APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3709

Nikki Steiner Mazzocchio and Angela Steiner Kraus

Appellees

v.

Cotter Corporation and Commonwealth Edison Company

Appellants

DJR Holdings, Inc., formerly known as Futura Coatings, Inc.

St. Louis Airport Authority, A Department of the City of St. Louis

Appellant

Bridgeton Landfill and American Nuclear Insurers

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:22-cv-00292-MTS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

December 18, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Maureen W. Gornik

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 23-3709

Nikki Steiner Mazzocchio; Angela Steiner Kraus

Plaintiffs - Appellees

v.

Cotter Corporation; Commonwealth Edison Company

Defendants - Appellants

DJR Holdings, Inc., formerly known as Futura Coatings, Inc.

Defendant

St. Louis Airport Authority, A Department of the City of St. Louis

Defendant - Appellant

Bridgeton Landfill; American Nuclear Insurers

Amici on Behalf of Appellant(s)

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 25, 2024
Filed: October 30, 2024

Before BENTON, ARNOLD, and KOBES, Circuit Judges.

ARNOLD, Circuit Judge:

Sisters Nikki Mazzocchio and Angela Kraus suspect that exposure to radioactive waste caused them to develop cancer. So they brought a federal "public liability action" under the Price-Anderson Act (PAA) against defendants that had handled the waste over the years, raising claims of negligence, negligence per se, strict liability, and civil conspiracy. The defendants moved to dismiss the complaint on the ground that federal law preempted the plaintiffs' state-law claims because federal nuclear dosage regulations provide the exclusive standard of care in a public liability action, and the plaintiffs didn't adequately plead that the defendants had violated those standards. The district court[1] disagreed and denied the motions to dismiss, and we granted the defendants permission to appeal. *See* 28 U.S.C. § 1292(b). We affirm.

At this stage of the proceedings, we accept the facts alleged in the complaint as true. *See Tholen v. Assist Am., Inc.*, 970 F.3d 979, 982 (8th Cir. 2020). Years ago a company named Mallinckrodt processed uranium in downtown St. Louis. It transported radioactive waste to a site that the defendant St. Louis Airport Authority now

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[1] The Honorable Matthew T. Schelp, United States District Judge for the Eastern District of Missouri.

owns near St. Louis Lambert International Airport and Coldwater Creek. From there radioactive waste was transported to another site next to Coldwater Creek about a mile downstream. When defendant Cotter Corporation assumed control of the waste stored at the downstream site, it dried and transported much of the waste by rail and mixed the rest into soil that was dumped in a landfill. Cotter, which was later bought by defendant Commonwealth Edison Company, certified that the downstream site was decontaminated. Surveys of the area later showed otherwise. The plaintiffs allege that radioactive waste under the defendants' control contaminated Coldwater Creek and the surrounding properties, "including the areas where Plaintiffs lived, gardened, and frequented (and where Plaintiff Mazzocchio worked)."

"Congress enacted the PAA in 1957 to encourage private commercial nuclear research and energy production after it became clear that, without government intervention, the liability risks from nuclear material would stunt private development." *In re Cotter Corp., (N.S.L.)*, 22 F.4th 788, 794 (8th Cir. 2022). The PAA did so by providing "a system of private insurance, Government indemnification, and limited liability for claims for federal nuclear licensees." *See id.* Congress amended the PAA in 1988 to give federal courts jurisdiction over what it called a "public liability action" that "aris[es] out of or result[s] from a nuclear incident." *See id.*; 42 U.S.C. § 2210(n)(2). In turn, a "nuclear incident" is defined broadly to mean "any occurrence . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special

nuclear, or byproduct material." *See* 42 U.S.C. § 2014(q). With this amendment, Congress essentially "expressed an unmistakable preference for a federal forum" by giving federal courts original and removal jurisdiction to hear these claims. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484–85 (1999).

The defendants here maintain that Congress prefers not only a federal forum but also application of federal standards of care, such as federal nuclear dosage regulations governing how much radiation could be released into the environment. *See, e.g.*, 10 C.F.R. § 20.105 (1960), § 20.106 (1964). They emphasize that we have said "that the states possess no authority to regulate radiation hazards." *See N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1149–50 (8th Cir. 1971). They note, moreover, that the Supreme Court has similarly recognized that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation," and so state regulations in the field of nuclear safety are preempted except where regulatory authority is "expressly ceded to the states." *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). And they point to a section of the Atomic Energy Act that permits the Nuclear Regulatory Commission (NRC) to enter into agreements with a state to permit the state to regulate "for the protection of the public health and safety from radiation hazards." *See* 42 U.S.C. § 2021(b). That statute goes on to say that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards," *see id.* § 2021(k), which the defendants read to mean that states cannot

regulate the hazards of radiation absent the requisite agreement, as here.

These authorities make clear that, absent an agreement between the NRC and a state, states cannot enact and enforce "before-the-fact nuclear safety" statutes or regulations. *See Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1098 (10th Cir. 2015) (Gorsuch, J.). But the question we face is whether the rules of state tort law, which might indirectly regulate in this field, are preempted as well. Both the Supreme Court and Congress have made clear that the answer is no.

Less than a year after it decided *Pac. Gas*, the Court had to decide whether federal law preempted a jury's award of punitive damages in state court to a plaintiff who was injured when plutonium escaped from a nuclear facility. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241 (1984). It explained that, though "the federal government has occupied the entire field of nuclear safety concerns," *see id.* at 249 (quoting *Pac. Gas*, 461 U.S. at 212), Congress in enacting the PAA assumed that "state tort law would apply" when someone was injured in a nuclear accident. *See id.* at 252, 256. The Court observed that "[n]o doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on it own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them." *See id.* at 256.

The defendants emphasize that the Court in *Silkwood* wrestled with whether a plaintiff was entitled to a particular remedy under state law and not with whether state standards of care apply. But the Court spoke about the role of state tort law in broad terms, stating that "[i]t may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." *See id.* So the Court was clear that state-law standards of negligence and strict liability would continue to play a role in compensating those injured in a nuclear accident, notwithstanding the federal government's occupation of the field of nuclear safety.

Congress enacted the PAA's 1988 amendments a few years after the Court decided *Silkwood*. And though Congress limited plaintiffs' ability to recover punitive damages after suffering an injury from a nuclear incident, *see* 42 U.S.C. § 2210(s), Congress did not repudiate the Court's understanding of the role that state tort law plays in a public liability action. In fact, Congress approved it. According to § 2014(ii), "A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." As one court put it, § 2014(ii) "merely affords a federal forum when a nuclear incident is 'assert[ed]' and provides a modest form of conflict preemption once the case is underway: normal state law principles continue to govern

unless they conflict with the rules found in § 2210." *See Cook*, 790 F.3d at 1095.

The defendants contend that state standards of care are inconsistent with the PAA and its "underlying policies, backdrop of federal preemption, and surrounding federal regulatory structure, which includes the federal dose standards." The defendants appear to be invoking "some brooding federal interest" rather than specific statutory provisions that conflict with state standards of care. *See Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion of Gorsuch, J.)). One specific provision they do cite is § 2021(k)—the Atomic Energy Act provision that they interpret to suggest that states cannot regulate (absent an agreement with the NRC) radiation hazards. But § 2014(ii) says that a public liability action is deemed to arise under § 2210, and state substantive rules of decision are derived from state law unless they are "inconsistent with the provisions of such section." By using the phrase "such section," Congress was quite clearly referring to § 2210, and the defendants identify nothing in that section that even mentions federal dosage regulations, much less an indication that they take precedence over state standards of care. The defendants essentially ask us to disregard the plain statutory text and instead consider whether state law conflicts with other provisions relating to the regulation of nuclear safety, but we aren't at liberty to rewrite § 2014(ii) as the defendants ask. And the Court in *Silkwood* has already explained how exclusive federal regulatory power and state tort law can operate together.

It's worth mentioning that the NRC itself has said that it doesn't view compliance with its regulations as a safe harbor from state tort liability. *See In the Matter of*

A.N. Tschaeche, 23 N.R.C. 461, 463–64 (1986). Though it recognized that it lacked authority to promulgate rules of evidence for state courts, it also noted the general principle that "compliance with government safety regulations is accepted as evidence of a person's having acted reasonably but is not considered conclusive proof of the absence of negligence." *See id.* at 463. So even the NRC doesn't maintain that federal dosage regulations preempt state standards of care.[2]

We recognize that other circuits have held that federal law preempts state standards of care in a public liability action. *See, e.g.*, *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1003 (9th Cir. 2008) (collecting cases). We respectfully disagree with those circuits on this question, as they have not provided a persuasive reason to disregard § 2014(ii)'s plain text or the *Silkwood* Court's discussion of the role that state tort law plays in a public liability action. As Justice Gorsuch noted in *Cook*, "Often Congress entrusts before-the-fact regulation to a federal agency while leaving at least some room for after-the-fact state law tort suits. It has done so in the field of motor vehicle safety. It has done so in the field of medical devices. And all the statutory evidence before us suggests it has done the same thing here." *See Cook*, 790 F.3d at 1098. So we instead take a path different

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[2] *See also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 270 (8th Cir. 1993) (affirming that evidence of compliance with federal safety standards was relevant to a negligence claim) (citing *Ward v. City Nat'l Bank & Trust Co.*, 379 S.W.2d 614, 619 (Mo.1964)); *see generally Riegel v. Medtronic, Inc.*, 552 U.S. 312, 345 (2008) (Ginsburg, J., dissenting) ("Most States do not treat regulatory compliance as dispositive, but regard it as one factor to be taken into account by the jury.").

from our sister circuits, one lit by the statutory text and Supreme Court guidance.

