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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR) NO. CV-91-3015-WFN
RESERVATION LITIGATION)
) ORDER RE: PLAINTIFFS'
) MOTION FOR SUMMARY
) JUDGMENT--ABNORMALLY
) DANGEROUS ACTIVITY
)

This Order relates to: All Cases

At the tenth status conference on October 28, 2004, the Court reserved ruling on Plaintiffs' Motion for Summary Judgment--Abnormally Dangerous Activity, filed September 9, 2004 (Ct. Rec. 1564). Argument was presented by Peter Nordberg for the Plaintiffs and William (Randy) Squires for the Defendants.¹

The Court has reviewed the file, all materials submitted on the Motion, considered the oral arguments of counsel, and is fully informed. For the reasons stated below, the Motion is granted.

I. DISCUSSION

The Plaintiffs' Motion requires the Court to determine whether the chemical separation that occurred in the Hanford plutonium production

¹See Tenth Status Conference Order: October 28, 2004, filed 11/01/04 (Ct. Rec. 1602) for listing of additional counsel present at the hearing.

1 process is an abnormally dangerous activity. The chemical separation
2 created radioactive I-131 that was released into the air by Defendants
3 DuPont and General Electric² and allegedly caused thyroid disease in the
4 Plaintiffs. If the activity is abnormally dangerous then the Defendants
5 may be held strictly liable for Plaintiffs' damages, regardless of
6 whether Defendants exercised the utmost care in the conduct of their
7 activities at Hanford.

8 Plaintiffs have moved for partial summary judgment on this issue of
9 liability pursuant to Rule 56[©]) of the Federal Rules of Civil Procedure.
10 A party is entitled to summary judgment where the documentary evidence
11 produced by the parties permits only one conclusion. *Anderson v. Liberty*
12 *Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary
13 judgment must show that no genuine issue of material fact exists and that
14 he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*,
15 477 U.S. 317, 323 (1986). "A material issue of fact is one that affects
16 the outcome of the litigation and requires a trial to resolve the
17 parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*, 677
18 F.2d 1301, 1306 (9th Cir. 1982). Here however, the parties are in
19 agreement that the question of whether Defendants' were engaged in an
20 abnormally dangerous activity is a question of law for the court. *Langan*
21 *v. Valicopters, Inc.*, 88 Wash. 2d 855, 861 (1977). They also agree that
22 the facts upon which the Court must make its legal determination are not
23 facts that a jury must decide. Restatement (Second) of Torts

24
25 ²Defendants DuPont and General Electric will be referred to
26 collectively as Defendants in this Order.

1 [Restatement] § 520 (1977) Comment 1 (the issue "is no part of the
2 province of the jury to decide"). Thus, since the material facts are
3 generally not disputed, and disagreement is over the inferences to be
4 drawn from the facts, the Court is permitted to draw the inferences and
5 reach a legal conclusion. If factual disputes exist, the Court is
6 permitted to weigh the facts. The Court will construe all facts in favor
7 of the Defendants as the non-moving party and all justifiable inferences
8 will also be drawn in their favor. *Anderson*, 477 U.S. at 255.

9 The Defendants argue that summary judgment should not be granted
10 because the record is not complete. The Court disagrees. Both parties
11 had sufficient opportunity to present a complete factual record on this
12 dispositive motion. Further, both parties submitted significant
13 documentary evidence in support of their statement of facts. There is
14 enough evidence in the record for the Court to determine the issue.

15 **Abnormally Dangerous Activity.** In this Price-Anderson Act [P-AA]
16 action, the substantive rules for decision are derived from state law
17 unless that law is inconsistent with the provisions of § 2210 of the P-
18 AA. 42 U.S.C. § 2014(hh). "In Washington, [the] court has adopted the
19 Restatement (Second) of Torts [Restatement] §§ 519, 520" (1977) which
20 deal with the imposition of strict liability for abnormally dangerous or
21 ultra-hazardous activities. *Langan*, 88 Wash. 2d at 860. Section 519
22 of the Restatement provides:

23 (1) One who carries on an abnormally dangerous activity is sub-
24 ject to liability for harm to the person, land, or chattels of
25 another resulting from the activity, although he has exercised
the utmost care to prevent the harm.

26 (2) This strict liability is limited to the kind of harm the
possibility of which makes the activity abnormally dangerous.

1 Restatement, § 519, p. 34. Section 520 of the Restatement lists the
2 factors to be considered in determining whether an activity is abnormally
3 dangerous:

4 (a) existence of high degree of risk of some harm to the
5 person, land, or chattels of others;

6 (b) likelihood that the harm that results from it will be
7 great;

8 (c) inability to eliminate the risk by the exercise of
9 reasonable care;

10 (d) extent to which the activity is not a matter of common
11 usage;

12 (e) inappropriateness of the activity to the place where it is
13 carried on; and

14 (f) extent to which its value to the community is outweighed
15 by its dangerous attributes.

16 Restatement, § 520, p. 36.

17 In determining whether an activity is abnormally dangerous, the
18 Court is to consider all of the factors, but all do not have to weigh
19 equally in favor of characterizing an activity as abnormally dangerous
20 in order for the Court to determine that the activity is subject to
21 strict liability. *Langan*, 88 Wash. 2d at 861. However, one factor alone
22 is not necessarily sufficient for a finding that the activity is
23 abnormally dangerous. *Id.* "The essential question is whether the risk
24 created is so unusual, either because of its magnitude or because of the
25 circumstances surrounding it, as to justify the imposition of strict
26 liability for the harm which results from it, even though it is carried
on with all reasonable care." *Id.* at 862, quoting Restatement § 520,
comment f. After a review of all the factors which will be discussed
infra, this Court concludes that this essential question must be answered

1 in the affirmative. Even though the Defendants may have exercised all
2 reasonable care in the chemical separation activity, which was necessary
3 to the production of plutonium for the World War II atomic weapons, the
4 risk of harm to the downwind population was so unusual that under
5 Washington law strict liability should be imposed for harm that resulted
6 from the activity.

