November 24, 2010 CD10-0335

Sophia Angelini
Office of General Counsel for Civilian Nuclear Programs, GC-52
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Subject: Response to Notice of Inquiry, Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation – 75 FR 43945

Dear Ms. Angelini:

The purpose of this letter is to provide comments in response to the subject Notice of Inquiry (NOI) published by the Department of Energy (DOE). In light of our interest in providing consulting, design, construction, or other services for the disposal of low-level radioactive waste (LLW) in other countries, Energy*Solutions* is submitting these comments. Specifically, we are concerned with how terms such as "nuclear supplier" and "nuclear installation" are defined in the context of LLW disposal. We also are concerned with how risk will be considered by DOE in implementing its section 934 responsibilities.

In addition to these comments, Energy*Solutions* supports the comments submitted by the Nuclear Energy Institute (NEI) in this matter. Unless those comments submitted on behalf of the nuclear industry are addressed, suppliers from the United States will be at a competitive disadvantage as a result of section 934 of the Energy Independence and Security Act of 2007. We fully share the view expressed by NEI that the Administration should support legislation to enhance the competitiveness of U.S. suppliers by limiting their obligations to fund the supplementary fund.

Section 934 implements the Convention on Supplementary Compensation for Nuclear Damage (CSC), which requires participation in a retrospective risk pooling program by nuclear suppliers who are persons who provide services for covered installations. Section 934(b) defines a covered installation as a nuclear installation at which the occurrence of a nuclear incident could result in a request for funds under the CSC in response to nuclear damage. Sections 934(e)(2)(C)(ii)(I)((aa) and (bb)) allow DOE to exclude from the risk assessment formula used for the pooling program "goods and services with negligible risk" and classes of goods and services not intended specifically for use in a nuclear installation." In the NOI, DOE notes that these provisions allow it "to *exclude* nuclear suppliers with little or no risk of being determined legally liable for a covered incident resulting in nuclear damage in excess of 300 million SDRs." (Emphasis added) 75 FR at 43950.

Energy*Solutions* proposes that DOE clarify in its rulemaking that:

1) LLW Disposal Sites are neither "covered installations" nor "nuclear installations" because disposal is not a listed attribute of a nuclear installation, and

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2) Suppliers to LLW disposal sites, to the extent classified as "nuclear suppliers" should be excluded from the risk formula for the retrospective risk pooling program.

The bases for these positions are set out below.

I. LLW Disposal Sites are not "covered installations" and "nuclear installations" because disposal is not a listed attribute of a nuclear installation

Energy*Solutions* agrees with NEI that there should be a listing of "covered installations." We further propose that DOE revise the definition of a "covered installation" to make it clear that a disposal site is not a "covered installation" based on the definition of a "nuclear installation" in the CSC, which addresses facilities where nuclear material is "stored" not disposed.

Article I.(b) of the CSC Annex defines "nuclear installation" as:

> (i) any nuclear reactor ...;
> (ii) any factory using nuclear fuel ...and;
> (iii) any facility where nuclear material is *stored*, other than *storage* incidental to the carriage of such material; ... . (Emphasis added)

The definition of "nuclear installation" uses the term "storage" but not "disposal." Disposal and storage have different meanings; they are two distinct regulatory concepts, are subject to different regulatory regimes, and pose different risks. NRC addresses disposal and storage under different regulations (see 10 CFR Parts 60, 61, and 72). The Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management that the United States ratified in 2003 provides separate definitions for these two terms and treats them separately.[1] Given the plain meaning of these terms, the drafters of the CSC were no doubt fully aware as to the distinction. This is clearly a case where the legal maxim of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) applies. Moreover, the distinction is warranted given that storage is more likely to present a risk of release.

Disposal is not an attribute for a nuclear installation or a covered installation. Consequently, a LLW disposal site is not a nuclear installation. Thus, DOE should clarify that LLW disposal sites are excluded from the definition of a "nuclear installation," and, therefore, are not "covered installations." DOE also should clarify that a person who supplies facilities, equipment, fuel, services, or technology pertaining to the design, construction, operation, or decommissioning of a LLW disposal site is not a "nuclear supplier" since the person would not be supplying a "covered installation."

II. Suppliers to LLW disposal sites to the extent classified as nuclear suppliers should be excluded from the risk formula for the retrospective risk pooling program

If DOE concludes that a LLW disposal site is a covered installation, it should exclude nuclear suppliers to a LLW disposal site from the risk assessment formula. As noted above, DOE has

[1] Article II. (d) defines "disposal" to mean the emplacement of spent fuel or radioactive waste in an appropriate facility without the intention of retrieval. Article II. (t) defines "storage" to mean the holding of spent fuel or of radioactive waste in a facility that provides for its containment, with the intention of retrieval.

expressed the view that under section 934 it may exclude from the risk assessment formula "nuclear suppliers with little or no risk of being determined legally liable for a covered incident resulting in nuclear damage in excess of 300 million SDRs." 75 FR at 43950. DOE also stated in the NOI that it believes that:

> the intent of this provision is to exclude from participation in the risk pooling program those nuclear suppliers that provide goods or services that are the least likely to result in a nuclear incident for which requests under the Convention for contributions to the international supplementary fund would be invoked.

Based on the definitions in the Annex, the CSC appears to be aimed at the potential liabilities produced from production and utilization activities, i.e., reactors and reprocessing. The focus is on reactors, reactor fuel, reprocessing of reactor fuel, storage of nuclear fuel and waste from reprocessing and reactors. LLW disposal sites do not pose similar risk and liability concerns. While clearly it is important that LLW be properly disposed of, LLW disposal sites have no reasonably foreseeable risk of an incident involving potential damage if more than 300 million SDRs ($450 million). The suppliers of such facilities would have little or no likelihood of being determined legally liable for damages in excess of 300 million SDR's.

The NRC recognizes the lesser risk associated with LLW disposal sites and as such their regulations do not require LLW disposal sites to meet Price Anderson requirements, to have financial assurance requirements requiring liability insurance, or to comply with the quality assurance requirements of 10 CFR Part 50. In addition, LLW disposal sites have buffer zones and monitoring wells so that any leak should be detected well before there is any risk of offsite contamination. Furthermore the performance objectives established for LLW disposal sites provide substantial margin such that even if they are exceeded, actual exposures should not result in adverse health effects.

Thus, we propose that should DOE conclude that a person who supplies facilities, equipment, fuel, services, or technology pertaining to the design, construction, operation, or decommissioning of a LLW disposal site is a "nuclear supplier," the person is excluded from the risk informed assessment formula for the risk pooling program.

Thank you for this opportunity to comment. Questions regarding these comments may be directed to me at (240) 565-6148 or temagette@energysolutions.com.

Sincerely,

Thomas E. Magette, P.E.
Senior Vice President
Nuclear Regulatory Strategy