For the reasons we've given, we agree with the district court's denial of the defendants' motion to dismiss.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NIKKI STEINER MAZZOCCHIO, *et al.*, Plaintiffs, vs. COTTER CORPORATION, *et al.*, Defendants.	Case No. 4:22-cv-292-MTS

MEMORANDUM AND ORDER

Before the Court is Defendant Cotter Corporation (N.S.L.)'s Motion for Certification for Interlocutory Appeal, Doc. [100]. Defendant St. Louis Airport Authority also has filed a Motion to Join Cotter Corporation (N.S.L.)'s Motion for Certification for Interlocutory Appeal, Doc. [108]. For the reasons discussed herein, the Court will grant both motions.

Legal Standard

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order." *See* 28 U.S.C. § 1292(b).

Stated more concisely, the Court must opine that "(1) the order involves a controlling question of law; (2) there is substantial grounds for difference of opinion; and (3) certification will materially advance the ultimate termination of the litigation." *Pendleton v. QuikTrip Corp.*, 4:06-cv-1455-HEA, 2007 WL 1174850, at *1 (E.D. Mo. Apr. 20, 2007). "Inherent in these requirements is the concept of ripeness." *Paschall v. Kan. City Star Co.*, 605 F.2d 403, 406 (8th Cir. 1979) (referencing *Control Data Corp. v. IBM Corp.*, 421 F.2d 323 (8th Cir. 1970)).

The U.S. Court of Appeals for the Eighth Circuit has clarified that "it is the policy of the courts to discourage piecemeal appeals"; however, § 1292(b) may be utilized in "exceptional cases where a decision on appeal may avoid protracted and expensive litigation." *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994). The trial court has discretion to grant or deny a motion for interlocutory appeal, and the court of appeals has discretion to certify the appeal. *Pendleton*, 2007 WL 1174850, at *1; *see also Tidewater Oil Co. v. United States*, 409 U.S. 151, 167 (1972) ("Those interlocutory orders not within [§ 1292(a)], were made appealable in § 1292(b) subject to the judgment and discretion of the district court and the court of appeals.").

Discussion

1. Ripeness

Where the necessary requirements for interlocutory appeal certification are met, "the case must be of sufficient ripeness so that this can be determined from the record." *Paschall*, 605 F.2d at 406. "Consideration of the factual basis must be such that a sound premise exists upon which the legal issues can be determined with precision." *See Minnesota v. U.S. Steel Corp.*, 438 F.2d 1380, 1384 (8th

Cir. 1971). A district court must ensure that factual issues are sufficiently resolved before granting certification. *See J.T.H. v. Dept. of Soc. Servs.*, 1:20-cv-222-ACL, 2021 WL 3847134, at *1 (E.D. Mo. Aug. 27, 2021) (citing *S.B.L. v. Evans*, 80 F.3d 307, 311 (8th Cir. 1996)).

As detailed below, the question of which standard of care is applicable in a Price-Anderson Act public liability action is a question of law. Because the question has been presented to the Court, and the Court has found the standard to be determined on a case-by-case basis, the legal issue is ripe. Furthermore, given that the other requirements of § 1292(b) are met, the question is sufficiently ripe for review. *See Paschall*, 605 F.2d at 407 ("[T]he easier it is to ascertain whether or not the prerequisites for section 1292(b) certification are satisfied, the easier it is to identify whether or not the issue is one suited for section 1292(b) review.").

2. Controlling Question of Law

A "'question of law' as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *See Williams v. LG Chem, Ltd.*, 4:21-cv-00966-SRC, 2022 WL 1502380, at *2 (E.D. Mo. May 12, 2022) (citing *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000)). To be a *controlling* question of law, it must be apparent that reversal would terminate the action. *See Emerson Elec. Co. v. Yeo*, 4:12-cv-1578-JAR, 2013 WL 440578, at *2 (E.D. Mo. Feb. 5, 2013) ("All that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court."

(quoting *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 876 (E.D. Mich. 2012))).

The question presently at issue is "whether federal law or state law provides the standard of care in a [Price-Anderson Act] public liability action." *See Mazzocchio v. Cotter Corp.*, 4:22-cv-292-MTS, 2023 WL 5831960, at *7 (E.D. Mo. Sept. 8, 2023). This Court determined that "the applicable standard of care depends on the facts of each case and the claims asserted against each defendant." *Id.* at *11. Here, the question has reference to the meaning of a statutory provision—the standard of care in a Price-Anderson Act public liability action. Additionally, the question of law is controlling because resolution of the standard of care, and the potential imposition of Defendants' proposed standard, would lead to the dismissal of the action, as discussed below.

3. Substantial Grounds for Difference of Opinion

A "sufficient number of conflicting and contradictory opinions" demonstrates a substantial ground for difference of opinion. *White*, 43 F.3d at 378. Here, Defendants claimed the Price-Anderson Act preempts state law standards of care, which conflicts with the Eighth Circuit's plain language approach. *Mazzocchio*, 2023 WL 5831960, at *7 ("Nothing in the text of the PAA or Section 2210 immunizes Defendants from liability for all claims except those based on breach of federal dosage limits."). While Eighth Circuit precedent provides insight that this argument would "likely not be accepted," no concrete standard has been established within the Eighth Circuit, where cases are not directly dispositive of the precise issue before the Court. *Id.* at *1, *9; *McClurg v. MI Holdings, Inc.*, 933 F. Supp. 2d 1179, 1187 (E.D. Mo.

2013) ("The Eighth Circuit Court of Appeals has not yet considered this issue, but every Circuit Court that has, the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh, have concluded that the maximum permissible radiation dose levels set by federal safety standards establish the duty of care for radiation injuries, and that imposing a non-federal duty would conflict with federal law."); *McClurg v. Mallinckrodt, Inc.*, 4:12-cv-0036-AGF, 2017 WL 2929444, at *5 (E.D. Mo. July 7, 2017) (explaining "[a]s to which federal standards apply," the Eighth Circuit to date, "has not considered the issue").

It is true that courts within this district have agreed with Defendants' argument that federal dosage regulations are the sole standard of care. *See Mazzocchio*, 2023 WL 5831960, at *9; *see also, e.g.*, *McClurg*, 933 F. Supp. 2d at 1187 ("District court opinions overwhelmingly hold that an essential element of a public liability action is that each plaintiff's exposure exceeded the federal dose limits."). Conversely, some courts within this district have expressed doubts that federal dosage limits provide the exclusive standard of care in all PAA actions. *Mazzocchio*, 2023 WL 5831960, at *11; *see also Dailey v. Bridgeton Landfill, LLC*, 299 F. Supp. 3d 1090, 1100-01 (E.D. Mo. 2017) (hesitating to apply Part 20 dosage regulations to a non-NRC licensed facility given that the claim was for property damage and NRC-regulations "on their face" apply to a "licensee" and set the limit of exposure for "individual members of the public"). Others look outside the Eighth Circuit for instruction in absence of a clear direction. *See McClurg*, 2017 WL 2929444, at *5 ("As to which federal standards apply to Cotter's conduct between 1969 and 1973, the Eighth Circuit has not

considered the issue, and the Court is persuaded by the Third Circuit's reasoning.").

Since there is incongruence within the district, a substantial ground for difference of opinion exists. *See Roeslein & Assocs., Inc. v. Elgin*, 4:17-cv-1351-JMB, 2019 WL 6340956, at *6 (E.D. Mo. Nov. 27, 2019) ("The Court would give serious consideration to certifying an interlocutory appeal if there was a split among judges of the district courts or if it was arguable among reasonable jurists that this Court's determination was wrong.").

4. Materially Advance the Termination of the Litigation

The last requirement "necessitates a showing that the case at bar is an extraordinary case where 'the decision of an interlocutory appeal might avoid protracted and expensive litigation.'" *See E.E.O.C. v. Allstate Ins. Co.*, 4:04-cv-01359-ERW, 2007 WL 38675, at *5 (E.D. Mo. Jan. 4, 2007) (quoting *U.S. ex rel. Hollander v. Clay*, 420 F. Supp. 853, 859 (D.D.C. 1976)). Ultimately, "whether an immediate appeal may materially advance the ultimate termination of the litigation can properly turn on pragmatic considerations." *E.E.O.C.*, 2007 WL 38675, at *5 (quoting *SCM Corp. v. Xerox Corp.*, 474 F. Supp. 589, 594 (D. Conn. 1979) (Newman, J.)).