7 In Washington, an assessment of the § 520 factors has resulted in
8 the imposition of strict liability for fire work displays, *Klein v.*
9 *Pyrodyne Corp.*, 117 Wash. 2d 1 (1991); pile driving where injury occurred
10 to the property on an adjacent lot, *Vern J. Oja & Assoc. v. Washington*
11 *Park Towers, Inc.*, 89 Wash. 2d 72 (1972); for aerial spraying of crops,
12 *Langan*, 88 Wash. 2d 855; and for a common carriers' transportation of
13 large quantities of gasoline, *Siegler v. Kuhlman*, 81 Wash. 2d 448 (1972).
14 Under the same analysis of factors of § 520, Washington courts have held
15 that the following activities are not abnormally dangerous including the
16 transmission of electricity, *Dorsch v. City of Tacoma*, 92 Wash. App. 131
17 (1998); the selling of handguns, *Knott v. Liberty Jewelry & Loan, Inc.*,
18 50 Wash. App. 267 (1988); ground damage caused by the crash landing of
19 aircraft, *Crosby v. Cox Aircraft Co. of Washington* , 109 Wash. 2d 581
20 (1987); and the transmission of natural gas, *New Meadows Holding Co. by*
21 *Raugust v. Washington Water Power co.*, 34 Wash. App. 25 (1983).

22 In several cases the courts have found activities to not be
23 abnormally dangerous based upon the fact that the harm caused by the
24 activity was not the harm which made the activity abnormally dangerous.
25 Restatement § 519(2). For instance, blasting operations might be held
26 to be abnormally dangerous if harm was caused from flying debris but when

1 minor vibrations and noise frightened a mother mink and caused her to
2 kill her kittens, strict liability was not imposed. *Foster v. Preston*
3 *Mill Co.*, 44 Wash. 2d 440 (1954). This was because the minor vibrations
4 and noise were not the kind of harm that made the activity ultra-
5 hazardous. Similarly, while explosives and the handling of the same are
6 often considered abnormally dangerous, the courts have held that
7 detonation of explosives that were stolen and transported 300 miles away
8 before being detonated would not result in strict liability for the
9 corporation from whom the explosives were stolen. *Washington State Univ.*
10 *v. Indus. Rock Products, Inc.*, 37 Wash. App. 586 (1984). Again, the harm
11 that resulted was not the kind of harm that made the use and storage of
12 the explosives abnormally dangerous. Here, the asserted harm of thyroid
13 disease is one of the harms the possibility of which would make
14 Defendants' chemical separation process abnormally dangerous.

15 The Court will address each of the factors of § 520.

16 **(a) High Degree of Risk of Some Harm.** The comment to § 520 related
17 to factors (a) and (b) provides the following regarding the application
18 of these factors:

19 An activity that is abnormally dangerous ordinarily involves
20 a high degree of risk of serious harm to the person, land or
21 chattels of another. The harm threatened must be major in
22 degree, and sufficiently serious in its possible consequences
23 to justify holding the defendant strictly responsible for
24 subjecting others to an unusual risk. It is not enough that
25 there is a recognizable risk of some relatively slight harm,
even though that risk might be sufficient to make the actor's
conduct negligent if the utility of his conduct did not
outweigh it, or if he did not exercise reasonable care in
conducting it. If the potential harm is sufficiently great,
however, as in the case of a nuclear explosion, the likelihood
that it will take place may be comparatively slight and yet the
activity be regarded as abnormally dangerous.

26 Restatement § 520, comment g, p. 38.

1 The focus of inquiry for the Court regarding whether there was an
2 abnormally dangerous activity relates to the activity carried on by the
3 Defendants. Restatement § 520, comment 1, pp. 42-43. The question of
4 whether the activity created a high degree of risk that had serious
5 potential consequences is separate from the question of causation--did
6 the activity actually cause the bellwether Plaintiffs' illness? Thus,
7 even though Defendants assert that the doses were too low to cause
8 illness, that would not mean that there was no risk.

9 The Plaintiffs assert that the release of large quantities of
10 radioactive substances carried a great risk of harm to human health.
11 They argue that the Defendants knew of the releases' risk to health and
12 that even later technology did not prevent emissions of the radioactive
13 substances. The Defendants argue that they would have to have had know-
14 ledge based on scientific studies that I-131 caused thyroid cancer and
15 hypo-thyroidism in order to be held strictly liable. Plaintiffs
16 correctly note that the Restatement and Washington cases fail to set
17 forth this highly specific requirement. Even in the negligence context,
18 foreseeability is found if the harm falls within a general field of
19 danger which should be anticipated. *Hetzel v. Parks*, 93 Wash. App. 929,
20 938 (1999).

21 The facts presented by the parties related to this factor are as
22 follows:

23 1) Hanford Created I-131 and Released it Into the Air. It is
24 undisputed that the plutonium production process included chemical
25 separation which created radioactive I-131 that was released into the
26 air. Most releases of I-131 occurred between December, 1944 and

1 December, 1947. The Hanford Environmental Dose Reconstruction Project
2 [HEDR] estimated that 740,000 curies of I-131 were released between 1944
3 and 1992. Πs' SOF 12-13; Δs' SOF 43.³

4 2) The Scientific Community Knew of I-131 and Thyroid Connection and
5 Cancer Risk of Radiation. The state of scientific knowledge was: in
6 1941 that I-131 would concentrate in the thyroid, Πs' R-SOF 2; in the
7 early 1940s that radiation could cause cancer, Πs' R-SOF 3 (1942), Πs'
8 R-SOF 6 (1941); and in 1942 that hypothyroidism could follow radiation
9 treatment of the thyroid, Πs' R-SOF 6.

