

NUCLEAR ENERGY INSTITUTE

QUESTIONS AND DISCUSSION TOPICS

for

**SEPTEMBER 16, 2016 DOE PUBLIC WORKSHOP ON
PROPOSED DATA COLLECTION FOR DOE RULEMAKING TO
IMPLEMENT THE CONVENTION ON SUPPLEMENTARY
COMPENSATION FOR NUCLEAR DAMAGE CONTINGENT COST
ALLOCATION**

DOE-HQ-2014-0021; RIN 1990-AA39

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FOR SEPTEMBER 16, 2016 DOE PUBLIC WORKSHOP ON PROPOSED DATA COLLECTION FOR DOE RULEMAKING TO IMPLEMENT THE CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE CONTINGENT COST ALLOCATION (DOE-HQ-2014-0021; RIN 1990-AA39)

I. Introduction

In response to the U.S. Department of Energy (DOE or “the Department”) Notice of Public Workshop, “Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation,” 81 Fed. Reg. 51140 (Aug. 3, 2016), the Nuclear Energy Institute, Inc. (NEI)¹ submits the following questions and proposed discussion topics for use at the September 16, 2016 DOE public workshop.

We appreciate DOE’s decision to conduct a public workshop on its proposed collection of information related to the 2014 DOE notice of proposed rulemaking (NOPR) on the Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation (“DOE CSC proposed rule”). *See* 79 Fed. Reg. 75076 (Dec. 17, 2014). That DOE proposed rule set forth a retrospective risk pooling program covering nuclear suppliers that may be required under certain circumstances to pay for any U.S. government contribution to the international supplementary fund created by the CSC. As part of the NOPR, DOE proposed a formula for calculating the retrospective premium payment. In their 2015 comments on the proposed rule, NEI and other stakeholders addressed the proposed DOE formula, among other issues.

DOE now proposes a CSC Data Collection Form (“DOE Form”) to support further development of the CSC rulemaking, and requests public comment on the DOE Form. DOE indicates that the information collection is a one-time effort, separate and distinct from future information-gathering and reporting that may be required under a CSC final rule. *See* 81 Fed. Reg. 51141. The Department also states that while it continues to review and consider data obtained from its outreach to other federal agencies, this information collection effort is needed to provide information that is not reported to or available from other federal agencies, in order to inform and advance the CSC rulemaking process. *See* 81 Fed. Reg. 51140.

NEI appreciates that DOE is considering using the current data collection in part “to obtain the information that could support a regulation” based on the model for a retrospective risk pooling program proposed by NEI in its April 17, 2015,² comments on the DOE CSC proposed rule. *See* 81

¹ NEI is responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory, financial, technical, and legislative issues. NEI members include all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel cycle facilities, material licensees, and other organizations and individuals involved in the nuclear energy industry.

² *See* “Comments of Nuclear Energy Institute, Inc. re Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation Docket Number: DOE-HQ-2014-0021 – RIN 1990-AA39,” (April 16, 2015).

Fed. Reg. at 51141. We also note that the DOE information collection effort is generally consistent in several respects with NEI's 2015 comments.

As noted in the questions and comments below, however, some definitions of terms used in both the DOE Form and the DOE Proposed Rule are inconsistent. This creates confusion for entities potentially required to submit information on the DOE Form. In addition to this concern, the representative list of issues below also touches on other questions worthy of consideration as DOE finalizes its information collection effort and, more broadly, the CSC proposed rule.

To the extent possible, we encourage the Department to address the issues identified herein at the workshop.³ Those discussions should further inform our ability to provide meaningful comments on the DOE Form. Additionally, after considering public comments on the proposed DOE Form, we urge the Department to re-issue it for another round of public comment.

II. Definitions Used in the DOE Form and the 2014 DOE CSC Proposed Rule

While the Department's CSC Data and Information Collection Form appears to be related to the 2014 DOE CSC proposed rule, several definitions used in the DOE Form (and the instructions for completing the Form) are inconsistent with definitions used in the DOE CSC proposed rule. We believe there is benefit in ensuring consistency in these definitions. Thus, we request that DOE clarify the intended meaning of the terms used in the DOE Form where those definitions differ from those used in the DOE proposed rule, explain the implications of these inconsistencies, and revise the DOE Form as needed to apply the definitions used in the DOE proposed rule.

"Nuclear Supplier"

The DOE Form defines a nuclear supplier as:

"any person (or successor in interest of a person) that supplies goods or services that are: (a) facilities, equipment, fuel, services, or technology pertaining to the design, construction, operation, or decommissioning of a nuclear installation, or (b) transportation of nuclear materials to a foreign nuclear installation."⁴

³ NEI also reserves the right to provide additional comments on the DOE data collection proposal as requested; see U.S. Department of Energy, Notice and Request for Comments, "Proposed Agency Information Collection," 81 Fed. Reg. 51193 (Aug. 3, 2016).