The standard of care is a driving force behind the resolution of the present action. Given the Order entered by the Court denied Defendants' Motion to Dismiss, an immediate appeal of the issue would allow for the potential termination of the matter, but termination aside, such an appeal would clarify the standard of care in conducting discovery and also would determine whether a party could adequately meet such standard of care. *See, e.g.*,

O'Conner v. Commw. Edison Co., 748 F. Supp. 672, 679 (C.D. Ill. 1990) ("This Court further finds that the question of whether or not the [federal permissible dose] regulation in this case should be adopted as the standard of care applicable to this case is an issue which should be certified under 28 U.S.C. § 1292(b).").

5. Stay

Given the question to be certified seeks to resolve the standard of care in the present action, a stay of proceedings in this Court is appropriate. 28 U.S.C. § 1292(b) ("[A]pplication for appeal [under § 1292(b)] shall not stay proceedings in the district court unless the district judge or the Court of Appeals" shall order.). Therefore, proceedings in this Court shall be stayed pending the Eighth Circuit's review of any application under § 1292(b) in this matter and pending the appeal if the Eighth Circuit so permits one.

According,

IT IS HEREBY ORDERED that Defendant St. Louis Airport Authority's Motion to Join Defendant Cotter Corporation (N.S.L.)'s Motion for Certification for Interlocutory Appeal, Doc. [108], is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Cotter Corporation (N.S.L.)'s Motion for Certification for Interlocutory Appeal, Doc. [100], is **GRANTED**. This Court's September 8, 2023 Order is amended to certify the following question for immediate appeal:

1. Whether federal dosage regulations should be exclusively utilized as the standard of care in a Price-Anderson Act public liability action.

Dated this 1st of November 2023.

Matthew T. Schelp
MATTHEW T. SCHELP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NIKKI STEINER MAZZOCCHIO, *et al.*, Plaintiffs, vs. COTTER CORPORATION, *et al.*, Defendants.	Case No. 4:22-cv-292-MTS

MEMORANDUM AND ORDER

Before the Court are Defendants'[1] Motions to Dismiss, Docs. [58], [60], [62], Plaintiffs' First Amended Complaint, Doc. [44], pursuant to Federal Rule of Civil Procedure 12(b)(6) and the Price-Anderson Act ("PAA"), 42 U.S.C. §§ 2210, *et seq*. Under the PAA, Plaintiffs bring a "public liability action" arising from a "nuclear incident" against four Defendants for damages allegedly arising from exposure to radioactive materials. *See* Doc. [44]. For the reasons that follow, the Court denies Defendants' Motions to Dismiss.

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[1] The motions to dismiss at issue in this Memorandum and Order are from Defendants Cotter Corporation, Commonwealth Edison Company ("ComEd"), and St. Louis Airport Authority. While Plaintiffs filed suit against a fourth Defendant, DJR Holdings, Inc., the Court previously denied that motion to dismiss. *See Mazzocchio v. Cotter Corp.*, 4:22-cv-292-MTS, 2023 WL 3995146 (E.D. Mo. June 14, 2023).

* * * * * * * *

Defendants argue the PAA preempts all state-law standards of care in public liability actions arising out of a "nuclear incident." Specific to this action, Defendants argue federal radiation dose levels set by the Nuclear Regulatory Commission ("NRC"), codified in Title 10 Part 20 of the Code of Federal Regulations ("Part 20"), exclusively establish the standard of care in the public liability actions asserted here. But the PAA's "unusual" preemption provision does not fit neatly here. *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 484 (1999). Given the facts of this case, the Court concludes the federal dosage regulations Defendants seek to import here do not provide the exclusive standard of care.

Defendants read into the PAA a blanket standard of care that is not based on any provisions in the PAA. In fact, requiring a *per se* rule that PAA actions must be based on a breach of federal regulations conflicts with the plain language of the PAA, Atomic Energy Act, and federal regulations and causes consequences seemingly contrary to Congressional intent. Moreover, while cases from the Court of Appeals for the Eighth Circuit are not directly dispositive of the precise question before this Court, the Eighth Circuit's most recent PAA decision undermines Defendants' preemption argument here. *See In re Cotter Corp., (N.S.L.)*, 22 F.4th 788 (8th Cir. 2022). Decisions by other circuit courts similarly cast doubt on whether federal dosage regulations supply the exclusive standard of care in all PAA actions. *See Est. of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 285, 278 n.3 (3d Cir. 2017); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000). The Court concludes that the standard of care to be used in a PAA action must be made on a case-

by-case basis and determined under ordinary preemption principles.

Applying this approach to the facts currently before the Court, Part 20 dosage regulations *could* provide the standard of care in some claims against one Defendant, Defendant Cotter Corporation ("Cotter")—the only Defendant licensed by the NRC[2]—but those dosage regulations may not be the exclusive standard of care given the facts of this case and the specific claims against Cotter. As to the other three Defendants, Part 20 dosage regulations do not apply; rather, state-law standards of care will apply unless Defendants are able to identify federal statutes, regulations, or other binding safety standards that controlled their alleged conduct with respect to the class properties during the relevant time and also show that those federal laws are in "conflict" with the state standards.

I. BACKGROUND

This case concerns claims by Plaintiffs Nikki Steiner Mazzocchio and Angela Steiner Krause under the PAA against four Defendants for damages allegedly arising from exposure to radioactive materials. Plaintiffs seek damages "related to the processing, transport, storage, handling, and disposal of hazardous, toxic, and radioactive materials . . . in and around St. Louis County, Missouri." Doc. [44] ¶ 7.

During World War II, Mallinckrodt LLC ("Mallinckrodt") contracted with the federal government to produce radioactive material for the Manhattan

[2] In 1974, the NRC succeeded the Atomic Energy Commission ("AEC"). Thus, the Court will refer to both commissions interchangeably as the NRC.

Project.[3] Mallinckrodt stored waste materials at a site near the St. Louis airport, known as the St. Louis Airport Site ("SLAPS"). In 1973, Defendant St. Louis Airport Authority ("Airport") purchased SLAPS and remains the current owner. Mallinckrodt eventually moved some waste to another site in Hazelwood, Missouri, known as "Latty Avenue."[4] Between 1969 and 1973, Defendant Cotter possessed and used nuclear waste at Latty Avenue, under a material source license issued by the federal government.[5] Cotter is the only named Defendant to have a license issued by the NRC. Neither SLAPS nor Latty Avenue are alleged to be nuclear plants, facilities regulated by the NRC, or NRC-licensed facilities. Plaintiffs filed suit against Defendants Cotter, Airport, and two other entities—but not Mallinckrodt—alleging nuclear waste materials from the various St. Louis sites leaked into Coldwater Creek and its 100-year floodplain in St. Louis County, damaging their health.

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[3] No Defendant in this action is subject to Mallinckrodt's PAA indemnification agreement. Doc. [44] ¶ 143.

[4] The radioactive wastes allegedly include (1) pitchblende raffinate, (2) Colorado raffinate, (3) barium sulfate (unleached), (4) barium cake (leached), and (5) miscellaneous residues stored in deteriorated drums. Doc. [44] ¶ 43.

[5] Plaintiffs allege Cotter never maintained financial protection pursuant to the PAA nor did it have an indemnification agreement pursuant to the PAA. Doc. [44] ¶ 46. Further, Cotter never conducted any activities related to Mallinckrodt's contract, or any other contract, with the Government. *Id.* ¶ 51. Plaintiffs also allege Cotter terminated its license under false pretenses by misrepresenting that Latty Avenue was decontaminated and "conspired" with Defendant ComEd "to perpetuate the fraud that there was no radioactive contamination remaining." *Id.* ¶¶ 14, 57–61.