10 3) Defendants Generally Knew of Physiological Risks. Both DuPont
11 (in 1943) and General Electric (in 1946) were reluctant to become
12 involved in plutonium production. Δs' SOF 3, 5. Both companies
13 recognized significant potential liability due to physiological hazards
14 resulting from the endeavors and sought to be released from liability.
15 Πs' SOF 17, 23.⁴

16
17
18 ³The parties' Statement of Material Facts are referenced as follows:
19 Plaintiffs' Statement of Facts in Support of their Motion: Πs' SOF #;
20 Defendants' Statement of Facts in Response to Plaintiffs' Motion: Δs'
21 SOF #; Plaintiffs' Statement of Facts on Reply: Πs' R-SOF #.

22 ⁴Defendants point out that the contracts were for \$1.00 implying
23 that it would not be fair to impose strict liability on a contractor who
24 acted out of a sense of patriotic duty. The Restatement § 520 comment d
25 advises however that strict liability applies even when there is not
26 financial benefit to the actor.

1 4) Defendants Knew of the I-131 and Thyroid Connection .

2 Specifically, Met Lab scientists working with Hanford noted in March of
3 1943 that releases of I-131 could cause damage by the concentration of
4 the iodine in the thyroid. Πs' SOF 18, 19; see also Πs' SOF 20, 22. In
5 November 1943, Met Lab recognized that this could result in the possible
6 destruction of the thyroid. Πs' SOF 21. In 1943, Met Lab had a fear
7 that the iodine would be released and noted that they could protect the
8 thyroid gland from the I-131 by administering potassium iodine pills.
9 Πs' R-SOF 9-11. In March, 1944, Met Lab planned medical research
10 projects to look for cancer and other long-term effects of radiation.
11 Πs' R-SOF 4.

12 5) Defendants Attempted to Control I-131 Emissions with Variable
13 Success. In addressing the risks, scientists established a safety level
14 of one rad per day of I-131 exposure. Δs' SOF 12-14. They attempted to
15 keep well below the tolerance levels but admitted scattered readings of
16 2 to 2½ times the tolerance levels. Δs' SOF 15; Defendants' Exh. 7, p.
17 1. Met Lab recommended to the contractors a cooling time of 54 to 62
18 days to allow the iodine to decay before chemical separation. Πs' R-SOF
19 13. At the T plant, however, the average cooling time in December, 1944
20 was 32.7 days. At the same plant in 1945, the cooling time for six
21 months was less than 40 and for nine months was less than 50 days.
22 Similarly, at the B plant in 1945, in six of the nine months of operation
23 the cooling time was less than 40 days and in all nine months was less
24 than 50 days. Πs' R-SOF 15.

25 6) Defendants Said There Was No Risk with the Emissions but
26 Acknowledged the Need for More Information. In 1945, Hanford scientists

1 stated that there was no inhalation risk from I-131 and the ingestion of
2 I-131 deposited on plants did not pose a risk to humans. Δs' SOF 18, 19,
3 24. This same conclusion was drawn in 1948 and 1950 though a danger to
4 grazing animals was acknowledged. Δs' SOF 21, 22. But more knowledge
5 was admittedly needed to determine what amount of contamination was safe.
6 Defendants' Exh. 25, p. 115. Hanford conducted studies of workers'
7 thyroids in 1945 and found no readings above 1/100th of the thyroid
8 tolerance dose. Δs' SOF 23.

9 7) The scientific community was aware and the Defendants likely knew
10 of the milk route risk. As to the milk route, it was known as early
11 as 1925 that iodine in the diet of milk cows was transferred to
12 their milk. Πs' SOF 27. In 1955, the Director of Radiological
13 Science Department at Hanford said that since the first year of
14 Hanford operations, it was known that the permissible levels of
15 radioactive iodine in the atmosphere was too high because ingestion
16 and not inhalation was the problem including "drinking of milk from cows
17 on contaminated pastures," and that for children, the intake of milk
18 should likely be less than two quarts per day. Πs' R-SOF 20; Plaintiffs'
19 Reply Exh. P.

20 Based upon these facts, the Court concludes that Defendants were
21 engaged in an unusual activity that caused significant early releases
22 of I-131 which in turn created a risk of some harm in the form of
23 illnesses to exposed humans. Whether the risk was very high (as
24 Plaintiffs state) or not very high (as Defendants urge) is immaterial as
25 the potential harm was very serious as will be discussed *infra* so a lower
26 risk is sufficient. Restatement, § 520, comment g, p. 38.

1 **(b) Likelihood That the Harm That Results from it Will Be Great .**

2 The question presented by this factor is whether the harm resulting from
3 emissions of large quantities of I-131 would be serious or major harm,
4 that is harm with serious consequences. See Restatement § 520 Comment
5 g, p. 38. Plaintiffs assert that the harm in the form of illness is
6 great relying upon *In Re: Hanford Nuclear Reservation Litigation*, 292
7 F.3d 1124, 1137 (9th Cir. 2002) ("Radiation is capable of causing a broad
8 range of illnesses, even at the lowest doses.") and R.C.W. 70.99.010
9 (finding that radioactive wastes are dangerous to the health and welfare
10 of people). The Defendants argue that Plaintiffs aren't specific enough
11 as to the health conditions at issue in this case and have provided no
12 evidence that I-131 causes the conditions. As discussed previously
13 however, the thyroid conditions Plaintiffs allege are within the general
14 type of harm posed by releases of I-131 and evidence on causation is not
15 relevant to the question presented by Plaintiffs' Motion.

