he knows of no instance of indemnification under the Price Anderson Act of the Massachusetts General Hospital or indemnification under that Act of any hospital for intentional exposures in the course of medical uses of reactors or radioactive materials. See In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio, 1995). Certainly, no such indemnification was granted under the auspices of the Nuclear Regulatory Commission or was "inherited" by the Commission from its predecessor, the Atomic Energy Commission (AEC). We also have no record or knowledge of a contractual indemnification for Dr. Sweet. This was to be expected because we know of no instance where the NRC has executed a contract of indemnification with an individual person or has succeeded to the AEC as indemnifier in such a contractual relationship.

With regard to your questions on the applicability of the Price Anderson Act to this case, you appear to be confusing the applicability of the broad jurisdictional provisions introduced in the 1988 amendments with the far narrower reach of the liability coverage for nuclear incidents. As recently as May 3, 1999, the Supreme Court had occasion to speak to one aspect of the jurisdictional complexities of that Act, as amended, in the context of a case involving whether and to what extent the Price Anderson removal provisions were applicable to an action in a tribal court. See El Paso Natural Gas Company, et al., v. Laura Neztsosie, et al., ___ U.S. ___, 119 S.Ct. 1430 (1999).

Your references in your September 7 letter to earlier legislative history discussing the scope of indemnification under the Act do not appear to me to be relevant to the point we made in our letter to Mr. Lynch when he was representing M.I.T. and of which I understand you have a copy. (Letter from Marjorie Nordlinger to Francis C. Lynch, August 29, 1996, copy attached for your convenience.) The Act and legislative history, including that which you cite, are very clear that if there is indemnification at all, it covers any person liable for the nuclear incident. Not every nuclear incident is indemnified. Whether there is indemnification at all depends on whether it is required under the Price Anderson Act or if not required whether the Commission or Dept of Energy has exercised its statutory discretion to indemnify. As I have previously explained, it is our view that the acts involved in Heinrich v. Sweet are not covered by either the terms of the Act or by any discretionary action of the Commission. Nothing in your letter addressed the specific objection that we raised, i.e. that the Price-Anderson liability system did not cast the government as insurer for personal harms from medical administrations or from medical treatments without informed consent, but as indemnifier for unexpected but possible public dangers associated with the operation of nuclear reactors or materials used to fuel them. In addition and in any event, we pointed out in our August 26 letter that there are issues relating to the tolling of the statute that would cast doubts on any claim that you might make on behalf of your client.

I hope that this letter will respond to your current inquiries and will be of assistance to you.

Sincerely,

Marjorie S. Nordlinger

Attachment as stated
cc Burke Wong, DOJ
Jeanette Helfrich, DOE

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CHARLES J. O'MALLEY
(1965-1996)

October 20, 1999

VIA FACSIMILE
AND FIRST CLASS MAIL

Marjorie S. Nordlinger, Esq.
Office of the General Counsel
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

RE: Evelyn Heinrich, et al v. William H. Sweet, M.D., et al
U.S. District Court C.A. No. 97-CIV-12134-WGY

Dear Ms. Nordlinger:

I write you to advise of the jury verdict in the above referenced case and to respond to your letter of September 15, 1999. The jury found in favor of William Sweet and Massachusetts General Hospital on the plaintiffs' claim of lack of informed consent, but in favor of the plaintiffs on their claim against Dr. Sweet and MGH for negligence and wrongful death. I enclose a copy of the verdict slip for your review.

Prior to submitting the case to the jury, Judge William Young found that Dr. Sweet was an employee of Massachusetts General Hospital and was working within the scope of his employment at the time of the alleged injuries which is why Dr. Sweet and MGH are treated as a single unit for the purposes of the verdict slip. This judicial finding is significant because as you will recall, Dr. Sweet claims indemnity from the NRC for his actions pursuant to the contract(s) between the AEC and MGH regarding the work on BNCT.)