⁴ Regarding this definition, the DOE Form states:

"You are a Nuclear Supplier required to file Form DOE XX-XXXX if you have directly supplied nuclear goods or services or transported nuclear material to a nuclear installation outside the United States (also referred to as a foreign nuclear installation), or have reasonable knowledge that your nuclear goods or services, without substantial transformation prior to export, were supplied to a foreign nuclear installation during the reporting time period. Stated otherwise, you are a Nuclear Supplier if you are the principal party in interest in the supply of the nuclear goods or services or nuclear material transport, meaning you are the person receiving the primary monetary benefit from the export transaction, whether you, your authorized agent, a carrier, or another Nuclear Supplier obtained the applicable U.S. government license or authorization for the export of your nuclear goods or services."

The DOE Form also discusses nuclear suppliers who are not required to file Form DOE XX-XXXX.

The DOE proposed rule defines this term as follows (*see* 79 Fed. Reg. 75,076, 75,095):

“Nuclear supplier means a covered person (or a successor in interest of a covered person) that--

- (1) Supplies facilities, equipment, fuel, services, or technology pertaining to the design, construction, operation, or decommissioning of a covered installation, or
- (2) Transports nuclear materials that could result in a covered incident.”

- The definition of “Nuclear Supplier” in the DOE Form appears to be broader than that in the DOE proposed rule. Is the definition of this term intended to be the same in the proposed rule and the DOE Form?
- If not, why has DOE used inconsistent definitions, and what are the implications for nuclear suppliers required to submit the DOE Form?
- What would be the implication of using the concept of a “covered person” in the definition of a “nuclear supplier” under the DOE Form?
- DOE previously concluded in its CSC proposed rule that “suppliers of natural or depleted uranium or uranium conversion services are not suppliers of fuel and thus not nuclear suppliers that would be subject to the requirements of this proposed rule.” *See* 79 Fed. Reg. 75076, 75082 (Dec. 17, 2014). For clarity and for consistency with the scope of the rule, is DOE willing to include on the DOE Form a statement that: “The definition of nuclear supplier does not include suppliers of natural or depleted uranium or uranium conversion services”?

“Covered Installation”

The term “covered installation” is defined in the 2014 DOE proposed rule as “a nuclear installation at which the occurrence of a nuclear incident could result in a request for funds under the Convention.”⁵

- Why is the term “covered installation” not used in the DOE Form?
- Would including the term “covered installation” in the DOE Form effectively limit the number of nuclear suppliers required to submit the form?
- Consistent with NEI’s April 27, 2015 comments on the DOE proposed rule, we request that DOE produce a list of nuclear installations outside the U.S. that would be “covered” installations under the CSC. We believe that DOE’s production of such a list would allow a more accurate calculation of potential U.S. liability. In turn, an accurate calculation of potential U.S. liability will facilitate the ability to insure against contingent costs.

⁵ *See* Department of Energy notice of proposed rulemaking, Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation, 79 Fed. Reg. 75,076, 75,095 (Dec. 17, 2014). (“DOE proposed rule”).

“Covered Supplier”

The DOE proposed rule defines a “covered supplier” as “a nuclear supplier whose goods or services, if supplied in the United States, would be subject to the requirements of 10 CFR Part 21.” (See 79 Fed. Reg. at 75,095 and 75,080; *see also* definition of “covered nuclear supplier” in proposed Section 951.3.)

- Why is the term “covered supplier” not used in the DOE Form?
- Does using the defined concept of a “covered nuclear supplier” effectively limit the DOE proposed rule to suppliers of nuclear safety-related equipment?

“Nuclear Goods and Services”

In contrast to the proposed rule, the DOE Form defines “nuclear good or service” to mean “goods and services that are: (a) facilities, equipment, fuel, services, or technology pertaining to the design, construction, operation, or decommissioning of a nuclear installation, or (b) transportation of nuclear materials to foreign nuclear installations.”

- Could equipment “pertaining to the operation” of a plant include non-safety related equipment or balance of plant equipment that is not covered by 10 CFR Part 21, and which would not be reactor equipment requiring an NRC export license under 10 CFR Part 110, Appendix A to export (or be subject to the DOE Part 810 regulations)?⁶
- Is the scope of equipment to be included as a “nuclear good or service” under the DOE Form intended to be broader than that contemplated under the DOE proposed rule? If so, what is the basis for this distinction?
- Is the definition of nuclear goods and services used in the DOE Form intended to apply to suppliers of non-safety related equipment or commercial grade equipment that may occasionally be used at nuclear installations?
- Why does the DOE proposed rule includes as one definition of a “nuclear supplier” a covered person who “transports nuclear materials that could result in a covered incident,” while the DOE Form does not include the term “covered incident?” See 79 Fed. Reg. 75,095. What are the implications of this inconsistency?

