

October 25, 2021

VIA EMAIL: PAAREPORTNOI@HQ.DOE.GOV

To: U.S. Department of Energy
Office of General Counsel
Room 6A-167
1000 Independence Avenue SW
Washington, DC 20585

Re: University Laboratory Group Response to Department of Energy Notice of Inquiry on Preparation of Report to Congress Concerning Reauthorization of the Price Anderson Act (Doc. No. 2021-15840)(86 FR 40032 and 86 FR 45714)

This submission is made in response to the above-referenced Notice of Inquiry (NOI or Notice) issued by the U.S. Department of Energy (DOE). The submission is made by three (3) universities and an association of institutions for higher learning that operate National Laboratories on behalf of DOE. Those laboratories are SLAC National Accelerator Laboratory (SLAC) operated by The Leland Stanford Junior University (Stanford); Lawrence Berkeley National Laboratory (LBNL) operated by the Regents of the University of California (UC); Argonne National Laboratory (Argonne) and Fermi National Accelerator Laboratory (Fermilab), operated by the University of Chicago affiliates, UChicago Argonne LLC and Fermi Research Alliance, LLC, respectively (University of Chicago); and Thomas Jefferson National Laboratory (Jefferson Lab), operated by the Southeastern University Research Association Inc. (SURA) affiliate, Jefferson Science Associates, LLC.¹ For ease of reference, we refer to the group of three universities and SURA as the University Laboratory Group or simply, the Group.

The University Laboratory Group submits these comments in response to DOE's "Notice of Inquiry on Preparation of Report to Congress on the Price-Anderson Act" (PAA).² The Notice summarizes the DOE PAA system of financial protection with respect to DOE contractors:

[T]he DOE PAA system of financial protection is in the form of an indemnification by DOE ("DOE Price-Anderson Indemnification") for legal liability for a nuclear incident or a precautionary evacuation arising from activity under a DOE contract. The DOE Price-Anderson indemnification: (1) Provides omnibus coverage of all persons who might be legally liable; (2) indemnifies fully all legal liability up to the statutory limit on such liability (as of 2018 approximately \$13.7 billion, inflation-adjusted, for a nuclear incident in the United States); (3) covers all DOE contractual activity that might result in a nuclear incident in the United States; (4) is not subject to the availability of funds; and (5) is mandatory and exclusive.³

¹ The universities and the association submitting these comments do so in their capacities as the current contractors for the listed National Laboratories. They do not submit the comments on behalf of DOE, or any other universities, associations or other entities involved in the management and operation of DOE National Laboratories.

² 86 Fed. Reg. 40032 (July 26, 2021). The original Notice of Inquiry (NOI) was amended on August 16, 2021, to extend the due date for comments to October 25, 2021. 86 Fed. Reg. 45714.

³ 86 Fed. Reg. 40032 (footnotes omitted).

As explained by the DOE's Notice, the PAA was originally enacted in 1957, and has undergone several amendments and reauthorizations since its enactment. The Price-Anderson Amendments Act of 2005 extended DOE's authority to grant PAA indemnification until December 31, 2025.⁴ The current NOI seeks public comment to support DOE's statutorily required Report to Congress on the reauthorization of PAA indemnity. The University Laboratory Group is providing comments in response to Questions 1- 9, 12, and 24.

Each of the University Laboratory Group members has a strong interest in the strength and continued availability of DOE's indemnification authority under the PAA. The PAA indemnification permits universities and other nonprofit entities to participate in the DOE research mission, which in many instances involves nuclear-related risks, without the substantial disincentive of having to cover those risks through costly insurance programs, even if they were available, or the exposure to substantial claims arising from a nuclear incident. The PAA indemnification authority fosters participation in DOE's scientific research mission by universities and other nonprofits and without that indemnification, many would need to cease supporting that research mission due to the unacceptable levels of risk.⁵ The withdrawal of universities and nonprofits from DOE research and the management and operation of National Laboratories due to the lack of PAA indemnity would severely impair DOE's research mission. As explained below in the University Laboratory Group's responses to the NOI's specific questions, Congress should reauthorize the Department's indemnification authority under the PAA, without substantial change or modification.