16 The facts presented by the parties related to this factor are as
17 follows:

18 1) Bellwether Plaintiffs Received Some Dose of I-131. This fact is
19 undisputed. Πs' SOF 29.

20 2) The Hanford Thyroid Disease Study [HTDS] Shows the Same Risk of
21 Thyroid Disease Regardless of Dose and There Doesn't Appear to Be an
22 Increased Risk of Thyroid Disease from Exposure to I-131. Δs' SOF 31.

23 As discussed under factor a, the harm potentially associated with I-131
24 is thyroid disease which has been described as serious and includes
25 cancer. An Environmental Protection Agency publication presented by the
26 Defendants also states "[l]ong term (chronic) exposure to radioactive

1 iodine can cause nodules, or cancer of the thyroid. Δs' Exh. 34, p. 4.
2 Although the HTDS found no increase in disease (which relates to the
3 likelihood Plaintiffs' diseases were caused by Hanford emissions), that
4 doesn't negate the proposition that the potential harms were serious for
5 purposes of an abnormally dangerous activity evaluation under factor b.
6 The Court concludes that the I-131 emissions could result in potentially
7 serious illnesses with serious consequences.

8 **(c) Inability to Eliminate the Risk by the Exercise of Reasonable**
9 **Care.** The Restatement comments advise that

10 Most ordinary activities can be made entirely safe by the
11 taking of all reasonable precautions; and when safety cannot
12 be attained by the exercise of due care there is reason to
13 regard the danger as an abnormal one.

14 There is probably no activity, unless it is perhaps the use
15 of atomic energy, from which all risks of harm could not
16 be eliminated by the taking of all conceivable precautions,
17 and the exercise of the utmost care, particularly as to the
18 place where it is carried on. Thus almost any other
19 activity, no matter how dangerous, in the center of the
20 Antarctic continent, might be expected to involve no
21 possible risk to anyone except those who engage in it. It is
22 not necessary, for the factor stated in Clause ©) to
23 apply, that the risk be one that no conceivable precautions or
24 care could eliminate. What is referred to here is the
25 unavoidable risk remaining in the activity, even though the
26 actor has taken all reasonable precautions in advance and has
exercised all reasonable care in his operation, so that he is
not negligent.

20 Restatement § 520 comment h, pp. 38-39. In sum, an operation that
21 exercises due care to control risks and can do so is an ordinary activity
22 while the operation that cannot control all risks is an abnormal
23 activity.

24 Plaintiffs argue that the Defendants have impliedly admitted that
25 they could not control the risk of I-131 releases because Defendants
26 assert they were not negligent and contend that they set cooling

1 temperatures at the safest practical level to reduce emissions yet the
2 emissions occurred. The Defendants respond that since I-131 has a half
3 life of eight days, longer cooling times could have reduced the risk of
4 I-131 emissions, thus the risk was avoidable. It was only because
5 shorter cooling times were used so that the plutonium could be produced
6 faster for military uses that I-131 was emitted.

7 The facts presented on this factor establish that:

8 1) Defendants Acted Prudently. Project engineers acted prudently
9 and reasonably and alternative technologies suggested by the Plaintiffs
10 were not reasonably available or inappropriate for reducing emissions.
11 Πs' SOF 35.

12 2) Longer Cooling Time would Reduce I-131 Emissions. Longer cooling
13 times could reduce the volume of I-131 emitted. Πs' SOF 36.

14 3) Military Demand for Plutonium Required Shorter Cooling Times.
15 Given the need for plutonium for atomic weapons the cooling times were
16 often shorter than desirable to reduce I-131 emissions. Δs' SOF 34; Πs'
17 R-SOF 14-15.

18 While longer cooling times could have theoretically reduced
19 emissions of I-131, that outcome was impossible to achieve given the
20 pressure to produce the plutonium for the war effort. Under the actual
21 circumstances in which this I-131 was created, the risk of emissions was
22 unavoidable. The Court concludes that this factor weighs in favor of a
23 finding of an abnormally dangerous activity.

24 **(d) Extent to Which the Activity Is Not a Matter of Common Usage.**

25 The Restatement comment provides the following guidance in assessing this
26 factor:

1 An activity is a matter of common usage if it is customarily
2 carried on by the great mass of mankind or by many people
3 in the community. . . . Certain activities, notwithstanding
4 the recognizable danger, are so generally carried on as to
be regarded as customary. Thus automobiles have come into
such general use that their operation is a matter of common
usage. . . .

5 Although blasting is recognized as a proper means of excava-
6 tion for building purposes or of clearing woodland for
7 cultivation, it is not carried on by any large percentage of
the population, and therefore it is not a matter of common
usage.

8 Restatement § 520 comment I, pp. 39-40.

9 Plaintiffs argue that the production process certainly was not a
10 common usage during the time period at issue in this case. In response,
11 the Defendants argue that while the production of plutonium for use in
12 atomic weapons was not a common activity, the chemical separation and air
13 dilution and venting through a tall stack were common endeavors based on
14 the science of the time. As to I-131, the Defendants argue also that
15 existing knowledge was used to make the emissions safe.

16 The undisputed facts are as follows:

17 1) Plutonium Production was a Totally New Endeavor. Plutonium
18 production operations were an entirely new endeavor. Πs' SOF 40.

19 2) Chemical Separation Used in Other Settings. Chemical separation
20 techniques had been used in other industrial settings. Δs' SOF 35.

21 3) X-Ray Radiation Used in Medical Diagnosis and Treatment. X-ray
22 radiation had been used in the 1960s to treat thyroid disease and
23 specifically I-131 continues to be used in nuclear medicine. Δs' SOF 36.