Plaintiffs originally filed this action in Missouri state court alleging state law causes of action pursuant to Missouri law. Cotter removed to federal court, Doc. [1], based on a recent decision from the Eighth Circuit that determined that based on the statute's plain language "the PAA provides federal question jurisdiction over all 'nuclear incidents,' regardless of whether the defendant had an applicable license or indemnity agreement." *In re Cotter*, 22 F.4th at 793. In April 2022, the Court stayed this action pending the Supreme Court's decision on whether to grant a Petition for Writ of Certiorari and review the Eighth Circuit's decision. Doc. [27]. Following the Supreme Court's denial of the Writ Petition, 143 S. Ct. 422, and given the Eighth Circuit's decision, Plaintiffs filed the Amended Complaint ("Complaint"), which is the subject of these Motions to Dismiss, to affirmatively allege a "public liability action" arising from a "nuclear incident" under the PAA. *See* Doc. [44]. In the instant Motions, Defendants seek to dismiss the entire action against them for failure to state a claim under the PAA.[6]

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). For a pleading to state a claim for relief it must contain "a short and plain statement of the claim showing

[6] The Court notes Defendant ComEd makes an additional argument in its motion to dismiss: that Plaintiffs improperly seek to hold ComEd liable for Cotter's conduct solely because of ComEd's status as Cotter's parent company. Doc. [61] at 9–12; Doc. [80] at 2–7. The Court concludes Plaintiffs bring allegations against ComEd outside of its parent status, and therefore, the Court concludes, at this stage of the litigation, Plaintiffs stated claims against ComEd.

that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The complaint must contain facts sufficient to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" when the plaintiff pleads factual content that allows the court to draw the "reasonable inference" that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. When considering a Rule 12(b)(6) motion, the Court assumes all of a complaint's factual allegations to be true and makes all reasonable inferences in favor of the nonmoving party. *See Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989); *Martin v. Iowa*, 752 F.3d 725, 727 (8th Cir. 2014). However, the Court "need not accept as true a plaintiff's conclusory allegations or legal conclusions drawn from the facts." *Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019).

III. DISCUSSION

Before the Court begins its analysis, some procedural background is necessary, given the "unusual" framework of the PAA. *Neztsosie*, 526 U.S. at 484. In 1957, Congress, as part of the Atomic Energy Act ("AEA"), enacted the PAA "to encourage private commercial nuclear research and energy production," *In re Cotter*, 22 F.4th at 794 (citing *Neztsosie*, 526 U.S. at 476), and spread "potential liability among private insurance, the federal government, and licensees," *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 718 (6th Cir. 2021). In 1988, Congress amended the PAA ("1988 Amendments") in response to the Three Mile Island accident and the wave of litigation it prompted. *See* Pub. L. No. 100-408, 102 Stat. 1066 (1988);

Neztsosie, 526 U.S. at 477. Because that accident did not fit within the PAA's definition of an "extraordinary nuclear occurrence" ("ENO"), there was no mechanism to consolidate the cases in federal court. *Neztsosie*, 526 U.S. at 477 (citing S. Rep. 100-218, at 13 (1987)). Congress therefore amended the PAA to provide federal "district courts original and removal jurisdiction" over not just ENOs, but for "any public liability actions arising out of or resulting from a nuclear incident."[7] *Neztsosie*, 526 U.S. at 477 (citing 42 U.S.C. §§ 2210(n)(2), 2014(hh)). While the 1988 Amendments "expressed an unmistakable preference for a federal forum," *Neztsosie*, 526 U.S. at 484 (citing 42 U.S.C. § 2210(n)(2)), Congress required those actions to be based on "the law of the State in which the nuclear incident involved occurs," 42 U.S.C. § 2014(hh) & Pub. L. No. 100-408, 102 Stat. 1066 (1988) ("amended by adding . . . 'hh. . . . substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs.'"). Essentially, the "clear purpose of the 1988 Amendments" was "to broaden federal jurisdiction to encompass lawsuits arising from nuclear accidents that are not ENOs." *In re Cotter*, 22 F.4th at 795.

Here, Plaintiffs assert a public liability action arising from a "nuclear incident" under the PAA. A chain of definitions defines this term. A "public liability action" is "any suit asserting public liability." 42 U.S.C. § 2014(hh). Public liability" means "any legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w).

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[7] The PAA now provides the mechanics for consolidating such actions, 42 U.S.C. § 2210(n)(2), for managing them once consolidated, *id.* § 2210(n)(3), and for distributing limited compensatory funds, *id.* § 2210(*o*).

"Nuclear incident," in turn, means "any occurrence, including an extraordinary nuclear occurrence," ("ENO") causing "bodily injury" or property damage and arising out of "radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." *Id.* § 2014(q). Because the PAA did not define "occurrence," as used in the definition of "nuclear incident," *see* 42 U.S.C. § 2014(q), the Eighth Circuit applied the term's "ordinary meaning" and held that "occurrence" means "something that takes place" or "happens." *In re Cotter*, 22 F.4th at 794, 796; *see also Est. of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 281 (3d Cir. 2017) (adopting same interpretation); *Matthews*, 15 F.4th at 722–23 (same). The definition of "nuclear incident" is "facially quite broad." *In re Cotter*, 22 F.4th at 794 (quoting *Est. of Ware*, 871 F.3d at 280).

The structure of the PAA has been described as "complicated," "interlocking," and "us[ing] words in unintuitive ways." *Est. of Ware*, 871 F.3d at 280. So, it is no surprise the Supreme Court described the PAA as containing an "unusual preemption provision." *Neztsosie*, 526 U.S. at 484. Nowhere does the PAA expressly preempt state law. Rather, courts have interpreted two provisions in the PAA to affect preemption. *See* 42 U.S.C. § 2014(hh) & 42 U.S.C. § 2210(n)(2).[8] As explained below, the PAA preempts state law in two different respects.

First, the PAA preempts state law causes of action that fit the definition of a "public liability action."[9] *See* 42

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[8] But, the Court notes Section 2210(n)(2) does not preempt state law, and such characterization is "a seemingly misleading classification given the jurisdictional nature of the doctrine." *Matthews*, 15 F.4th at 720–21.

[9] The Eighth Circuit has not expressly held the PAA is the exclusive

U.S.C. §§ 2014(hh),[10] 2210(n)(2);[11] *cf. Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 974, 977 (8th Cir. 2018) ("Congress spoke clearly when stating such 'action shall be deemed to be an action arising under' federal law" and thus, "created a federal cause of action for public liability claims concerning nuclear incidents"). Essentially, the PAA "transforms into a federal action 'any public liability action arising out of or resulting from a nuclear incident.'" *Neztsosie*, 526 U.S. at 484 (citing 42 U.S.C. § 2210(n)(2)). In other words, "for claims arising from a nuclear incident, a plaintiff 'can sue under the Price-Anderson Act, as amended, or not at all.'" *Matthews*, 15 F.4th at 721; *accord In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007) ("The PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."). The parties agree on this point—meaning, that assuming Plaintiffs' action is one arising out

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means of bringing state-law claims for a "nuclear incident," such that the PAA preempts state law claims. But the parties agree on this point, and other circuit courts have held so too. *See, e.g.*, *Matthews*, 15 F.4th at 721; *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2007); *Pinares v. United Techs. Corp.*, 973 F.3d 1254, 1260 (11th Cir. 2020); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

[10] 42 U.S.C. § 2014(hh) ("A public liability action shall be deemed to be an action arising under section 2210 of this title.").

[11] 42 U.S.C. § 2210(n)(2) ("With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction. . . . [A]ny such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.").

of a "nuclear incident,"[12] as defined in 42 U.S.C. § 2014(q), the PAA preempts Plaintiffs' state law claims.

Second, the PAA preempts substantive state law, but *only* to the extent it is "inconsistent" with Section 2210. *See* 42 U.S.C. § 2014(hh) ("A public liability action shall be deemed to be an action arising *under section 2210 of this title*, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of *such section*." (emphasis added)). Notably, a public liability action is "one decided under substantive state-law rules." *Neztsosie*, 526 U.S. at 485 n.6; *accord Halbrook*, 888 F.3d at 974 (explaining a public liability action is a "federal cause of action" that "incorporates substantive state-law standards for liability").

Defendants mention a third type of preemption: complete preemption.[13] While the PAA may "resemble" complete preemption, *Neztsosie*, 526 U.S. at 484 n.6, the Supreme Court distinguished the PAA from those "complete preemption" statutes because federal law does not provide the "exclusive cause of action" in the PAA.

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[12] The parties here do not argue Plaintiffs failed to plead a "public liability action" arising out of a "nuclear incident," as defined by the PAA.

[13] "Complete preemption is [] quite rare." *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012). The Supreme Court has found complete preemption in just three statutory settings: the Labor Management Relations Act (LMRA), *see Avco Corp. v. Machinists*, 390 U.S. 557 (1968), the Employee Retirement Income Security Act (ERISA), *see Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), and the National Bank Act, *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003) (discussing complete preemption).

Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8 (2003). Quite to the contrary, the PAA preserves state rules of decision, *see* 42 U.S.C. § 2014(hh), unlike in true complete preemption statutes where federal law "wholly displaces the state-law cause of action."[14] *Anderson*, 539 U.S. at 8. This nuance is mirrored throughout circuit courts. *See Matthews*, 15 F.4th at 721 ("At first blush, the Price-Anderson Act would seem to fit the mold of complete preemption . . . . [but] [b]y incorporating state law into the federal action, the Act does not entirely displace state law, making the Act unlike other instances of complete preemption."); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1097 (10th Cir. 2015) (Gorsuch, J.) (explaining the PAA is not a "complete preemption" statute because "while the Act provides a federal forum it also does much to preserve state rules of decision"). Given this structure, the Supreme Court noted the PAA is "unusual" compared to true complete preemption statutes. *See Neztsosie*, 526 U.S. at 484 n.6 (citing 42 U.S.C. § 2014(hh)).