I. BACKGROUND DISCUSSION

The following sections summarize for the Department the views of the University Laboratory Group with respect to the importance PAA indemnity plays in the National Laboratories' successful pursuit of DOE's scientific research mission.

A. DOE's National Laboratories

The DOE website aptly summarizes the important role filled by the Department's 17 National Laboratories in meeting the "the critical scientific challenges of our time":

The Energy Department's 17 National Labs tackle the critical scientific challenges of our time – from combatting climate change to discovering the origins of our universe – and possess unique instruments and facilities, many of which are found nowhere else in the world. They address large scale, complex research and development challenges with a multidisciplinary approach that places an emphasis on translating basic science to innovation.

<https://www.energy.gov/national-laboratories>. The Department's National Laboratories host 'scientific user facilities' and high-performance computers that far exceed the capabilities of research laboratories at the world's top universities and in industry. As a result, scientists from universities and industry conduct

⁴ Pub. L. No. 109-58, codified as amended at 42 U.S.C. 2210.

⁵ The University Laboratory Group's comments in this submission are specifically directed at the role, concerns and issues that universities and nonprofit organizations participating in DOE's research mission face from nuclear-based risks. These comments are not intended to suggest that for-profit contractors involved in both DOE's research mission and its mandate for the cleanup of nuclear weapons program waste have any less significant need for or interest in the continued availability of PAA indemnity.

important research at the DOE National Laboratories.⁶ These scientific user facilities provide current and future scientists with essential research facilities, at no cost to the researchers, to conduct multidisciplinary cutting-edge scientific work on a wide range of topics crucial to our country's economic and national security, the development of science and technology solutions that benefit both the country and the world, and in training the country's next generation of scientists and engineers.⁷

The PAA indemnification authority covers a broader scope of activities than just research and work in connection with the Nation's nuclear weapons stockpile or the legacy nuclear waste clean-up. The indemnification authority covers the risk of nuclear incidents arising from research involving the risk of public liability from a nuclear incident "arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material," as those terms are defined in the PAA.⁸ Many of DOE's National Laboratories, including members of the University Laboratory Group providing these comments, manage 'Government-Owned Contractor Operated' scientific facilities, on behalf of the Department of Energy, either using or resulting in the creation of radioactive materials. For example, facilities operated by the University Laboratory Group include storage ring and linear synchrotron light sources and other advanced particle accelerators that create radioactive materials in the course of performing the DOE research mission. These facilities and tools operated by the University Laboratory Group serve the needs of hundreds of institutions and agencies across the U.S. and the world, and clearly present the type of risk intended to be covered by the PAA indemnification authority.

Importantly, the research activities at DOE's National Laboratories are directed in many instances at the most essential scientific problems of our time. Just by way of example, research conducted at the National Laboratories operated by the Group, each of which implicate nuclear risks for which PAA indemnification could apply, includes:

- ***Response to the COVID-19 Pandemic***
 - LBNL's Advanced Light Source is used to examine antibody-antigen interactions.
 - Argonne's Advanced Photon Source is used to identify existing medications that may inhibit the COVID-19 virus.
 - Researchers used SLAC's Stanford Synchrotron Radiation Light Source to study the COVID-19 virus at the molecular level in search of possible new therapeutics to use against the disease.

⁶ For example, Eli Lilly and Company partnered with Argonne to operate a beam line at the Laboratory's Advanced Photon Source (<https://tinyurl.com/zr5kjsw4>). In addition, approximately one third of the nuclear science PhDs awarded in the U.S. are based on research using Jefferson Lab's Continuous Electron Beam Accelerator Facility/CEBAF (<https://tinyurl.com/d5cp4zws>).

