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

OFFICE OF THE
SECRETARY

April 15, 1977

Director
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Dear Sir:

Enclosed for publication in the Federal Register are an original and two certified copies of a document entitled:

TITLE 10 - ENERGY
CHAPTER I - NUCLEAR REGULATORY COMMISSION
PART 140 - FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

Miscellaneous Amendments

Please publish SCHEDULE I on Monday, April 18, 1977.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

Enclosures:
Original and 2 certified copies

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Title 10 - Energy

CHAPTER I - NUCLEAR REGULATORY COMMISSION

Part 140 - FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS

Miscellaneous Amendments

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Final Rule

SUMMARY: The Nuclear Regulatory Commission is amending its regulation "Financial Protection Requirements and Indemnity Agreements," to increase the level of the primary layer of financial protection required of certain indemnified licensees, and make certain other minor changes in indemnity agreement forms and in the facility form of nuclear liability insurance policy furnished as financial protection.

EFFECTIVE DATE: May 1, 1977

FOR FURTHER INFORMATION CONTACT: Mr. Ira Dinitz, Antitrust and Indemnity Group, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. (phone: 301-443-6961).

SUPPLEMENTARY INFORMATION: The provisions of Section 170 of the Atomic Energy Act,as amended, (the Act) require production and utilization facility licensees to have and maintain financial protection to cover public liability claims resulting from a nuclear incident. The Commission has exercised its discretionary authority to require persons licensed to possess plutonium in the amount of 5 kilograms or more and persons licensed to process plutonium in the amount of 1 kilogram or more for use in plutonium processing and fuel fabrication plants to also maintain financial protection at the maximum amount available from private sources. Section 170 of the

Act, in conjuction with section 201 of the Energy Reorganization Act of 1974, as amended, requires the Nuclear Regulatory Commission to indemnify the licensee and other persons indemnified, up to the statutory limitation on liability, against public liability claims in excess of the amount of financial protection required. Subsection 170b. of the Act requires that for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100 electrical megawatts or more, the amount of financial protection* required shall be the maximum amount available from private sources. For other licensees, the Commission may require lesser amounts of financial protection. Primary financial protection may be in the form of private insurance, private contractual indemnities, self-insurance or other proof of financial responsibility, or a combination of such measures. Nonprofit educational institutions and Federal agencies are exempted by statute from the financial protection requirements.

The insurers who provide the nuclear liability insurance, Nuclear Energy Liability-Property Insurance Association (NEL-PIA) and Mutual Atomic Energy Liability Underwriters (MAELU), have advised the Commission that effective January 1, 1977, the maximum amount of privately nuclear energy liability insurance available was increased from $125 million to $140 million. Pursuant to the provisions of subsection 170b. of the Act, the amount of primary financial protection required for facilities having a rated capacity of 100 electrical magawatts or more will be

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* Public Law 94-197 does not by its precise language require maintainance of a "primary" (i.e., nuclear liability insurance) layer and a "secondary" (i.e., retrospective premium) layer of financial protection but merely considers the combination of these two layers as "financial protection." However, the recently published amendments (42 F.R. 46, Jan. 3, 1977) to 10 CFR Part 140 implementing part of Public Law 94-197, distinguish between primary and secondary layer of financial protection on the basis of their different insurance characteristics. The amendments in this rule relate solely to increases in the primary layer of financial protection.

increased to $140 million, effective May 1, 1977. In accordance with recent amendments to 10 CFR Part 140, (42 F.R. 46, January 3, 1977), licensees of plutonium processing and fuel fabrication plants required to maintain the maximum amount of financial protection will have to comply with this requirement on August 1, 1977. The following amendments to 10 CFR Part 140, "Financial Protection Requirements and Indemnity Agreements," reflect this requirement.

Other changes to Part 140 to implement Pub. L. 94-197 relate to the extension of indemnity protection to (1) indemnified shipments of new or spent fuel while outside of the United States and any other nation during transit from one NRC licensee to another and (2) stationary nuclear facilities, such as floating nuclear power plants, licensed by the NRC and located in international waters. There is one slight difference between the endorsement to the facility form of nuclear liability insurance policy submitted by NEL-PIA and the amendments to the Commission indemnity agreement form implementing this change. The endorsement, unlike the indemnity amendments, will not extend coverage at this time to nuclear material being transported to or from a floating nuclear power plant. This coverage would be extended, however, before such a plant would be licensed.