The Eighth Circuit's most recent PAA decision supplies additional precedent for analyzing issues within the PAA framework. In *In re Cotter* the Eighth Circuit considered whether the PAA applied to a plaintiffs' claims where the defendant was not part of an indemnity agreement related to its use of radioactive materials. The Eighth Circuit concluded the PAA applied and held there can be a "nuclear incident," as defined in 42 U.S.C. § 2014(q), "regardless of whether the defendant had an

[14] The Court notes that during the 1988 Amendments, when Congress amended the jurisdictional grant in 42 U.S.C. § 2210(n)(2) to apply to all "nuclear incidents," it also added the substantive state-law clause in Section § 2104(hh).

applicable license or indemnity agreement."[15] *In re Cotter*, 22 F.4th at 793.[16] In making this conclusion, the Eighth Circuit pointed to the PAA's definition of "nuclear incident," which is defined as "any occurrence," which includes an ENO, *see* 42 U.S.C. § 2014(q). Emphasizing the plain language of the statute, the Eighth Circuit noted this style of draftsmanship required distinct meanings for the two terms. Because *only* the definition of ENO discussed indemnity agreements, *see id.* § 2014(j), the Eighth Circuit concluded the "indemnity agreement element [] does not apply beyond the meaning of an ENO," and the "absence of [ENO] requirements from the express definition of 'nuclear incident' reflects an intent to not impose them there." *In re Cotter*, 22 F.4th at 795. Such an "interpretation incorrectly imports limiting concepts from" one section and seeks to apply them into other areas of the statute to which Congress did not intend.[17] *Id.*

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[15] The Eighth Circuit expressly rejected, *In re Cotter*, 22 F.4th at 796 n.2, the holdings in other courts that held there could not be a "nuclear incident" under the PAA where the defendant lacked a license for radioactive materials or an applicable indemnity agreement. *See Strong v. Republic Services, Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017); *Kitchin v. Bridgeton Landfill, LLC*, 389 F. Supp. 3d 600, 611 (E.D. Mo. 2019), *rev'd and remanded*, 3 F.4th 1089 (8th Cir. 2021); *Banks v. Cotter Corp.*, 4:18-cv-00624-JAR, 2019 WL 1426259 (E.D. Mo. Mar. 29, 2019).

[16] The Eighth Circuit analyzed this issue in regard to jurisdiction of the PAA, and not the merits of PAA claim. *In re Cotter*, 22 F.4th at 793 (holding "the PAA provides federal question jurisdiction over all 'nuclear incidents,' regardless of whether the defendant had an applicable license or indemnity agreement). The Court notes the jurisdictional grant relies on the same definitions at issue here and those that the Eighth Circuit discussed in *In Re Cotter*.

[17] The other two circuit courts to confront the question in *In Re Cotter* reached the same conclusion as the Eighth Circuit. *Acuna*, 200 F.3d

This holding is significant for three reasons. First, the Eighth Circuit mandates any action arising from a "nuclear incident," 42 U.S.C. § 2014(q), asserted against any defendant, regardless of licensee or indemnification status, is a claim under the PAA. Second, the Eighth Circuit broadly defined "nuclear incident" as "something that happens [or takes place] within the United States, causing bodily injury or property damage and arising out of nuclear material." *In re Cotter Corp*, 22 F.4th at 796. Third, the Eighth Circuit emphasized the distinction between "nuclear incidents" based on an ENO and a non-ENO (i.e.: arising from "any occurrence") noting "the PAA applies broadly to *any* event causing bodily or property damage from nuclear material, rather than a narrow category of nuclear catastrophes," as in the case of an ENO.[18] *Id.* at 795 (emphasis added).

To practically understand the Eighth Circuit's holding, there are three[19] potential types of public liability actions based on a "nuclear incident": (1) a non-ENO licensee/indemnification action, (2) a non-ENO non-licensee/indemnification action, and (3) an ENO licensee/indemnification action. Depending on the type of

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at 339; *Est. of Ware*, 871 F.3d at 283.

[18] The Eighth Circuit has emphasized this nuance—ENO versus non-ENO— and the different rules and consequences of alleging a public liability action for a "nuclear incident" arising from an ENO or arising from a non-ENO. *See In re Cotter*, 22 F.4th at 794; *Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 974–75 (8th Cir. 2018).

[19] The reason there is not a fourth type of action—an ENO non-licensee/indemnification action—is based on the definition of ENO, which limits ENOs to only those discharges that happen "offsite," and "offsite" means "away from 'the location' or 'the contract location' as defined in the applicable . . . indemnity agreement." *See* 42 U.S.C. § 2014(j).

action alleged, different rules may apply. *See In re Cotter*, 22 F.4th at 794; *Halbrook*, 888 F.3d at 974–75. As one example, "suits arising from an ENO are subject to a statute of limitations and . . . for a non-ENO 'nuclear incident,' . . . state substantive . . . limitations periods apply." *See In re Cotter*, 22 F.4th at 794. And in actions arising from an ENO, a strict liability claim may be the only cause of action, *see* 42 U.S.C. § 2210(n)(1) (mandating normally-available defenses be waived in the cases of an ENO), but there is "no limitation or waiver-of-defense provisions for 'regular,' non-ENO claims," *Halbrook*, 888 F.3d at 974.

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Against the backdrop of this complex statutory and legal framework, the Court turns to Defendants' argument. Defendants argue the PAA entirely preempts state law standards of care. Specifically, Defendants argue federal radiation dose levels set by the NRC, codified in Title 10 Part 20 of the Code of Federal Regulations ("Part 20"),[20] exclusively establish the standard of care in all public liability actions arising from a "nuclear incident." While this interpretation lacks authority from the Supreme Court, Eighth Circuit, and provisions of the PAA, Defendants make this argument because every circuit court to address this issue has concluded federal dosage regulations exclusively supply the standard of care in PAA public liability actions.[21] For

[20] Defendants argue the specific Part 20 regulation applicable to this case is 10 C.F.R. § 20.1301 ("Dose limits for individual members of the public.").

[21] The Court of Appeals for the Third Circuit was the first circuit court to hold that in a PAA public liability claim "federal law preempts state tort law on the standard of care." *In re TMI*, 67 F.3d 1103, 1107 (3d

reasons discussed below, Defendants' position conflicts with binding Eighth Circuit precedent and the plain language of the PAA, Atomic Energy Act, and federal regulations.

1. ***The text of the PAA does not support a standard of care based solely on federal dosage regulations.***

While the Eighth Circuit has not decided whether federal law or state law provides the standard of care in a PAA public liability action, it consistently analyzes issues arising under the PAA by emphasizing the plain language of the statute. *See In re Cotter*, 22 F.4th at 794–96; *see also Halbrook*, 888 F.3d at 977 n.3 (holding PAA claims are claims "under federal law" and while the Third and Seventh Circuit both reached the same conclusion, the Eighth Circuit found "it unnecessary to rely on th[o]se cases or repeat their analyses" because the Eighth Circuit, unlike those circuits, was "persuaded by the plain language of the Act" itself). Analyzing the PAA issues currently before it through the lens of the Eighth Circuit, the Court concludes Defendants' exclusive standard-of-care argument conflicts with the plain language of the PAA.

Cir. 1995) (citing *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 860 (3d Cir. 1991)). The Court of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuit followed suit. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994); *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998) (holding a PAA plaintiff must show "an amount of radiation in excess of the maximum permissible amount allowed by federal regulation"); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) (agreeing with *TM II* and *O'Conner*); *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1003 (9th Cir. 2008).

Defendants argue the PAA preempts state law standards of care because they are inherently "inconsistent" with federal dosage regulations. Defendants rely on Section 2014(hh) for support, but that provision lends no support for Defendants' argument. *See* 42 U.S.C. § 2014(hh) (stating "substantive rules" in a public liability action shall be derived from state law "unless such law is *inconsistent* with the provisions of such section" (emphasis added)). Defendants' interpretation ignores the plain language of Section 2014(hh), which preempts substantive state law *only when it is inconsistent with Section 2210*.[22] *See id.* Thus, Defendants' interpretation of Section 2014(hh)—that state law is preempted when inconsistent with federal regulations *generally*—is at odds with the plain language of the text.

Instead, Section 2014(hh) dictates the PAA preempts state law when inconsistent with Section 2210 *only*. Defendants point to no specific text of Section 2210 that is inconsistent with state law standards of care. Nor do

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[22] Several circuit courts agree with the Court's interpretation of Section 2014(hh). *See Matthews*, 15 F.4th at 719 (interpreting Section 2014(hh) to mean "the 'substantive rules for decision . . . derived' from state law, 'unless such law is inconsistent' with § 2210" (quoting 42 U.S.C. § 2014(hh))); *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1144 (10th Cir. 2010) (explaining Section 2014(hh) "merely provides that the PAA itself does not displace state law, unless there is a conflict with § 2210"); *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 206 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) ("I would instead hold that those remaining claims must be adjudicated in accordance with the substantive rules for decision derived from state law, because the defendants have failed to show that the rules for decision of those claims are inconsistent with § 2210.").