⁷ DOE's National Laboratories host and participate in a number of different programs to develop future scientists. These programs include the Science Undergraduate Laboratory Internship Program (<https://science.osti.gov/wdts/suli>); the Office of Science Graduate Student Research Award Program (<https://tinyurl.com/rtwzp5zk>); and the Workforce Development for Teachers and Scientists Program (<https://tinyurl.com/upw34xz4>).

⁸ 42 U.S.C. 2014(q)(defining the term "nuclear incident").

- SLAC's COVID-19 Rapid Access Program enables high-impact experiments focusing on Coronavirus and COVID-19 utilizing specialized instrumentation of the Linear Coherent Light Source (LCLS).
- ***Next Generation EV Battery Research to Support Market for Electric Vehicles and Other Uses***
 - Argonne was designated as the headquarters for DOE's Joint Center for Energy Storage Research (JCESR) working in collaboration with industry and other National Laboratories to focus on developing battery technologies that move beyond lithium-ion batteries.
 - LBNL uses its Advanced Light Source in conducting x-ray microtomography of Lithium-ion batteries to study battery charging rates.
 - Researchers use SLAC's Stanford Synchrotron Radiation Lightsource (SSRL) to simultaneously study both the surface and the interior of an individual battery electrode particle to understand how to engineer the whole particle to produce batteries with improved performance.
- ***Pursuit of Fundamental Science Objectives***
 - Jefferson Lab uses its accelerator to study the mechanics of subatomic particles (quarks), research that is essential to advances in materials sciences and numerous other disciplines. Technologies developed for these specialized experiments have been used in testing NASA's James Webb Space Telescope, spun-off to start medical imaging and nanomaterial companies, and are currently being utilized by Jefferson Lab scientists for environmental remediation and water purification research.
 - Fermilab's accelerator complex has driven discovery in fundamental physics, innovations in accelerator science and advances in accelerator-based applications. With its current PIP-II Project, the Laboratory will generate an unprecedented stream of neutrinos for the international, Fermilab-hosted Deep Underground Neutrino Experiment (DUNE) and Long-Baseline Neutrino Facility (LBNF) and enable multiple simultaneous experiments for many decades to come.
 - Over the past few years, the LCLS facility at SLAC has enabled scientists to uncover the 3-D molecular structure of proteins involved in the transmission of many important diseases, such as African sleeping sickness, Dengue fever and the Zika virus; it has aided the development of next-generation painkillers that seek to reduce side effects such as drug dependency; it has obtained live snapshots of the fleeting steps in the water-splitting reaction in photosynthesis; and it has studied the microscopic components of air pollution at the nanoscale.

The universities and association that make up the University Laboratory Group each participate in unique ways to the success of the Department's science mission. Each employs facilities that implicate the need for the Department's continued PAA indemnity authority.⁹

⁹ The above examples are highlights of the research conducted by the National Laboratories included in the University Laboratory Group submitting these comments. It is important to note that DOE's other National Laboratories are conducting similar leading edge, productive research, with many of them using similar particle accelerators and other facilities that present risk subject to PAA indemnification.

II. RESPONSE TO DOE'S QUESTIONS

The University Laboratory Group provides the following comments in response to DOE's NOI questions. The Group has responded to those questions that touch on the most significant issues involving National Laboratory programs, operations and mission goals. As a result, the Group has left it to other interested members of the DOE complex and the public to offer their views with respect to those questions the University Laboratory Group does not address in these comments. We appreciate the opportunity to offer our views on this critically important topic to the current and future success of DOE's National Laboratory research programs.

Question 1: Should the DOE Price-Anderson indemnification be continued without modification?

Yes, the PAA indemnification authority should be continued without modification.

Question 2: Should the DOE Price Anderson indemnification be eliminated or made discretionary with respect to all or specific DOE activities? If discretionary, what procedures and criteria should be used to determine which activities or categories of activities should receive indemnification?