24 Although radiation had seen medical usage and chemical separation
25 had been used before, it is still undisputed that the weapons grade
26 plutonium production which included chemical separation that released

1 I-131 was an activity in which few people were engaged. As such it was
2 not one of common usage and this factor weighs in favor of a finding of
3 an abnormally dangerous activity.

4 **(e) Inappropriateness of the Activity to the Place Where it Is**
5 **Carried On.** The Restatement provides the following guidance on this
6 factor:

7 Another factor to be taken into account in determining whether
8 an activity is abnormally dangerous is the place where it is
9 carried on. If the place is one inappropriate to the
particular activity, and other factors are present, the danger
created may be regarded as an abnormal one.

10 Even a magazine of high explosives, capable of destroying
11 everything within a distance of half a mile, does not
12 necessarily create an abnormal danger if it is located in the
midst of a desert area, far from human habitation and all
property of any considerable value.

13 Restatement § 520 comment j, p. 41.

14 The question presented on this issue is whether the location of
15 Hanford was inappropriate for the activity to be conducted. Plaintiffs
16 do not dispute that the location for Hanford may have been as safe as any
17 in the continental United States. They argue, however, that if an
18 activity will pose great health risk wherever it is conducted, this
19 factor should weigh in favor of a finding of an abnormally dangerous
20 activity. The Defendants assert that the Plaintiffs have no evidence
21 that the activity posed a grave health risk or would be dangerous
22 wherever sited.

23 The undisputed fact specifically identified as to this factor is
24 that: Hanford Was Sited at the Only Good Location that Could Be Found.
25 Πs' SOF 42; Δs' SOF 37.

1 The fact that Hanford may have been the only good location for
2 the activity is not dispositive of the question of whether the site was
3 appropriate for the activity of chemical separation that would
4 undisputedly release I-131 into the air. In the Washington case of
5 *Langan v. Valicopters*, an organic farming enterprise was harmed by aerial
6 spraying on adjacent land. 88 Wash. at 858-59. Obviously the spraying
7 had to be done where it was, i.e., from a practical standpoint it was the
8 only place to do it to benefit the adjacent landowner. But "[g]iven
9 the nature of organic farming, the use of pesticides adjacent to such an
10 area must be considered an activity conducted in an inappropriate place."
11 *Id.* at 864.

12 Similarly here, practically speaking Hanford was likely the best
13 site. But given the potential risk of I-131 exposure resulting in
14 possible disease to those downwind of the facility, the placement of the
15 chemical separation process at Hanford must be considered an activity
16 conducted in an inappropriate place for the purposes of an abnormally
17 dangerous activity evaluation. It would be anomalous for the Court to
18 hold otherwise and have this factor weigh against finding an abnormally
19 dangerous activity given the undisputed fact that downwinders did receive
20 doses of I-131 from the Hanford facility.

21 **(f) Extent to Which its Value to the Community Is Outweighed by its**
22 **Dangerous Attributes.** The Restatement § 520 provides guidance on the
23 evaluation of this factor as follows:

24 Even though the activity involves a serious risk of harm that
25 cannot be eliminated with reasonable care and it is not a
26 matter of common usage, its value to the community may be such
that the danger will not be regarded as an abnormal one. This
is true particularly where the community is largely devoted to

1 the dangerous enterprise and its prosperity largely depends
upon it.

2 Restatement, § 520, comment k, p.42.

3 The Restatement also notes that

4 The utility of [the actor's] conduct may be such that he is
socially justified in proceeding with his activity, but the
5 unavoidable risk of harm that is inherent in it requires that
it be carried on at his peril, rather than at the expense of
6 the innocent person who suffers harm as a result of it.

7 *Id.* at comment h, p. 39.

8 This factor requires the Court to do a risk benefit analysis, but
9 as comment h indicates, policy considerations about who should bear the
10 risk also are relevant.

11 The Plaintiffs do not dispute Hanford's contribution to the
12 United States' victory in World War II. They point out, however, that
13 the entire nation benefitted while only the people surrounding
14 Hanford bore the health risks, that were not knowingly or voluntarily
15 accepted by this community. Plaintiffs argue that "if injury to some
16 was the necessary price for a benefit to the many, the just course is
17 to be glad of the benefit while compensating the injured." Plaintiffs'
18 Memo. filed 9/08/04 (Ct. Rec. 1564) at p. 11. Defendants agree that
19 plutonium production was a socially justified activity. They argue
20 that the risks were not great as the separation process "was conducted
21 in a manner that ensured that any risks associated with the emission of
22 I-131 were negligible." Defendants' Response filed 9/29/04 (Ct. Rec.
23 1576) at p. 17.

24 The fact related to this factor is: The Hanford Operation Played a
25 Critical Role in Bringing World War II to a Successful End in August,
26 1945. Δs' SOF 39.

1 The chemical separation process for plutonium production which
2 resulted in the release into the air of I-131 presented a risk of serious
3 illness to people living in the downwind areas. The risk could not be
4 eliminated with reasonable care given the high war demand for the
5 plutonium and the activity is not a matter of common usage. That said,
6 Hanford's value to the national community was high. If only the downwind
7 area had benefitted from the Defendants' activity, this factor might
8 weigh against a finding of an abnormally dangerous activity. In this
9 case, however, the benefit accrued to the entire nation but the risk and
10 the potential harm was endured only by the people downwind of Hanford.
11 Policy considerations support that this factor be weighed in favor of
12 finding the Defendants' activities to be abnormally dangerous. The
13 innocent people who can prove they suffered harm should be compensated
14 by the entire nation who benefitted from the activity. This is
15 consistent with the Congressional intent underlying the P-AA.