Pub. L. 94-197 also provided that in the event of an "extraordinary nuclear occurrence" the Commission could enforce provisions in an insurance policy furnished as proof of financial protection and incorporated in indemnity agreements, requiring a licensee to waive any defense based upon a 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, but in no event more than 20 years after the date of the nuclear incident. Before the enactment of Pub. L. 94-197, the extension of the time for initiating of a suit for damages was only 10 years after the date of the nuclear incident. Both the endorsement to the facility form and the indemnity agreement forms implement this change as set forth below.

Apart from the change discussed above, there is one additional non-substantive modification in the present waiver of defenses endorsement submitted by NEL-PIA that differs from the waiver of defenses endorsement now contained in § 140.91. The existing endorsement was amended by addition of a new paragraph 6 published in the Federal Register on November 11, 1971 (36 F.R. 21580). That new paragraph basically provided that a licensee's workers employed at an indemnified site exclusively in connection with the construction of a nuclear reactor for which no operating license had been issued would be permitted to take advantage of the waiver of defenses provisions of the facility form. The nuclear liability insurance pools intended that this paragraph be published as a separate endorsement and not as a part of the general waiver endorsement. Hence, this paragraph is now being retained as a separate endorsement.

This rule does not contain any provisions implementing (or interpreting) the amendments to H.R. 8631 introduced by Senator Hathaway, agreed to by

the Senate and contained in Pub. L. 94-197 regarding exclusion of the costs of investigating and settling claims from funds used for the payment of claims.

Since the amendments set out below conform the Commission's regulations to a statutory requirement, the Commission has found that good cause exists for omitting public notice of proposed rule making and public procedure thereon as unnecessary.

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.

1. The present § 140.11(a)(4) is amended by deleting "$125,000,000" and substituting therefor "$140,000,000." Section 140.11(a)(4) which becomes effective on August 1, 1977 is also amended by deleting "$125,000,000" and substituting "$140,000,000" therefor.

2. Section 140.13a(a) is amended by deleting the term "$125 million" and substituting "$140,000,000" therefor.

3. In § 140.91, Appendix A, Condition 4 is amended by revising the

footnote to read as follows: "For policies issued by Nuclear Energy Liability-Property Insurance Association the amount will be "$108,500,000"; for policies issued by Mutual Atomic Energy Liability Underwriters, the amount will be "$31,500,000."

4. In § 140.91, Appendix A, paragraph III of the "Optional Amendatory Endorsement" is amended by revising the footnote to read as follows: "For policies issued by Nuclear Energy Liability-Property Insurance Association the amount will be "$108,500,000;" for policies issued by Mutual Atomic Energy Liability Underwriters the amount will be "$31,500,000."

5. In § 140.91, Appendix A, the "Waiver of Defenses Endorsement" is amended by deleting paragraph 6.

6. Section 140.91, Appendix A, is amended by adding the following endorsements:

NUCLEAR ENERGY LIABILITY POLICY
(FACILITY FORM)
WAIVER OF DEFENSES ENDORSEMENT
(Extraordinary Nuclear Occurrence)

The named insured, acting for himself and every other insured under the policy, and the members of ----------agree as follows:

1. With respect to any extraordinary nuclear occurrence to which the policy applies as proof of financial protection and which

   (a) arises out of or results from or occurs in the course the construction, possession, or operation of the facility, or

   (b) arises out of or results from or occurs in the course of the transportation of nuclear material to or from the facility,

   the insureds and the companies agree to waive

   (1) any issue or defense as to the conduct of the claimant or the fault of the insureds, including but not limited to:

      (i) negligence,
      (ii) contributory negligence,
      (iii) assumption of risk, and
      (iv) unforeseeable intervening causes, whether involving the conduct of a third person, or an act of God,

   (2) any issue or defense as to charitable or governmental immunity, and

   (3) any issue or defense based on any statute of limitations if suit is instituted within three (3) years from the date on which the claimant first knew, or reasonably could have known, of his bodily injury or property damage and the cause thereof, but in no event more than twenty (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.

2. The waivers set forth in paragraph 1. above do not apply to

   (a) bodily injury or property damage which is intentionally sustained by the claimant or which results from a

nuclear incident intentionally and wrongfully caused by the claimant;

(b) bodily injury sustained by any 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;

(c) 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.