The total damage award for the two plaintiffs is $8,000,000.00, but defense counsel are drafting post-trial motions which will be filed this week. We are strongly optimistic that the punitive damages will be eliminated entirely and that the compensatory damages will be either eliminated or reduced. We expect Judge Young to issue his ruling on the post-trial motions within one or two weeks after filing.

Responding to your letter of September 15, 1999, I find your suggestion that you are unaware of a prior ruling regarding the applicability of Price-Anderson to injuries allegedly suffered from medical use of a nuclear reactor not surprising, as MIT holds the only license granted by the AEC for medical

use. The NRC has stated: "MIT also holds a 104a license [for medical therapy] in accordance with 10 CFR 50.21(c). MIT is the only NPR [non-power reactor] to hold a 104a license. This license was issued in 1958 when the original MIT reactor was licensed by the Atomic Energy Commission. A potential medical therapy use for NPRs that was identified in the 1950s is the use of neutron beams to treat the cancers glioblastoma multiform and metastasized melanoma...(c)alled Boron Neutron Capture Therapy (BNCT)..." Safety Evaluation by the Office of Nuclear Reactor Regulation, February 16, 1993, par. 2.0 (copy enclosed). While the odds are slim of finding precedent for exactly this type of indemnity claim given that only one reactor was ultimately licensed for medical use, it does not follow that medical use of atomic energy was not one of the peaceful purposes Congress intended to encourage by enacting the Price-Anderson Act.

Indeed, the Act specifically states: "The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1967, for which it requires financial protection, agree to indemnify and hold harmless the licensee and other persons indemnified...from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee...Such a contract of indemnification shall cover public liability *arising out of or in connection with the licensed activity*. Price-Anderson Act, section 170(c)(emphasis added). "Licensed activity" is defined as "any activity for which a license is issued...". Subcommittee on Legislation of the Joint Committee on Atomic Energy, Selected Materials on Atomic Energy Indemnity Legislation, p. 111.

As reflected in your letter of September 15th, we agree that "(t)he Act and legislative history...are very clear that if there is indemnification at all, it covers any person liable for the nuclear incident."

Your September 15th letter pointed out that the government would not provide indemnity for medical administration without informed consent. That makes sense to me. It is important for the NRC to understand, however, that the jury verdict establishes that Dr. Sweet and MGH do not have any liability for failure to obtain informed consent from their patients. That claim, appropriately, was rejected by the jury. The remaining count, on which liability was found, was, essentially, negligent medical use of the MIT nuclear reactor. Negligent acts arising from a section 104 license without any suggestion of an intent to injure, is exactly the type of claim the Price-Anderson Act was intended to indemnify. I believe the conclusion is clear that NRC owes indemnity to Dr. Sweet in this matter under the medical use license issued to MIT by the AEC for Boron Neutron Capture Therapy.

Please advise me what further steps I should follow to complete Dr. Sweet's claim to the NRC for indemnity.

O'MALLEY AND HARVEY

Thank you.

Sincerely,

James E. Harvey, Jr.

JEH/eos
Enclosure

Copy: Burke Wong, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EVELYN HEINRICH on behalf of her husband GEORGE HEINRICH, HENRY M. SIENKEWICZ, JR. on behalf of his mother EILEEN ROSE SIENKEWICZ, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 97-12134-WGY
WILLIAM H. SWEET, M.D.; MASSACHUSETTS GENERAL HOSPITAL; MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Defendants.	)	

JURY VERDICT

1. On the Heinrich' claims, we find

   a. as to the negligence claim, for

   ✓ George Heinrich ____ William H. Sweet-MGH

   ____ George Heinrich ✓ MIT

   b. as to the informed consent claim, for

   ____ George Heinrich ✓ William H. Sweet-MGH

   ____ George Heinrich ✓ MIT

c. and assess damages of $250,000.