16 In sum, the Court concludes that the six factors of Restatement
17 § 520 weigh in favor of a finding that the Defendants were engaged in an
18 abnormally dangerous activity which allows the imposition of strict
19 liability under Washington law. The Court's inquiry does not end at this
20 point however, as Defendants have raised two arguments why strict
21 liability may not be imposed on them.

22 Public Duty. Defendants, assert that they may not be held strictly
23 liable because they acted pursuant to a public duty. Defendants cite,
24 *inter alia*, Restatement (Second) of Torts § 521 and *Lamb v. Martin*
25 *Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993). Plaintiffs
26 counter that Washington has never adopted § 521 and even if it had, the

1 Defendants would not fit within the plain terms of the section because
2 they are not public officers or employees or common carriers.

3 Restatement § 521 provides:

4 The rules as to strict liability for abnormally dangerous
5 activities do not apply if the activity is carried on in
6 pursuance of a public duty imposed upon the actor as a public
7 officer or employee or as a common carrier.

8 Restatement § 521, p. 46.

9 A justifiable inference may be drawn that Defendants were fulfilling
10 a "public duty." It is not disputed that the plutonium production by
11 Defendants was at the direct request of the government and was important,
12 if not critical, to the nation's defense. Still, the fact that
13 Defendants were engaged in a public duty does not necessarily mean that
14 the public duty exception to strict liability would be applicable here.

15 On a Price-Anderson Act [P-AA] claim "the substantive rules for
16 decision . . . shall be derived from the law of the State in which the
17 nuclear incident involved occurs" 42 U.S.C. § 2014(hh). In this
18 case, the substantive law of Washington is applied. Some states, such
19 as Kentucky, have adopted § 521 of the Restatement and found public
20 officers and common carriers to not be subject to strict liability. See,
21 e.g., *Kentucky Utilities Co. v. Auto Crane Co.*, 674 S.W. 2d 15, 18 (Ky.
22 Ct. App. 1983) (the transmission of electricity is a public necessity and
23 not subject to strict liability as abnormally dangerous activity citing
24 § 521). Other states, such as Washington, have not adopted § 521.⁵ In
25 dealing with a common carrier of gasoline who caused a fatal accident

26 ⁵Defendants do not cite, nor could the Court find, any Washington
case that applied Restatement (Second) of Torts § 521.

1 from a spill, the Washington court held the common carrier strictly
2 liable under § 520 of the Restatement. *Siegler v. Kuhlman*, 81 Wash. 2d
3 448 (1972). A California federal district court cited *Siegler* in holding
4 a railroad strictly liable for an explosion caused by bombs being carried
5 under contract with the Navy. *Chavez v. So. Pacific Transp. Co.*, 413 F.
6 Supp. 1203, 1214 (E.D. Cal. 1976). The court explained that common
7 carriers engaged in abnormally dangerous activities were held strictly
8 liable for harm caused from the activity based upon the rationale that
9 the carrier could distribute that loss to the public. *Id.* at 1214. "The
10 harsh impact of inevitable disasters is softened by spreading the cost
11 among a greater population and over a longer time period. A more
12 efficient allocation of resources results." *Id.* The Washington court's
13 failure to apply § 521 in the *Siegler* case, and the spreading of the loss
14 rationale support Plaintiffs' argument that Washington has not adopted
15 § 521 of the Restatement so it is not applicable to Defendants' on this
16 Motion.

17 In addition, Plaintiffs argue persuasively that even if Washington
18 had adopted § 521 of the Restatement, the section would not be applicable
19 to the Defendants because they are not public officers or employees or
20 a common carrier. Even though the Defendants may have been operating
21 under contract with the government, that would not preclude them from
22 being held strictly liable. See *Lobozzo v. Adam Eidemiller, Inc.*, 263
23 A.2d 432 (Pa. 1997) (highway construction contractor was strictly liable
24 for damage to adjacent property caused by blasting even though the
25 governmental entity's plans and specifications required the blasting).
26 Defendants' citation to *Lamb* provides little strength to their argument

1 that Defendants may not be held strictly liable under § 521. Defendants
2 cite the case for an alternate holding and that holding was based on
3 Kentucky law, a state which had adopted § 521 and the public duty
4 exception to strict liability, not Washington law. *Lamb*, 835 F. Supp.
5 at 971. The court made this alternate determination without addressing
6 whether the contractor was a public officer or employee or common
7 carrier. *Id.*

8 In the *Lobozzo* case, the court explained the rationale for excepting
9 public officers or employees from strict liability. Such a person has
10 a duty to conduct activities assigned by his or her government employer
11 even if the activity was abnormally dangerous. The government may be
12 immune to suit if the activity causes harm to the public but the public
13 servant may not share the immunity. The court reasoned that the public
14 servant should not be held liable when he is not in a position like that
15 of an independent contractor who could balance the risks and contract
16 with the government accordingly. *Lobozzo*, 263 A.2d at 434. Here, the
17 Defendants were independent contractors who were undisputedly aware
18 of the risks of the activity and did contract accordingly. Πs' SOF
19 17, 23; Δs' SOF 3, 5. The Court concludes that the public duty exception
20 to strict liability (Restatement § 521) is not applicable to the
21 Defendants.

22 **Preemption of State Standard** Defendants also argue that the
23 Washington strict liability standard is preempted by federal regulations.
24 Defendants assert that all federal circuits that have addressed the issue
25 have concluded that the P-AA preempts states from imposing non-federal
26 duties in tort for alleged injuries arising from nuclear incidents and

1 that federal, not state, law provides the liability standard for claims
2 arising under the Act. Plaintiffs respond first that there were no
3 federal regulations at the time of the Defendants' releases at issue in
4 this case, only tolerance doses that the operators consulted for
5 practical guidance. Second, Plaintiffs assert that the cases cited by
6 the Defendants from other circuits were wrongly decided as explained by
7 Judge Kane in *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175 (D.
8 Colo. 2003).