No, the PAA indemnification should not be eliminated or made discretionary with respect to all or specific DOE activities. It may take years or even decades to enjoy the societal benefits resulting from research projects and other activities undertaken at the National Laboratories. That is the nature of the complex basic research that is a core mission of DOE National Laboratory system. The planning for such research and other activities requires certainty as to coverage for risks. If the PAA indemnification is eliminated or even if it is made discretionary, the ability to assess and allocate associated risk will be made uncertain. That, in turn, will stand in the way of advanced research planning and the execution of projects that are integral to DOE's mission.

In addition, making the PAA indemnification "discretionary" will dilute its value in risk reduction for advanced research. Universities and nonprofit associations involved in operating the National Laboratories, such as the members of the University Laboratory Group, will not be able to depend on that indemnity in planning and seeking the funding for projects. It also will inject an unmanageable level of uncertainty and unpredictability in planning and executing research projects, with the potential for the exercise of discretion to vary over changes in leadership and policy within the Department.

In addition, certain of the universities operating DOE's National Laboratories are public universities with particular concern that an end to PAA indemnity would have the effect of shifting the risks of a nuclear incident at a laboratory from the federal government to a state government. As a matter of consistency and sound policy, that is the wrong result. National Laboratories operate in the national interest and the risk of a nuclear incident arising from those operations is rightly carried by the federal government and not the government and citizens of the State in which the laboratory is operated. The PAA indemnity is correctly based on recognition that the indemnity supports DOE's national research mission at Government-Owned Contractor-Operated laboratories and the indemnity should remain as an indemnity by the federal government.

Question 3: Should the DOE Price-Anderson indemnification continue to provide omnibus coverage of all persons legally liable for nuclear damage, or should it be restricted to DOE contractors, subcontractors, and suppliers?

Yes, PAA indemnification should continue to cover "omnibus coverage" for all persons legally liable for nuclear damage.

National laboratories are complex business, research and scientific environments. There are numerous persons and organizations that contribute in a variety of different roles to the success of National Laboratory research. The contractors operating National Laboratories, including the members of the University Laboratory Group, have supply chains for the physical delivery of supplies and services or the construction of facilities that are akin to standard supply chains found throughout American industry.

In addition, however, the universities and nonprofits operating National Laboratories also have a complex portfolio of additional research and technical arrangements that contribute skilled resources to accomplishment of the laboratories' mission. These include: the operation of Government-Owned Contractor-Operated scientific user facilities that involve collaborations with both domestic and foreign research organizations, visiting scholars, PhD students and principal investigators; individuals and organizations participating in laboratory projects under approved CRADAs and other forms of technology arrangements; and many different entities participating in laboratory activities under the Department's Strategic Partnership Projects (SPP) programs. The 2020 DOE Annual Report on the National Laboratories states that the research facilities at the five National Laboratories included in the University Laboratory Group have over 30,000 users.¹⁰ All these different collaborators and participants in laboratory research are essential to the success of the National Laboratory mission, but do not fall into traditional categories of "subcontractors" or "suppliers". Elimination of the PAA indemnity for the broader ecosystem of researchers, facility users and other participants in National Laboratory work would severely discourage continued participation, just as it would discourage the universities and nonprofits from participating as National Laboratory prime contractors. This would compromise the Department's ability to meet its mission goals for advanced research.

As discussed in greater detail in Question 8, limitation of indemnification also will have negative implications for the fundamental policy goal of the PAA: proper protection for members of the public that might be affected by DOE's nuclear activities. Limiting the scope of indemnitees for which PAA protection is afforded will necessarily mean that those with claims will no longer have certainty as to their prompt and equitable compensation for any personal injury or property damages resulting from a nuclear incident in connection with a DOE activity.

Question 4: If the DOE indemnification were not available for all or specified DOE activities, are there acceptable alternatives? Possible alternatives might include Public Law 85–804, section 162 of the AEA, general contract indemnity, no indemnity, or private insurance. To the extent possible in discussing alternatives, compare each alternative to the DOE Price-Anderson indemnification, including operation, cost, coverage, risk, and protection of potential claimants.