Defendants cite to a provision of Section 2210 that even alludes to a federal safety standard that could provide the standard of care in a PAA action. Rather, Section 2210 provides for indemnification and limitation of liability for federal licensees and contractors. *See generally* 42 U.S.C. § 2210 (titled "Indemnification and limitation of liability"). To the extent federal dosage regulations provide the sole standard of care in public liability actions, that requirement surely does not derive from the plain language of Section 2014(hh). Through a plain reading of the statute, the Court concludes applying state law standards of care is not "inconsistent" with Section 2210, as meant in 42 U.S.C. § 2014(hh), and thus, is not preempted by the PAA on that basis.

Moreover, interpretating the PAA to require all claims to be based only on a breach of federal dosage regulations will produce consequences in conflict with the plain language of Section 2014(hh). Exclusive use of federal dosage regulations virtually limits the types of claims that may be brought in a public liability action, essentially providing an ordinary preemption defense against all state-law tort claims. Had Congress intended to limit PAA claims to actions based exclusively on breaching federal dosage regulations, it could have done so, as Congress plainly and expressly did when it excluded certain types of claims. *See* 42 U.S.C. § 2014(w) (excluding three types of claims from public liability actions: workers' compensation claims, act of war claims, and certain types of property claims). Nothing in the text of the PAA or Section 2210 immunizes Defendants from liability for all claims except those based on a breach of federal dosage limits.

Quite to the contrary, with the 1988 Amendments, Congress chose to specifically preserve state tort law in PAA public liability actions, *see* 42 U.S.C. § 2014(hh); *see also* H.R.Rep. No. 100-104, pt. 1, at 20 (1987) ("the policy of only interfering with state tort law to the minimum extent necessary [is] a principle which has been embodied in the Price-Anderson Act for the last 30 years."), notably, at the same time it *expanded federal jurisdiction* over such actions, 42 U.S.C. § 2210(n)(2). "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–167 (1989)). Despite this plain language that Congress did *not* regard state tort law as an obstacle to achieving its purposes, Defendants seek to preempt all state-law on that exact basis.

Defendants' proposed preemption is also undermined by the text of the Atomic Energy Act ("AEA"). The AEA allows the federal government to enter into agreements with states allowing *the states* to regulate certain radioactive and nuclear materials. *See* 42 U.S.C. § 2021; *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1902 (2019) (Section 2021 "allow[s] the NRC to devolve certain of its regulatory powers to the States"). For example, the NRC may enter into agreements with states allowing them to regulate "source," "special nuclear," and "byproduct" materials in the NRC's stead. *See* 42 U.S.C. § 2021(b); *see also Va. Uranium*, 139 S. Ct. at 1902 ("under § 2021(b) the NRC may now, by agreement, pass to the States some of its preexisting authorities to regulate various nuclear

materials 'for the protection of the public health and safety from radiation hazards.'"); *Est. of Ware*, 871 F.3d at 283–84 (noting Section 2021 "gives the NRC authority to enter into agreements with states allowing them to issue licenses in the NRC's stead"). Notably, these are the exact nuclear materials encompassed in the PAA's definition of "nuclear incident." *See* 42 U.S.C. § 2014(q). States may also formulate their *own* "standards for protection against hazards of radiation" as long as "coordinated and compatible" with federal standards. *See* 42 U.S.C. §§ 2021(g), (k); *see, e.g.*, Mo. Code Regs. tit. 19, §§ 20-10 (2023) (state of Missouri "Protection Against Ionizing Radiation" regulations).[23] If the Court were to accept Defendants' proposed preemption here, even in a situation where the nuclear material was licensed and governed by state law, as in *Estate of Ware*, 871 F.3d at 283–84,[24] federal dosage limits would solely determine liability, effectively preempting any other applicable law and completely ignoring liability based on a breach of the governing law. This outcome is nonsensical, especially when Defendants' argument is not grounded in the plain language of the statute and is contrary to congressional direction that states may regulate in this area. *Cf. Acuna*, 200 F.3d at 339 ("There is nothing in the definition of

[23] Plaintiffs actually allege Defendants violated these exact Missouri regulations. *See* Doc. [44] ¶ 117.

[24] There, the nuclear license at issue "was issued by the Pennsylvania Department of Environmental Protection Bureau of Radiation Protection, which exercises delegated authority from the NRC per . . . 42 U.S.C. § 2021." *Est. of Ware*, 871 F.3d at 283–84. The Third Circuit concluded that if possession of a license is required for PAA applicability, the state license would satisfy that requirement and rejected the argument that the PAA only applied to a defendant with an NRC license. *Id.*

'nuclear incident' which suggests it should be contingent on whether the *occurrence took place in a state which regulates its own [nuclear material]* under NRC guidelines or whether the facility is covered under the separate indemnification portions of the [PAA]." (emphasis added)).

2. ***Defendants' one-size-fits-all standard-of-care argument is at odds with the Eighth Circuit's opinion in* In Re Cotter.**

Defendants' argument that federal dosage regulations exclusively supply the standard of care in all public liability actions is undermined by advocating for a blanket standard without considering (1) the licensee/indemnification status of the defendant or (2) the type of "nuclear incident" alleged. While Eighth Circuit cases are not directly dispositive of the precise question before the Court, they do indicate that the Eighth Circuit would likely not accept this argument at face value.

First, Part 20 dosage regulations as the exclusive standard of care is discordant with *In re Cotter* and fatal to Defendants' standard-of-care argument. Defendants argue the sole standard of care in the PAA claims here are the federal dose regulations promulgated by the NRC in Part 20. Yet, these regulations apply only to NRC-licensed entities or facilities. *See* 10 C.F.R. § 20.1001 ("The regulations in part [20] establish standards for protection against ionizing radiation resulting from activities conducted *under licenses issued by the Nuclear Regulatory Commission*." (emphasis added)); 10 C.F.R. § 20.1301 (regulating a "licensee," which is defined in Part 20's definitions, § 20.1003, as the "*holder* of a *license*" issued under NRC regulations (emphasis added)); *Morris*

v. U.S. Nuclear Regul. Comm'n, 598 F.3d 677, 687–88 (10th Cir. 2010) ("The clear language of [10 C.F.R. § 20.1301(a)(1)] supports the NRC's decision to focus only on the licensed operation," as the "NRC has now specifically linked the relevant measured dose to the 'licensed operation,'" such that "dose limit[s] apply only to the operation being licensed").[25] In other words, the federal dosage regulations Defendants seek to import as the exclusive standard of care here are regulations imposed *only* on NRC-licensees.

In *In Re Cotter*, the Eighth Circuit held public liability actions based on a "nuclear incident" encompass claims against licensees and non-licensees alike. *In re Cotter*, 22 F.4th at 793. Contrary to this precedent, Defendants argue regulations that impose a duty on NRC licensees *only* exclusively supply the standard of care in all public liability actions. Surely, the Court cannot hold that non-licensees owe a duty of care that is solely imposed on NRC licensees, as dictated by the plain language of the federal regulations. Nor is it persuasive that non-licensees, who are not subject to the regulations, would owe no duty of care and thus, escape liability completely. *See, e.g.*, *Lawson v. Gen. Elec. Co.*, 323 F. Supp. 3d 980, 990–91 (N.D. Ill. 2018).[26] Of course, completely shielding from

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[25] The Court also doubts whether the specific Part 20 regulation Defendants seeks to require here, 10 C.F.R. § 20.1301, is even applicable (even as to Defendant Cotter) given that the two sites at issue in this action are not alleged to be NRC-licensed facilities or nuclear plants governed by the NRC. *See, e.g.*, *Morris v. U.S. Nuclear Regul. Comm'n*, 598 F.3d 677, 687–88 (10th Cir. 2010).

[26] In *Lawson v. General Electric Co.*, 323 F. Supp. 3d 980, 990–91 (N.D. Ill. 2018), the Court dismissed all claims arising from a "nuclear incident" against a defendant on the basis that the defendant owed no duty of care to the plaintiff because the "sole duty of care" is based on

liability every non-NRC licensee that would otherwise be subject to liability resulting from a "nuclear incident" is in conflict with *In Re Cotter*, which concluded the PAA broadly applies to all claims for a "nuclear incident" and is not dependent on licensee status.