9 Defendants request that the Court infer from the facts presented
10 that the tolerance doses established by scientists working with
11 the Defendants were federal safety regulations governing releases
12 from nuclear facilities at the time of the early emissions of I-131
13 from Hanford. These standards, the Defendants argue, should
14 preempt Washington standards. It is undisputed that Met Lab scientists
15 working with the Defendants established tolerance doses for human
16 exposure. Δs' SOF 12. The Defendants suggested inference is not
17 justifiable for two reasons. First, the tolerance doses were
18 not emissions standards. Doses received by individual Plaintiffs
19 relate to the causation question, not to the Defendants' activity
20 resulting in emissions. Second, the Atomic Energy Commission in a 1945
21 article noted that these doses had no legal status. Plaintiffs' Reply
22 Exh. N, p. 18. The tolerance doses were practical guidelines not legally
23 binding federal regulations. The Court concludes that no federally-
24 established regulations existed in the early years of Hanford emissions
25 of I-131. Thus no standards would exist to test the Plaintiffs' claims
26 against if the Washington law of strict liability was preempted. Here,

1 from a purely practical standpoint federal law does not preempt state
2 strict liability standards.

3 From a legal standpoint the Court also concludes that even if the
4 tolerance doses were construed as federal regulations they would not
5 preempt the Washington standard of strict liability. Unfortunately,
6 there is no Ninth Circuit authority on this issue. The most relevant
7 Supreme Court authority is found in *Silkwood v. Kerr McGee Corp.*, 464
8 U.S. 238 (1984). *Silkwood* addressed claims of the estate of a deceased
9 lab analyst at a federally licensed nuclear facility brought under state
10 tort law to recover for plutonium contamination to the analyst's person
11 and property. The jury awarded, *inter alia*, punitive damages and the
12 Supreme Court upheld the award. *Silkwood*, 464 U.S. at 258. Although
13 this was not a P-AA claim, as the Supreme Court noted, it discussed the
14 P-AA at length. *Id.* at 251-56. The court's conclusion is significantly
15 probative on the issue before this Court.

16 In sum, it is clear that in enacting and amending the Price-
17 Anderson Act, Congress assumed that state-law remedies, in
18 whatever form they might take, were available to those injured
19 by nuclear incidents. This was so even though it was well
20 aware of the NRC's exclusive authority to regulate safety
21 matters. No doubt there is a tension between the conclusion
22 that safety regulation is the exclusive concern of the federal
23 law and the conclusion that a state may nevertheless award
24 damages based on its own law of liability. But as we
25 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. We can do no less. It 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.

26 We do not suggest that there could never be an instance in
which the federal law would preempt the recovery of damages

1 based on state law. But insofar as damages for radiation
2 injuries are concerned, preemption should not be judged on the
3 basis that the federal government has so completely occupied
4 the field of safety that state remedies are foreclosed but on
5 whether there is an irreconcilable conflict between the federal
and state standards or whether the imposition of a state
standard in a damages action would frustrate the objectives of
the federal law. We perceive no such conflict or frustration
in the circumstances of this case.

6 *Id.* at 256.

7 The Defendants suggest that the *Silkwood* decision was wrongly
8 decided. It appears unlikely that the Supreme Court is withdrawing
9 from its holding that incidental regulatory effects are permissible
10 and only direct state regulation of safety aspects of nuclear energy
11 are preempted. The holding has been cited in several more recent
12 Supreme Court cases, one allowing state workers' compensation awards to
13 employees at a nuclear production facility, *Goodyear Atomic Corp. v.*
14 *Miller*, 486 U.S. 174, 185-86 (1988), and in another precluding
15 preemption by the federal Energy Reorganization Act of state law
16 claims for intentional infliction of emotional distress of a nuclear
17 fuel production facility worker. *English v. GE Co.*, 496 U.S. 72, 85-86
18 (1990). Most recently the Supreme Court, in discussing its earlier
19 *Silkwood* decision, noted the clear Congressional intent that supported
20 the *Silkwood* decision to not preempt state remedies such as punitive
21 damages. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351-52
22 (2001).

23 The *Silkwood* decision predated the 1988 Amendments Act to the P-AA.
24 The Amendments Act expanded original and removal jurisdiction creating
25 a federal cause of action for any action arising from a nuclear incident.
26 42 U.S.C. § 2210(n)(2). Congress also directed that the state law would

1 provide the rules of decision "unless such law is inconsistent with
2 provisions of such section [referring to 42 U.S.C. § 2210, the Price-
3 Anderson Act]." 42 U.S.C. § 2014(hh). Two circuits, the Third and the
4 Seventh, heavily relied upon by the Defendants, addressed the
5 constitutionality of the Amendments Act and found that Congress had not
6 exceeded its Article III authority. *In Re: TMI Litigation Cases Consol.*
7 *II*, 940 F.2d 832 (3d Cir. 1991); *O'Connor v. Commonwealth Edison Co.*, 13
8 F.3d 1090 (7th Cir. 1994). Had these cases found otherwise, the federal
9 compensatory scheme would have been stricken. Instead, in *TMI* the court
10 found that the P-AA removal provision was constitutional so that the
11 personal injury claims related to the TMI incident were properly removed
12 from state to federal court. 940 F.2d 832. The *O'Connor* case relied on
13 *TMI* and similarly found a nuclear power plant worker's state claim for
14 negligent exposure to radiation which caused injury properly removed to
15 federal court. 13 F.3d 1090. Summary judgment was granted to the
16 defendants in the *O'Connor* case because the worker could not show that
17 federal safety standards regarding permissible radiation doses were
18 exceeded. 13 F.3d at 1107.