Other forms of possible indemnity are not sufficient to provide the necessary, predictable and durable risk reduction afforded by PAA indemnity that is essential to enable long-term research planning and development at the National Laboratories. Public Law 85-804 indemnity is discretionary with the Secretary and is generally project or program specific, rather than the broad indemnification provided by the PAA. That discretion introduces variability on whether and under what circumstances the 85-804 indemnity will be approved. That uncertainty will disrupt and frustrate the National Laboratories in

¹⁰ The Department's 2020 Report on the National Laboratories is available at this link: <https://www.energy.gov/sites/default/files/2021/01/f82/DOE%20National%20Labs%20Report%20FINAL.pdf>

planning and executing research. In addition, Public Law 85-804 indemnity lacks the comprehensive and efficient claims management and resolution process that is a key part of PAA indemnity.

The other referenced forms of contractual relief (AEA Section 162) or contractual indemnity would be insufficient to cover the risks presently subject to PAA indemnity. It is the University Laboratory Group's understanding that Section 162, requiring Presidential action, has not been extensively used by the Department to indemnify contractors. As a result, there is little basis to support the conclusion that Section 162 relief would be a reasonable substitute for PAA indemnification. Contractual indemnity has to be consistent with Anti-Deficiency Act requirements which necessarily inject uncertainty that is not present in PAA indemnity. These factors and limitations make the alternative forms of indemnification inadequate and unsatisfactory substitutes to PAA indemnity.

Given the possibility for excessive risk exposure, the lack of PAA indemnity likely would cause universities and nonprofits to curtail or eliminate participation in DOE National Laboratory management and operating contracts. This point was recognized by the Department in its 1999 Report to Congress, outlining the potential adverse results if PAA indemnity were to be curtailed or eliminated. Those potential results remain the same today.¹¹

Question 5: To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE to perform its various missions? Explain your reasons for believing that performance of all or specific activities would or would not be affected.

The loss of PAA indemnity will adversely affect all contractors involved in DOE's mission, including universities, nonprofits and for-profit contractors. Many of DOE's National Laboratories involve operating companies that are comprised of universities, nonprofits and for-profit contractors. Also, DOE's nuclear waste cleanup projects are led by for-profit contractors. All of the contractors involved with these projects, regardless of their nonprofit or for-profit status, will either choose not to participate in the DOE mission or will severely curtail the scope of their participation to account for the greater risk from elimination of the PAA indemnity.¹²

With specific regard to the universities and nonprofits operating DOE's National Laboratories, the elimination of PAA indemnification could result in curtailment of all or a substantial portion of the laboratories' research. At the heart of many of the laboratories in DOE's complex, including those managed by the contractors in the University Laboratory Group, are one or more technical facilities such as storage ring and linear synchrotron light sources and other advanced particle accelerators. Those facilities, by their nature, produce radioactive materials as an integral part of each laboratory's research activities. If PAA indemnity is not available for use of these technical facilities, it could curtail or end research that is at the core of DOE's mission.

¹¹ 1999 DOE Report to Congress (March 1999)(1999 DOE Rept.) at 10 (recognizing that "[n]onprofit contractors in particular are not in a position to protect themselves against the financial implications of a nuclear incident. Without indemnification, several have stated that they would have to discontinue work for DOE").

¹² This has been a long-standing concern. See e.g., Richard C. Abington letter to Ed Patenaude, US Department of Energy, June 24, 1988, *included as an attachment to Reauthorization of the Price-Anderson Act : Hearings before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce, House of Representatives, One Hundred Seventh Congress, first session, September 6, 2001, page 26* (expressing view that General Electric would need to cease work at a nuclear-related DOE facility if PAA indemnity were not reauthorized).

There is an additional reason the University Laboratory Group believes elimination of PAA indemnity would not only be catastrophic to DOE's research activities that involve nuclear risk, but also a step toward bad policy. A core mission for the Department is advancement of scientific research through its National Laboratories which are Federally Funded Research and Development Centers (FFRDCs). FFRDCs have as their stated mission:

An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDC's enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. . . The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency. . . .