“Nuclear Installation”

On the DOE Form, a nuclear installation is defined to mean: “(1) civilian nuclear power reactor plants; (2) civilian nuclear research reactor plants; (3) uranium enrichment facilities; (4) nuclear fuel fabrication facilities; (5) spent or used nuclear fuel reprocessing facilities; and (6) nuclear material storage facilities, except for storage of nuclear materials incidental to the

⁶ The DOE proposed rule applied this definition of nuclear goods or services linked to 10 CFR Part 21 deliberately, as a “reasonable basis for allocating risk among nuclear suppliers.” The proposed rule states: “the Department believes that the statutory risk factors to be considered in developing the risk-informed assessment formula . . . indicate that only nuclear suppliers of goods or services most likely to be exposed to significant liability in the event of a covered incident would be included in the retrospective risk pooling program.” 79 Fed. Reg. 75,080.

transport of such materials.” The DOE Form specifies that a “foreign” nuclear installation is a nuclear installation outside the United States.

In the DOE proposed rule, a nuclear installation is defined as: “(1) Any nuclear reactor facility or plant other than one with which a means of sea or air transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; (2) Any facility or plant using nuclear fuel for production of nuclear materials, or any facility or plant for the processing of nuclear material, including any facility or plant for the reprocessing of irradiated nuclear fuel; and (3) Any facility or plant where nuclear material is stored, other than storage incidental to the carriage of such material; provided that the Installation State may determine that several nuclear installations of one operator which are located at the same site shall be considered a single nuclear installation.”

- Does DOE intend these definitions of “nuclear installation” to be interpreted as identical for the purposes of completing the DOE Form?

III. Other Questions relating to the DOE Form

Legal Basis for the Filing Obligation

- What is the underlying legal basis for the filing requirement? What are the legal consequences to a nuclear supplier for failure to file Form DOE XX-XXXX?

Reporting Time Period

- What is the reason for selection of the reporting time period on the DOE Form (Jan. 1, 2008 – Dec. 31, 2015)?

Scope of Reporting Obligations

- Under the DOE Form as currently drafted, would nuclear suppliers’ reporting obligations include reporting transactions to any foreign nuclear installations, whether or not located in a CSC member state? If so, is DOE willing to revise the DOE Form to limit information gathering to nuclear goods and services to CSC signatory countries?

Use of a de Minimis Threshold or Exemption

- In drafting the DOE Form, did the Department consider applying a minimum (monetary) threshold, to limit the reporting obligation? If not, why not?

Confidentiality of Submittals

The DOE Form directs nuclear suppliers who believe their information is potentially confidential or proprietary to “submit one complete copy containing the information claimed to be confidential or proprietary clearly marked as such, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted.” The DOE Form further states that “DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under applicable regulations, including the DOE Freedom of Information regulations at 10 CFR 1004.11.”

- Is DOE willing to revise the Form to provide greater protection of sensitive business information and other confidential data against potential public disclosure?

Aggregation of Values and Use of Increments

- What is the basis for the DOE Form's directions on aggregating the value of nuclear goods and services, including the size of the various increments in estimating the value of nuclear goods or services?

Information re Public/Private Entity Status

- Why does the DOE Form ask nuclear suppliers to indicate whether they are a publicly or privately held entity?

Export Licenses or Authorizations

- What is the basis for the statement in the DOE Form that "it is expected that the supply of nuclear goods or services and the transportation of nuclear material to a foreign nuclear installation would require one or more U.S. government licenses or authorizations?"

Certification

- Does the DOE Form's requirement that an authorized official of the nuclear supplier certify that the information provided is correct to the best of his/her knowledge impose a legal obligation on the supplier? If so, please explain that obligation and any related enforcement mechanisms.

Selection of Industry Sectors for Reporting Purposes

- What is the basis for the selection of the various sectors used in Tables 1-5 of the DOE Form?

Risk Allocation

- The DOE Form, like the DOE proposed rule, does not provide a basis for key factors and assumptions by the Department, such as how to allocate risk among industry sectors and risk weighting factors for different types of goods and services. Can DOE provide guidance on how stakeholders can comment meaningfully on the DOE Form absent information on how the Department will use the data reported to develop an equitable allocation of costs across the nuclear supplier community?