19 Both *TMI* and *O'Connor* found the Amendments Act constitutional using
20 a field preemption analysis, observing that the federal government
21 occupied the whole field of nuclear safety and thus state law was
22 preempted if it acted in any way regulated by the Act. *TMI*, 940 F.2d at
23 858; *O'Connor*, 13 F.3d at 1101. *O'Connor* in addition held that federal
24 nuclear safety standards would establish the standard of care as opposed
25 to state standards which were preempted. *O'Connor*, 13 F.3d at 1104.
26 Plaintiffs assert that these cases were wrongly decided and cite Judge

1 Kane's lengthy and scholarly order in *Cook v. Rockwell Int'l Corp. and*
2 *Dow Chemical Corp.*, 273 F. Supp. 2d 1175 (D. Colo. 2003). Judge Kane
3 concluded that federal nuclear safety regulations did not preempt state
4 standards of care in P-AA public liability actions. *Cook*, 273 F. Supp.
5 2d 1175. He did so only after a comprehensive review of federal
6 preemption and the history of the P-AA including the Amendments Act. He
7 recognized his conclusion was at odds with the authority of *TMI* and
8 *O'Connor* but found that these cases were contrary to the Supreme Court
9 rulings in *Silkwood*, the plain language of the Amendments Act, and the
10 Congressional intent surrounding the P-AA. *Cook*, 273 F. Supp. 2d
11 1193-99.

12 In reviewing *TMI* and *O'Connor*, Judge Kane correctly observed that
13 the use of field preemption was in violation of the Supreme Court
14 direction in *Silkwood* that preemption in radiation injury claims
15 should not be based on the fact that the federal government so
16 completely occupied the field of safety that state remedies were
17 foreclosed. *Cook*, 273 F. Supp. 2d at 1194. Judge Kane also correctly
18 observed that both *TMI* and *O'Connor* violated the *Silkwood* binding
19 determination of Congressional intent at least as to the pre-1988
20 amendments. *Id.* at 1194. In addition, the *O'Connor* court justified
21 federal preemption of state standards by asserting that federal nuclear
22 safety standards are part of the P-AA statutory scheme. *O'Connor*, 13
23 F.3d at 1195. As Judge Kane points out, that contradicts the plain
24 language of § 2014(hh) which provides that state law provides the rule
25 of decision unless state law is inconsistent with the Act. *Id.* The Act,
26 § 2210, does not incorporate any federal safety regulations. Further,

1 the legislative history of the 1988 Amendments Act does not support any
2 Congressional intent to incorporate federal safety regulations and to
3 preempt state law. *Id.*

4 In *Silkwood*, the Supreme Court determined that an award of punitive
5 damages did not create an irreconcilable conflict between federal and
6 state standards and did not frustrate the objectives of federal law.
7 *Silkwood*, 464 U.S. at 257-58. The Washington strict liability law would
8 similarly not create an irreconcilable conflict between federal and state
9 standards or frustrate the objectives of federal law.

10 Based upon the P-AA compensatory purpose and the plain language of
11 § 2014(hh) of the Amendments Act that state law applies, the Court
12 concludes that Judge Kane's analysis of preemption is correct. The P-AA
13 does not require that federal safety regulations establish the standard
14 of care and preempt state tort remedies. The progeny of *TMI* and *O'Connor*
15 repeat the questionable analysis of these cases. *Nieman v. NLO, Inc.*,
16 108 F.3d 1546 (6th Cir. 1997); *Roberts v. Florida Power & Light Co.*, 146
17 F.3d 105 (11th Cir. 1998) (*per curiam*). Other cases, as Judge Kane
18 points out, just accept the questionable preemption analysis and cite the
19 above cases. *Cook*, 273 F. Supp. 2d at 1199, referencing *Good v. Fluor*
20 *Daniel Corp.*, 222 F. Supp. 2d 1236, 1247 (E.D. Wash. 2002); *see also*
21 *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457, 465-66
22 (S.D. Cal., 1996; *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp.
23 211, 218 (D. Me., 1996).

24 II. CONCLUSION

25 Plaintiffs brought a motion for partial summary judgment on the
26 issue of whether Defendants were engaged in an abnormally dangerous

1 activity and thus strictly liable. Although Defendants were fulfilling
2 a public duty, § 521 of the Restatement does not operate to preclude
3 an application of strict liability. In addition, the P-AA requires
4 that the substantive law of the State be applied, and this law is
5 not preempted by any federal law. In Washington strict liability
6 is applied if Defendants are engaged in an abnormally dangerous
7 activity. The Restatement factors of § 520 weigh in favor of a finding
8 that the Defendants' were engaged in an abnormally dangerous
9 activity.

10 Even though Defendants likely made their best efforts to minimize
11 risk the war effort required that safety take a second seat to plutonium
12 production. Defendants argue they should not be held strictly liable if
13 they did nothing wrong. The Court's determination is not that Defendants
14 did anything wrong, only that they were engaged in an activity that was
15 abnormally dangerous and that in such cases Defendants can spread the
16 risk more equitably allowing those who sustained harm to recover without
17 having to prove that Defendants were negligent. The remaining issue for
18 trial is whether Defendants' activities caused the Plaintiffs' alleged
19 damages. Accordingly,

20 **IT IS ORDERED** that Plaintiffs' Motion for Summary Judgment--
21 Abnormally Dangerous Activity, filed September 9, 2004, **Ct. Rec. 1564**,
22 is **GRANTED**.

23 The District Court Executive is directed to file this Order and
24 provide copies to Liaison Counsel; Mediator Gary Bloom; **AND TO** pro se
25 Plaintiffs Noreen L. Wynne, Carmela M. Destito-Buttice (for late John P.
26 Destito, Jr.), and Marylin F. Mlnarik.