Long-term relationships between the Government and FFRDCs are encouraged in order to provide the continuity that will attract high-quality personnel to the FFRDC. This relationship should be of a type to encourage the FFRDC to maintain currency in the fields(s) of expertise, maintain its objectivity and independence, preserve its familiarity with the needs of its sponsor(s), and provide a quick response capability.¹³

PAA indemnity supports universities' and other nonprofits' participation in the Government-Owned Contractor-Operated FFRDC laboratory model. The indemnity does not force universities and associations to weigh research decisions with the substantial risk from a nuclear incident that may be in conflict with the FFRDC requirement for independence and objectivity (e.g., by opting to avoid research that presents higher risk of an unindemnified nuclear-related liability). The FFRDC policy, in tandem with the PAA indemnity, permits universities and nonprofits operating FFRDCs to pursue research in the national interest and with objectivity. Removal of the PAA indemnity will impair an FFRDC laboratory's ability to pursue research consistent with this important mandate.¹⁴

Question 6: To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the willingness of existing or potential contractors to perform activities for DOE? Explain your reasons for believing that willingness to undertake all or specific activities would or would not be affected.

As explained above, universities and other nonprofit organizations would be highly discouraged from continuing participation in DOE research that presents financial risk of a nuclear incident. DOE would lose the access to academic excellence and research depth and expertise that is essential to the Department's research mission. This denial or severe diminishment of research resources would extend beyond just the prime contract level at the National Laboratories to include all other participants in DOE research.

¹³ 48 C.F.R. 35.017(a)(2) & (a)(4).

¹⁴ FFRDC status is not an exclusive basis for justifying coverage by the PAA indemnity. For-profit companies and other entities that are not FFRDCs but are engaged in legacy nuclear waste cleanup work or other nuclear-related for DOE, similarly would be affected by a decision to end PAA indemnity.

Question 7: To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE contractors to obtain goods and services from subcontractors and suppliers? Explain your reasons for believing that the availability of goods and services for all or specific DOE activities would or would not be affected.

On the same basis that universities and nonprofits would be discouraged from participating as prime contractors at the National Laboratories, it is the case that for-profit companies, as well as other universities and nonprofits that participate in the research activities and supply chain for National Laboratories, will be discouraged from participating in the absence of PAA indemnity. The current Nuclear Hazards Indemnity Agreement clause that DOE uses to implement PAA indemnity requires the flowdown of the indemnity to subcontractors.¹⁵ The flowdown of the indemnification gives subcontractors the same ability as prime contractors to perform DOE's mission with the financial risk of a nuclear incident covered by indemnity. Without that coverage, subcontractors would have the same, strong disincentive to continue participation in DOE's nuclear-related activities.

Question 8: To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of claimants to receive compensation for nuclear damage resulting from a DOE activity? Explain your reasons for believing the ability of claimants to be compensated for nuclear damage resulting from all or specific DOE activities would or would not be affected.

The University Laboratory Group members concur with DOE's views expressed in the 1999 Report to Congress on this issue:

The DOE indemnification insures that [the amount of PAA indemnification] is available to compensate claims for personal injury and property damage resulting from a nuclear incident in connection with a DOE activity. DOE believes it is essential to provide members of the public with this level of assurance concerning compensation in the event of a nuclear incident in connection with a DOE activity. Moreover, the Price-Anderson Act contains numerous provisions to ensure the prompt availability and equitable distribution of compensation, including emergency assistance payments, consolidation and prioritization of claims in one federal court, channeling liability to one source of funds, and waiver of certain defenses in the event of a large accident. Equitable compensation should not be dependent on the financial resources of a particular contractor, subcontractor or supplier or on the uncertainties of protracted litigation.¹⁶