d. as to the wrongful death claim, for

✓ Evelyn Heinrich ____ William H. Sweet-MGH

____ Evelyn Heinrich ____ MIT

e. and assess damages of $250,000

f. and punitive damages as to

(1) William H. Sweet of $750,000

(2) MGH of $1,250,000

(3) MIT of ____

2. On the Sienkewicz' claims, we find

a. as to the negligence claim, for

✓ Eileen Sienkewicz ____ William H. Sweet-MGH

____ Eileen Sienkewicz ✓ MIT

b. as to the informed consent claim, for

____ Eileen Sienkewicz ✓ William H. Sweet-MGH

____ Eileen Sienkewicz ✓ MIT

c. and assess damages of $500,000

d. as to the wrongful death claim, for

✓ Henry Sienkewicz ____ William H. Sweet-MGH

____ Henry Sienkewicz ____ MIT

e. and assess damages of $2,000,000

f. and punitive damages as to

(1) William H. Sweet of $1,000,000

(2) MGH of $2,000,000

(3) MIT of _____

Ken Richman
Foreman

Date: 10-15-99

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08 OCT -2 AM 10:22

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EVELYN HEINRICH on behalf of her husband GEORGE HEINRICH, HENRY M. SIENKEWICZ, JR. on behalf of his mother EILEEN ROSE SIENKEWICZ,[1]	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 97-12134-WGY
WILLIAM H. SWEET, M.D., Trustee of the Lee Edward Farr Trust dated 1/11/71, as amended,[2] THE ESTATE OF LEE EDWARD FARR, M.D., ASSOCIATED UNIVERSITIES, INC.,[2] MASSACHUSETTS GENERAL HOSPITAL, MASSACHUSETTS INSTITUTE OF TECHNOLOGY,[3] and THE UNITED STATES OF AMERICA,[4]	)	
Defendants.	)	

[1] This case originated as a putative class action, but class action status was denied. See Docket no. 271. The claims of the originally-named plaintiffs Joseph Mayne and Walter Carl Van Dyke were dismissed pre-trial. See Docket no. 217. The claim of the later-added plaintiff, Marc Oddo, has been severed and proceeds as an independent action. See Docket nos. 335, 349.

[2] All claims against each of these defendants were directed out of the case. See Docket no. 246.

[3] The jury found for Massachusetts Institute of Technology upon all claims. See Docket no. 268.

[4] The Court granted the United States' motion for judgment pursuant to the Federal Tort Claims Act's government contractor exception in an opinion dated February 9, 2000. See Heinrich v. Sweet, 83 F. Supp. 2d 214, 224 (D. Mass. 2000).

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DOCKETED

JUDGMENT

YOUNG, C.J. September 29, 2000

In accordance with the memorandum and order entered September 29, 2000, it is ORDERED, ADJUDGED, and DECREED that:

1. Evelyn Heinrich shall recover of William H. Sweet and Massachusetts General Hospital, jointly and severally, the sum of $250,000 and from each of these defendants individually the sum of $20,000, with statutory interest on the aggregate from the date of the judgment, and costs.

2. Henry M. Sienkewicz, Jr., shall recover of William H. Sweet and Massachusetts General Hospital jointly and severally, the sum of $500,000 and from each of these defendants individually the sum of $20,000, with statutory interest on the aggregate from the date of the judgment, and costs.

3. None of the other defendants are liable on any of these claims to the plaintiffs.

Elizabeth Smith

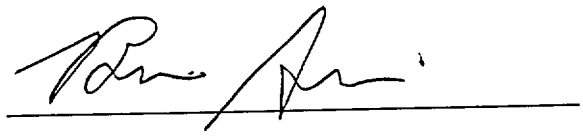
Elizabeth Smith, Deputy Clerk

Approved as to form: William G. Young

WILLIAM G. YOUNG
CHIEF JUDGE

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 12th day of January, 2001, I caused to be sent by United States mail (postage prepaid) a copy of "DEFENDANT'S MOTION TO DISMISS, IN PART, AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT" addressed as follows:

Thomas P. Billings, Esq.
Sally & Fetch
225 Franklin Street
Boston, Massachusetts 02110

Owen Gallagher, Esq.
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