Second, Defendants' argument is also undermined by their failure to distinguish between "nuclear incidents" based on an ENO and a non-ENO, a distinction emphasized by the Eighth Circuit.[27] *See In re Cotter*, 22 F.4th at 794–96; *Halbrook*, 888 F.3d at 974–75. The Eighth Circuit broadly defined "nuclear incident" as "something that happens [or takes place] within the United States, causing bodily injury or property damage and arising out of nuclear material." *In re Cotter*, 22 F.4th at 796. Notably, an ENO and its progeny are absent from the Eighth Circuit's definition, as the PAA's text and structure dictates an ENO as merely a subset of a "nuclear incident." The "PAA applies broadly to any event causing bodily or property damage from nuclear material." *In re Cotter*, 22 F.4th at 795. There is nothing in the definition of "nuclear incident" that suggests it should be contingent on breaching Part 20 dosage regulations promulgated by the NRC.

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the federal dose limit regulations, which regulations only impose duty on licensees of nuclear power plants, and thus, because defendant was not a licensee, it was not subject to liability.

[27] As previously discussed in this Memorandum and Order and in Footnote 18, Congress explicitly provided different rules and consequences for "nuclear incidents" whether based on an ENO or non-ENO. Thus, contrary to Defendants' argument that the PAA mandates a unified federal standard of care to be applied in all public liability actions for a "nuclear incident," the applicable standard may vary depending on the type of "nuclear incident" involved.

Similar to the interpretation rejected by the Eighth Circuit in *In Re Cotter*, Defendants here seek to import requirements from one portion of the statute and impose them into others—specifically, NRC regulations into all non-ENO "nuclear incidents." Only the term ENO mentions radiation levels deemed problematic by the "Nuclear Regulatory Commission or the Secretary of Energy."[28] 42 U.S.C. § 2014(j). Similar to the Eighth Circuit's reasoning regarding indemnity agreements, the Court finds the regulatory requirements from those agencies do "not apply beyond the meaning of an ENO" and the "absence of those requirements from the express definition of 'nuclear incident' reflects an intent to not impose them there." *In re Cotter*, 22 F.4th at 795; *see also Matthews*, 15 F.4th at 726 ("the regulatory requirements for a specific type of nuclear incident—an [ENO]—do not necessarily apply to all nuclear incidents in general."). Importing ENO concepts into the term "nuclear incident" has been described as "faulty statutory interpretation" and "contrary to Congressional intent." *In re Cotter*, 22 F.4th at 795 (citing *Acuna*, 200 F.3d at 339 & *Est. of Ware*, 871 F.3d at 283). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that

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[28] Even then, the definition of ENO does not incorporate or mention the federal dose limits from Part 20 that Defendants seek to import here. Instead, an ENO is defined as radiation levels declared by the NRC or Secretary of Energy "to be substantial" and established by "criteria in writing setting forth the basis upon which such determination shall be made." 42 U.S.C. § 2014(j); *Halbrook*, 888 F.3d at 974 (explaining the NRC "is authorized to declare a nuclear incident an" ENO (quoting 42 U.S.C. § 2014(j))). The NRC has promulgated that "criteria" in Part 40 of the federal regulations. *See* 10 C.F.R. §§ 140.84 and 140.85.

Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). If Congress sought to impose NRC regulatory requirements for all "nuclear incidents," not just those arising from an ENO, it could have done so.

Notably, Congress has amended the PAA at least three times since 1988, as late as 2005, and it could have required the standard of care to be exclusively based on NRC regulations codified in Part 20 or on any of the Code of Federal Regulations promulgated by the NRC. But the Court is "hardly free to extend a federal statute to a sphere Congress was well aware of but chose to leave alone. . . . [I]t is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium*, 139 S. Ct. at 1900.

3. ***The standard of care applicable in a public liability action must be made on a case-by-case basis***.

While every circuit court to consider this issue has held federal law preempts state law standards of care, those cases specifically dealt with entities or facilities licensed by the federal government and did not address the applicability of the PAA beyond that setting. *See, e.g.*, *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1003 (9th Cir. 2008) ("Every federal circuit that has considered the appropriate standard of care under the PAA has concluded that *nuclear operators* are not liable unless they breach federally-imposed dose limits." (emphasis added)); *In re TMI*, 67 F.3d 1103, 1108 & 1114 (3d Cir. 1995) (explaining Part 20 dosage regulations "regulates exposures of radiation to persons on the property of a *nuclear facility*" and "intended to cover persons outside a

nuclear plant's boundaries" (emphasis added)); *Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998) (applying federal dosage regulations to PAA claims based on injuries from a nuclear plant); *O'Conner v. Commw. Edison Co.*, 13 F.3d 1090, 1093 (7th Cir. 1994) (same). Of course, in those types of actions, exclusive use of federal dosage regulations is strongest based on ordinary preemption principles.[29] But, this preemption does not come from the text of the PAA itself, as detailed in Section(III)(1) of this Memorandum and Order.

Unlike the progeny of federal dosage cases, neither of the two sites at issue in this case is alleged to be an NRC facility, and the majority of the Defendants in this action are not NRC-licensees nor subject to the Part 20 dosage regulations. Even the Third Circuit—the pioneer of the federal dosage standard of care—admittedly left open the question of "whether possession of a license . . . might affect the [PAA's] applicability to a particular case" and doubted whether Part 20 dosage limits exclusively supplied the standard of care given the facts there. *See Est. of Ware*, 871 F.3d at 285, 278 n.3. Like the Third Circuit, other courts similarly express doubt that federal dosage limits promulgated by the NRC provide the exclusive standard of care in all PAA actions based on the facts there. *See, e.g.*, *Dailey v. Bridgeton Landfill, LLC*, 299 F. Supp. 3d 1090, 1100–01 (E.D. Mo. 2017) (hesitating to apply Part 20 dosage regulations to a non-NRC licensed facility given that the claim was for property damage and NRC-regulations "on their face" apply to a "licensee" and

[29] While Defendants allude to field and conflict preemption in their brief, they never develop the issue.

set the limit of exposure for "individual members of the public"); *Acuna*, 200 F.3d at 339.

Rather than adopting a *per se* rule that federal regulations preempt state law standards of care in every public liability action, the Court finds the applicable standard of care depends on the facts of each case and the claims asserted against each defendant. Then, by applying ordinary preemption principles, the Court would determine the applicable standard(s) of care. In other words, if defendants can identify federal statutes, regulations, or other binding safety standards that controlled their alleged conduct with respect to the nuclear properties during the relevant time period, the court would determine whether those federal laws preempt state law, including state-tort law. When such inquiry is fact-intensive, as is the case here, application of a specific standard of care at the pleading stage is premature.

Considering the facts and claims asserted here, Part 20 dosage regulations *could* provide the standard of care against Defendant Cotter—the only defendant licensed by the NRC—but, not exclusively.[30] As to the other three

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[30] Besides the NRC facility issue discussed in Footnote 25, *see, e.g.*, *Morris*, 598 F.3d at 687–88, the Court is also not convinced the Part 20 dosage regulations would provide the exclusive standard of care against Defendant Cotter based on Plaintiffs' allegations. Certainly, there are other possible sources of federal law that might preempt state law, *see, e.g.*, 10 C.F.R. Part 40 ("Domestic Licensing of Source Material") & 10 C.F.R. § 40.42 ("decommissioning of sites and separate buildings or outdoor areas"), and there are other claims that may not be regulated by federal law at all, *see, e.g.*, *Bohrmann v. Me. Yankee Atomic Power Co.*, 926 F. Supp. 211, 221 (D. Me. 1996) ("There is no reason apparent to this Court to believe that Congress intended that a defendant be insulated from liability for its intentional

Defendants, Part 20 dosage regulations do not apply; rather, state law standards of care will apply unless Defendants identify controlling federal law related to their alleged conduct and the nuclear material at issue and also show that those federal laws preempt Plaintiffs' alleged standards of care.

Maybe some federal safety regulation other than the regulations dealing with numeric dose limits could form the basis of a public liability action. And maybe Part 20 regulations used as the exclusive standard of care makes sense in certain types of "nuclear incident" actions.[31] But Defendants' one-size-fits-all approach is unpersuasive, especially given the facts of the case here. Without some clearer congressional mandate or binding judicial authority suggesting a safe harbor for liability based on federal tolerance doses, the Court declines Defendants' invitation to dismiss Plaintiffs' action on that basis.

* * * * * * * *

The text of the PAA makes clear that a plaintiff pleads a public liability action arising from a "nuclear incident" when something takes place or happens, causing bodily injury or property damage, and arises out of "radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(hh), (w), (q); *In re Cotter*, 22 F.4th at 795. Because the parties do not dispute Plaintiffs sufficiently pled a "public liability action" arising out of a "nuclear incident," as defined by the PAA, and because Defendants have not shown Plaintiffs' claims are preempted or subject to Part

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acts or fraud solely by complying with the federal safety standards.").

[31] For example, in an action for radiation injuries against an NRC licensee operating an NRC licensed nuclear plant.

20 dosage regulations, the Court concludes Plaintiffs have stated a claim to relief that is plausible on its face.