3. The waivers set forth in paragraph 1. above shall be effective only with respect to bodily injury or property damage to which the policy applies under its terms other than this endorsement; provided, however, that with respect to bodily injury or property damage resulting from an extraordinary nuclear occurrence, Insuring Agreement IV, "Application of Policy", shall not operate to bar coverage for bodily injury or property damage (a) which is caused during the policy period by the nuclear energy hazard and (b) which is discovered and for which written claim is made against the insured not later than twenty (20) years ~~after~~ the date of the extraordinary nuclear occurrence.

Such waivers 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

(a) the provisions of the policy applicable to the financial protection required of the named insured;

(b) the agreement of indemnification between the named insured and the Nuclear Regulatory Commission made pursuant to Section 170 of the Atomic Energy Act of 1954, as amended; and

(c) the limit of liability provisions of Subsection 170e. of the Atomic Energy Act of 1954, as amended.

Such waivers shall not preclude a defense based upon the failure of the claimant to take reasonable steps to mitigate damages.

4. Subject to all of the limitations stated in this endorsement and in the Atomic Energy Act of 1954, as amended, the waivers set forth in paragraph 1. above shall be judicially enforceable in accordance with their terms against any insured in an action to recover damages because of bodily injury or property damage to which the policy applies as proof of financial protection.

5. As used herein:

"extraordinary nuclear occurrence" means an event which the Nuclear Regulatory Commission has determined to be an extraordinary nuclear occurrence as defined in the Atomic Energy Act of 1954, as amended.

"financial protection" and "nuclear incident" have the meanings given them in the Atomic Energy Act of 1954, as amended.

"claimant" means the person or organization actually sustaining the bodily injury or property damage and also includes his assignees, legal representatives and other persons or organizations entitled to bring an action for damages on account of such injury or damage.

Effective Date of this Endorsement _____ To form a part of Policy No. ____
12:01 A.M. Standard Time

Issued to _____

For the subscribing companies

Date of Issue _____

By _____
General Manager

Endorsement No. _____ Countersigned by _____

SUPPLEMENTARY ENDORSEMENT
WAIVER OF DEFENSES
REACTOR CONSTRUCTION AT THE FACILITY

It is agreed that in construing the application of paragraph 2.(b) of the Waiver of Defenses Endorsement (NE-33a) 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 Nuclear Regulatory Commission 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.

Effective Date of this Endorsement_____ To form a part of Policy No._____
12:01 A.M. Standard Time

Issued to_____

For the subscribing companies

Date of Issue_____

By_____
General Manager

Endorsement No._____ Countersigned by_____

NUCLEAR ENERGY LIABILITY POLICY

(FACILITY FORM)

AMENDMENT OF DEFINITION OF
"NUCLEAR ENERGY HAZARD"
(Indemnified Nuclear Facility)

It is agreed that:

1. Solely with respect to an "insured shipment" to which the 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 handling and temporary storage incidental thereto, within

   (a) the territorial limits of the United States of America, its territories or possessions, Puerto Rico or the 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.

2. As used herein, "financial protection" has the meaning given it in the Atomic Energy Act of 1954, as amended.

INSTRUCTIONS: This form is to be used to modify all Nuclear Energy Liability Facility Forms in force on January 1, 1977 which were issued to become effective prior to January 1, 1977 and which are offered by the named insured as proof of financial protection being maintained as required by the Atomic Energy Act of 1954, as amended.

Effective Date of
this Endorsement _____ To form a part of Policy No. _____
12:01 A.M. Standard
Time

Issued to _____

For the subscribing companies

Date of Issue _____

By _____
General Manager

Endorsement No. _____ Countersigned by _____

NUCLEAR ENERGY LIABILITY POLICY
(FACILITY FORM)

AMENDMENT OF DEFINITIONS OF
"Nuclear Energy Hazard" and "Insured Shipment"
(Indemnified Nuclear Facility)

It is agreed that:

I. In Insuring Agreement III, "DEFINITIONS"

A. 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, Puerto Rico or the 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 for 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.

B. the definition of "insured shipment" is replaced with the following;

"insured shipment" means a shipment of source material, special nuclear material, spent fuel or waste, 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 other than the continuation of its transportation.

II. As used herein, "financial protection" has the meaning given it in the Atomic Energy Act of 1954, as amended.

INSTRUCTIONS: This form is to be used to modify all Nuclear Energy Liability Facility Forms which are issued to become effective on or after January 1, 1977 and which are offered by the named insured as proof of financial protection being maintained as required by the Atomic Energy Act of 1954, as amended.