Elimination of the PAA indemnity and its associated claim and litigation management process would severely disadvantage claimants affected by a nuclear incident. In the absence of the PAA indemnity system claimants would be left to file tort litigation in a variety of potential courts to obtain recovery for their injuries, leading to substantial delay and the risk of disparate findings on entitlement and damages. Claimants also would lose the DOE Secretary's (or the Nuclear Regulatory Commission's, as appropriate) authority to grant emergency payments for the aid of claimants, including providing immediate assistance following a nuclear incident. Elimination of this authority for immediate assistance payments would have the effect of disproportionately injuring claimants of limited means or disadvantaged status. Such persons would be more likely to lack the resources and access to services necessary to respond effectively to injuries from a nuclear incident (e.g., healthcare, temporary housing, or access to qualified legal services).

¹⁵ 48 CFR 952.250-70(k)(Aug 2016).

¹⁶ 1999 DOE Rept. at 10-11 (footnotes omitted).

Question 9: What is the existing and the potential availability of private insurance to cover liability for nuclear damage resulting from DOE activities? What would be the cost and the coverage of such insurance? To what extent, if any, would the availability, cost, and coverage be dependent on the type of activity involved? To what extent, if any, would the availability, cost, and coverage be dependent on whether the activity was a new activity or an existing activity? If the DOE Price-Anderson indemnification were not available, how would that affect the availability of insurance? Should DOE require contractors to obtain private insurance if the DOE Price-Anderson indemnification were not available?

The Department's March 1999 Report to Congress on the PAA explained the lack of availability of insurance coverage for nuclear risks, and the exceptionally high cost for that limited coverage, even if available.¹⁷ The University Laboratory Group is not aware of any information to suggest that the landscape for obtaining private insurance has significantly changed from the time of the 1999 Report or that the reasons for the lack of private insurance options, as articulated by DOE in that report, are not still relevant. Universities are often self-insured (with public universities' coverage limits and scope specified in state statutes) and the unavailability of PAA could lead to a gap in coverage. In the view of the University Laboratory Group members the fundamental policy tradeoff still strongly supports continued availability of comprehensive PAA indemnity for DOE contractors. Moreover, the high costs of insurance, even if available, ultimately would be borne by the Department under the cost-reimbursement contracts universities and other nonprofits have for management and operation of DOE's National Laboratories. The Department would face those same high costs, again if insurance were even available, for the for-profit contractors operating National Laboratories or conducting the Department's legacy nuclear waste cleanup mission.

Questions 10 and 11:

The University Laboratory Group members are not submitting comments on these Questions.

Question 12: Should the DOE Price-Anderson indemnification continue to cover DOE contractors and other persons when a nuclear incident results from their gross negligence or willful misconduct? If not, what would be the effects, if any, on: (1) The operation of the Price-Anderson system with respect to the nuclear incident, (2) other persons indemnified, (3) potential claimants, and (4) the cost of the nuclear incident to DOE? To what extent is it possible to minimize any detrimental effects on persons other than the person whose gross negligence or willful misconduct resulted in a nuclear incident? For example, what would be the effect if the United States government were given the right to seek reimbursement for the amount of the indemnification paid from a DOE contractor or other person whose gross negligence or willful misconduct causes a nuclear incident?

The members of the University Laboratory Group believe that PAA indemnity should continue to cover nuclear incidents arising from gross negligence or willful misconduct. A paring back of the PAA indemnity to exclude such nuclear incidents would hollow out the protections both for universities and nonprofits (as well as other for-profit companies) when acting as contractors under DOE National Laboratory contracts, but also for the other entities both in the laboratories' supply chain and those acting as research partners on DOE research work.

Any determination of "gross negligence or willful misconduct" will necessarily involve the need to examine facts concerning the origin and causes of a nuclear incident, opening the door to litigants to

¹⁷ 1999 DOE Rept. at 14.

fashion every claim to allege a breach of the “gross negligence or willful misconduct” standard. This will frustrate core aims of PAA indemnity – to ensure public protection in the event of a nuclear incident and to protect contractors from claims subject to the indemnity.