Accordingly,

IT IS HEREBY ORDERED that Defendant Cotter Corporation's Motion to Dismiss, Doc. [58], is **DENIED**.

IT IS FURTHER ORDERED that Defendant Commonwealth Edison Company's Motion to Dismiss, Doc. [60], is **DENIED**.

IT IS FINALLY ORDERED that Defendant St. Louis Airport Authority's Motion to Dismiss, Doc. [62], is **DENIED**.

Dated this 8th day of September, 2023

Matthew T. Schelp
MATTHEW T. SCHELP
UNITED STATES DISTRICT JUDGE

APPENDIX E

42 U.S.C. § 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for prototype, or a weapon test device.

(e) The term "byproduct material" means—

(1) 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;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; or

(B) any material that—

(i) has been made radioactive by use of a particle accelerator, including by use of a fusion machine; and

(ii) if made radioactive by use of a particle accelerator that is not a fusion machine, is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that—

(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health

and safety or the common defense and security; and

(B) before, on, or after August 8, 2005, is extracted or converted after extraction for use in a commercial, medical, or research activity.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the Secretary of Energy, as

appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "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.

(*l*) The term "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.

(m) The term "indemnitor" means (1) any insurer with respect to his obligations under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for cooperation.

(*o*) The term "Energy Committees" means the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives.

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, 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 source, special nuclear, or byproduct material: *Provided, however*, That as the term is used in section 2210(*l*) of this title, it shall include any such occurrence outside the United States: *And provided further*, That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States: *And provided further*, That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this division, which is

used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

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

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any

contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "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 security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. Except with respect to the export of a uranium enrichment production facility, such term as used in subchapters IX and XV shall not include any equipment or device (or important component part especially designed for such equipment or device) capable of separating the isotopes of uranium or enriching uranium in the isotope 235.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i)

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; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "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.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one

or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, 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.

(bb) The term "United States" when used in a geographical sense includes all territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) Fusion machine

The term "fusion machine" means a machine that is capable of—

(1) transforming atomic nuclei, through fusion processes, into different elements, isotopes, or other particles; and

(2) directly capturing and using the resultant products, including particles, heat, or other electromagnetic radiation.

(ee) High-level radioactive waste; spent nuclear fuel

The terms "high-level radioactive waste" and "spent nuclear fuel" have the meanings given such terms in section 10101 of this title.

(ff) Legal costs

As used in section 2210 of this title, the term "legal costs" means the costs incurred by a plaintiff or a defendant in initiating, prosecuting, investigating, settling, or defending claims or suits for damage arising under such section.

(gg) Nuclear waste activities

The term "nuclear waste activities", as used in section 2210 of this title, means activities subject to an agreement of indemnification under subsection (d) of such section, that the Secretary of Energy is authorized to undertake, under this chapter or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste; including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265).

(hh) Precautionary evacuation

The term "precautionary evacuation" means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is—

(1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes an evacuation; and

(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(ii) Public liability action

The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(jj) Transuranic waste

The term "transuranic waste" means material contaminated with elements that have an atomic number greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to· protect the public health and safety.

APPENDIX F

42 U.S.C. § 2210. Indemnification and limitation of liability

(a) Requirement of financial protection for licensees

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c). The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

(b) Amount and type of financial protection for licensees

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the

following: (A) the cost and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: *Provided,* That for facilities designed· for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided,* That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan

shall not be more than $95,800,000 (subject to adjustment for inflation under subsection (t)), but not more than $15,000,000 in any 1 year (subject to adjustment for inflation under subsection (t)), for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further,* That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (*o*)(1)(D), payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2)(A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1)—

(i) for any facility, if more than one nuclear incident occurs in any one calendar year; or

(ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would result in undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the

difference between the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4)(A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the

limitation on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds—

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such obligations shall bear

interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(5)(A) For purposes of this section only, the Commission shall consider a combination of facilities described in subparagraph (B) to be a single facility having a rated capacity of 100,000 electrical kilowatts or more.

(B) A combination of facilities referred to in subparagraph (A) is two or more facilities located at a single site, each of which has a rated capacity of 100,000 electrical kilowatts or more but not more than 300,000 electrical kilowatts, with a combined rated capacity of not more than 1,300,000 electrical kilowatts.

(c) Indemnification of licensees by Nuclear Regulatory Commission

The Commission shall, with respect to licenses issued between August 30, 1954, and December 31, 2025, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to· any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

(d) Indemnification of contractors by Department of Energy

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until December 31, 2025, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject

to financial protection requirements under subsection (b) or agreements of indemnification under subsection (c) or (k).

(B)(i)(I) Beginning 60 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85–804 [50 U.S.C. 1431 et seq.] entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b).

(2) In an agreement of indemnification entered into under paragraph (1), the Secretary—

(A) may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be

appropriate to cover public liability arising out of or in connection with the contractual activity; and

(B) shall indemnify the persons indemnified against such liability above the amount of the financial protection required, in the amount of $10,000,000,000 (subject to adjustment for inflation under subsection (t)), in the aggregate, for all persons indemnified in connection with the contract and for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person under this section shall be deemed to be amended, on August 8, 2005, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $500,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Limitation on aggregate public liability

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (*o*)(1)(D), shall not exceed—

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) (plus any surcharge assessed under subsection (*o*)(1)(E));

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d), the amount of indemnity and financial protection that may be required under paragraph (2) of subsection (d); and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section—

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection (i) and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b), to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) is applicable, such aggregate public liability shall not exceed the amount of $500,000,000, together with the amount of financial protection required of the contractor.

(f) Collection of fees by Nuclear Regulatory Commission

The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided,* That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above a level of $60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of services of private insurers

In administering the provisions of this section, the Commission or the Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 6101 of title 41

upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreements of indemnification

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) Compensation plans

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1), the Secretary or the Commisison,[1] as appropriate, shall—

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[1] So in original. Probably should be "Commission."

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (*o*), that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) the President shall submit to the Congress—

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount of aggregate public liability under subsection (e)(1);

(B) recommendations for additional sources of funds to pay claims exceeding the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1), which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a recommendation or recommendations as to the

relief to be provided, including any recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3)(A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection (e)(2) unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to the Senate, the Senate passes a resolution described in paragraph 6 of this subsection.

(5) For the purpose of paragraph (4) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6)(A) This paragraph is enacted—

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph (B) and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the term "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the approves the compensation plan numbered submitted to the Congress on _____, 19___.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D)(i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from

further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E)(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An

amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F)(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

(j) Contracts in advance of appropriations

In administering the provisions of this section, the Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31.

(k) Exemption from financial protection requirement for nonprofit educational institutions

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a). With respect to licenses issued between August 30, 1954, and December 31, 2025, for which the Commission grants such exemption:

(1) the Commission shall 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. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee 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.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

(*l*) Presidential commission on catastrophic nuclear accidents

(1) Not later than 90 days after August 20, 1988, the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with

the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1).

(2)(A) The study commission shall consist of not less than 7 and not more than 11 members, who—

(i) shall be appointed by the President; and

(ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1), and shall submit to the Congress a final report setting forth—

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4)(A) The chairperson of the study commission may appoint and fix the compensation of a staff of such persons as may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Administrator of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and services, including staff, as may be

necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of title 5.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on August 20, 1988.

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

(m) Coordinated procedures for prompt settlement of claims and emergency assistance

The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other

indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses and judicial procedures

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

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

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a),

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a), or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. 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. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers 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. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. 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 (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e).

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having

venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28 or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

> (i) a court, acting pursuant to subsection (*o*), determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) (or an equivalent amount in the case of a contractor indemnified under subsection (d)); or
>
> (ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another

district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel—

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(*o*) Plan for distribution of funds

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1):

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time and shall include establishment of priorities between claimants and

classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission or the Secretary as appropriate, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b).

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b), any licensee required to pay a standard deferred premium under subsection (b)(1) shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has—

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court—

(i) that such costs are reasonable and equitable; and

(ii) that such person has—

(I) litigated in good faith;

(II) avoided unnecessary duplication of effort with that of other parties similarly situated;

(III) not made frivolous claims or defenses; and

(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

(p) Reports to Congress

The Commission and the Secretary shall submit to the Congress by December 31, 2021, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(q) Limitation on awarding of precautionary evacuation costs

No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

(r) Limitation on liability of lessors

No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason of an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

(s) Limitation on punitive damages

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(t) Inflation adjustment

(1) The Commission shall adjust the amount of the maximum total and annual standard deferred premium under subsection (b)(1) not less than once during each 5-year period following August 20, 2003, in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) August 20, 2003, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) The Secretary shall adjust the amount of indemnification provided under an agreement of indemnification under subsection (d) not less than once during each 5-year period following July 1, 2003, in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) that date, in the case of the first adjustment under this paragraph; or

(B) the previous adjustment under this paragraph.

(3) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.