Effective Date of this Endorsement_____To form a part of Policy No._____

12:01 A.M. Standard Time

Issued to _____

For the subscribing companies

Date of Issue_____

By_____
General Manager

Endorsement No._____ Countersigned by_____

7. Section 140.92, Appendix B, Article II, paragraph 4(c) is amended by changing "ten years" to "20 years.""

8. Section 140.93, Appendix C, Article II, paragraph 4(c), is amended by changing "10 years" to "20 years."

9. Section 140.94, Appendix D, Article II, paragraph 4(c), is amended by changing "10 years" to "20 years."

10. Section 140.95, Appendix E, Article II, paragraph 2(c), is amended by changing "10 years" to "20 years."

11. Section 140.92, Appendix B, Article II, paragraph 8(a), is amended by deleting the amount "$96,875,000" wherever it appears and substituting therefor "$108,500,000."

12. Section 140.92, Appendix B, Article II, paragraph 8(b), is amended by deleting the amount "$28,125,000" wherever it appears and substituting therefor "$31,500,000."

13. Section 140.92, Appendix B, Article II, paragraph 8(c), is amended by changing the amount "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

14. Section 140.92, Appendix B, Article III, paragraph 4(b)(2), is amended by changing "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

15. Section 140.93, Appendix C, Article II, paragraph 8, is amended by changing the amount "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

16. Section 140.93, Appendix C, Article III, paragraph 4(b)(2), is amended by changing "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

17. Section 140.94, Appendix D, Article II, paragraph 6, is amended by changing "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

18. Section 140.95, Appendix E, Article III, paragraph 4(b)(2), is amended by changing "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

19. Section 140.92, Appendix B, Article I, the prefatory language of paragraph 5, is amended to read as follows:

> "'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, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

20. Section 140.93, Appendix C, Article I, the prefatory language of paragraph 5 is amended to read as follows:

> "'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, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

21. Section 140.94, Appendix D, Article I, the prefatory language of paragraph 4, is amended to read as follows:

"'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, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

22. Section 140.95, Appendix E, Article I, the prefatory language of paragraph 4, is amended to read as follows:

"'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,

including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

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

"'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, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

24. Section 140.108, Appendix H, Article I, the prefatory language of paragraph 4, is amended to read as follows:

"'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, including handling or temporary storage incidental thereto, of the radioactive material to the location or from the location provided that:"

25. Section 140.107, Appendix G, Article II, paragraph 6(a), is amended by deleting the amount "$96,875,000" wherever it appears and substituting therefor "$108,500,000."

26. Section 140.107, Appendix G, Article II, paragraph 6(b), is amended by deleting the amount "$28,125,000" wherever it appears and substituting therefor "$31,500,000."

27. Section 140.107, Appendix G, Article II, paragraph 6(c), is amended by changing the amount "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

28. Section 140.107, Appendix G, Article III, paragraph 4(b), is amended by changing the amount "$125,000,000" to "$140,000,000."

29. Section 140.108, Appendix H, Article II, paragraph 6(a), is amended by deleting the amount "$96,875,000" wherever it appears and substituting therefor "$108,500,000."

30. Section 140.108, Appendix H, Article II, paragraph 6(b), is amended by deleting the amount "$28,125,000" wherever it appears and substituting therefor "$31,500,000."

31. Section 140.108, Appendix H, Article II, paragraph 6(c), is amended by changing the amount "$125,000,000" to "an amount equal to the sum of $140,000,000 and the amount available as secondary financial protection."

32. Section 140.108, Appendix H, Article III, paragraph 4(b), is amended by changing the amount "$125,000,000" to "$140,000,000."

Effective date: The foregoing amendments become effective on May 1, 1977.

(Sec. 161, Pub. Law 83-703, 68 Stat. 948 (42 U.S.C. 2201); Sec. 170, Pub. Law 85-256, 71 Stat. 576, Pub. Law 94-197, 89 Stat. 1111 (42 U.S.C. 2210); Sec. 201, Pub. Law 93-438, as amended, 88 Stat. 1242, 89 Stat. 415 (42 U.S.C. 5841))

Dated at Washington, D. C., this 14th day of April, 1977.

FOR THE NUCLEAR REGULATORY COMMISSION.

Samuel J. Chilk
Secretary of the Commission