The creation of a right for DOE to seek reimbursement for indemnified liabilities also would materially undercut the strength of the PAA indemnification, causing universities, nonprofits and for-profit companies to pull back from serving as DOE contractors for the National Laboratories in the same way as if DOE or the Congress were to decide not to extend PAA indemnification. It would similarly undermine participation by other companies and third parties in the research activities of the National Laboratories.

Finally, and perhaps most significantly on this point, DOE has instituted its nuclear safety civil penalty regime which acts as an enforcement mechanism on the nuclear safety-related conduct of the Department’s contractors. That regulatory regime today provides DOE with the tools it needs to police nuclear safety among its National Laboratory contractors, including the university and the association submitting these comments. Continuation of the PAA indemnity in tandem with the civil penalty regime is the soundest policy approach balancing the Department’s need for the indemnity to have contractors participate in its research and national security missions, while ensuring safety in operations.

Questions 13 through 23

The University Laboratory Group members are not submitting comments on these Questions.

Question 24: Should the PAA be modified to address any environmental justice or equity and inclusion issues that may be associated with the implementation of the PAA, or the administration of claims covered by the PAA? If so, describe the modification and explain the rationale.

The members of the University Laboratory Group do not believe there are statutory changes needed to the PAA to address environmental justice, equity or inclusion issues. The PAA’s basic policy structure of affording broad-based, inclusive coverage of claims arising from a nuclear incident provides a vehicle for ensuring that all communities affected by a nuclear incident receive compensation for personal injury or property damage they suffer in an equitable manner. At the same time, the University Laboratory Group contractors encourage the Department to ensure PAA implementation plans in the event of a covered nuclear incident are designed and executed with environmental justice, equity and inclusion considerations in mind. Among the possible steps for the Department to consider would be:

- In the event of a nuclear incident, having a hotline so that those with less resources are made aware of the statutory scheme and rights under that scheme, to include information regarding the Department’s authority to render immediate assistance following a nuclear incident without the necessity of litigation¹⁸;
- Ensuring information concerning rights with respect to the filing of legal claims under the PAA framework is translated into languages that those impacted speak (e.g., Spanish);
- Having FAQs and other information that is distributed to community groups, churches, schools, and other organizations where people in the community may frequent, so that

¹⁸ This would be in reference to the Department’s authority under 42 U.S.C. 2010(m) to coordinate with “indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability” and to “make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident.”

people will be more likely to understand their rights, access the legal system as needed to advance their claims, and have fair access to the available payment of claims through the PAA system.

- Consider setting up local/regional pro bono legal panels in the event of a nuclear incident, so that members of affected, disadvantaged communities may be able to obtain low cost or no cost legal representation to file court claims in resulting PAA litigation.

DOE has the authorities under the PAA necessary to render prompt, equitable and inclusive relief to claimants following a nuclear incident. Those statutory authorities should be maintained, and the Department should be prepared to administer the authorized relief in a way that meets clear goals for achieving environmental justice, equity and inclusion as an integral part of DOE's mission.

III. CONCLUSION

The universities and the association comprising the University Laboratory Group thank the Department for the opportunity to comment on such a critically important issue to the success of DOE's National Laboratory scientific research mission. The Department and nonprofit academic institutions have partnered¹⁹ at the National Laboratories since the 1940s to serve a vital national interest: advancing the state of the art in scientific research using the assets and resources of the Department and the Department's network of laboratories, while contributing every day to the success of the Department's economic security, national security, and scientific research missions. The members of the University Laboratory Group look forward to continuing our work with DOE on these important missions.

Respectfully submitted,

University of Chicago

The Regents of the University of California

The Leland Stanford Junior University

The Southeastern Universities Research Association

¹⁹ James R. Newman, *The Atomic Energy Industry: An Experiment in Hybridization*, 60 YALE L. J. 1263 at 1330 (1951).