

DOE Summary of the Comments Received on the Government-Creditor Agreement

On October 25, 2024 in the Federal Register, the U.S. Department of Energy (DOE) published and requested comments on a template Government-Creditor Agreement (GCA) for use under DOE federal financial assistance awards. See 89 FR 85180 (October 25, 2024). In many instances there were common themes among the commenters. This document consolidates and summarizes the main comments, and DOE's responses to these comments. Other changes were made throughout the document. A redlined version is provided in addition to a clean version and this major theme summary.

The common themes among the comments were:

1. Length of cure period (section 1.1)
 2. Length of notice period for enforcement action (section 1.3(b))
 3. Continued Use requirements after disposition (original section 1.3(c)(ii))
 4. Novation and maintenance default cure requirements (section 1.3(d)(i))
 5. Enforcement Action scope and control (new section 1.3(f))
 6. Casualty and condemnation proceeds (section 1.4(c))
 7. Recipient termination of the DOE Award (new section 1.4(e))
 8. Bankruptcy (section 1.8)
 9. Governing Law and Venue (section 3.11)
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1. Original section 1.1 would have afforded the Creditor 60 calendar days to work with the Recipient to cure a Termination Event after DOE has notified the Recipient of its intent to terminate the DOE Award for such default. Several comments noted that the 60 calendar day period may be insufficient for a Creditor to cure certain defaults. After consideration by DOE, the revised section has a base 60 calendar day cure period that DOE may extend to no less than 120 calendar days if DOE in its reasonable judgment determines that the Termination Event is not reasonably capable of being cured within the initial 60 calendar day cure period and certain other conditions are met.
 2. Original section 1.3(b) would have implemented a 60 calendar day notice period before the Creditor could commence an Enforcement Action. Several commenters noted that the 60 calendar day period was too long for a Creditor to wait to commence an Enforcement Action.

After consideration by DOE, the revised section 1.3(b) retains the requirement for advance notice before commencing an Enforcement Action. As a policy matter, DOE requires notice of a potential sale or other disposition of Award Property and a sufficient period of time to conclude its evaluation. DOE also believes it is in the best interest of all parties that an Enforcement Action be carried out in an orderly manner so that each side can communicate its intentions and have a mutual understanding of the likely consequences of the Enforcement Action. However, DOE recognizes the need for

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timely action by the parties in this type of situation. Accordingly, the revised section provides that DOE will endeavor to conclude its evaluation within a 30 calendar day period, subject to a potential one time 15 calendar day extension if needed to conclude such evaluation.

3. Original section 1.3(c)(ii) would have required that the Creditor take commercially reasonable efforts to dispose of the Award Property to an entity that will continue to construct and use the Award Property for the purposes in the DOE Award. Several commenters noted that if the award is terminated and DOE is paid the appropriate amount, then the purchaser of disposed Award Property or Equity Interests following a termination should not be obligated to continue to use the Award Property as described in the DOE Award. After consideration by DOE, the provision was removed.
4. Original section 1.3(d)(i) would have required all existing defaults under the DOE Award to be cured prior to or simultaneously with a novation or maintenance. Several commenters noted that curing all defaults may not be possible in all circumstances, particularly where either a New Performer or New Parent taking control of the Recipient or Award Property is necessary to cure the default. After consideration by DOE, the revised section 1.3(d)(i) provides that it will not unreasonably withhold its consent to a cure plan if DOE reasonably determines that certain defaults cannot be cured until the New Performer or New Parent takes control of the Recipient or Award Property.
5. Several commenters asked for clarification on who controls the enforcement process and the scope of enforcement activities that would be subject to the GCA.

After consideration by DOE, the revised GCA:

- a) contains new section 1.3(f)(ii), which confirms that except as otherwise agreed in the GCA, the Creditor controls the carrying out an Enforcement Action.
 - b) contains new section 1.3(f)(i), which clarifies that the GCA is intended to apply to the lenders' power of sale or other similar remedies that provide for the potential sale or disposition of the Award Property, and is not intended to restrict other typical lender remedies such as a drawstop on further loans, the ability to accelerate loans, suspend further drawdown of loans, block the release of funds from collateral accounts, exercise step-in rights in material project documents, etc.
6. Several commenters raised concerns about the process and handling of casualty and condemnation proceeds. After consideration by DOE, section 1.4(c) has been revised to allow the Recipient (or Creditor on behalf of the Recipient) to apply the casualty and condemnation proceeds to restore or replace the lost or damaged property, as long as DOE's interest attaches to the new property, and it affirms that the Recipient (or Creditor on behalf of the Recipient) will have control over the negotiations with the insurance companies.
 7. Several commenters asked for written confirmation of the Recipient's (or the Creditor's, if permitted in the Loan Documents) ability under the applicable regulations to terminate the DOE Award, pay DOE the amount owed under the applicable

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regulations, and obtain vesting of the Award Property in the Recipient (or Creditor, as applicable), which is confirmed in new section 1.4(e).

8. Original section 1.8 would have required the Creditor to acknowledge the DOE interest in the Award Property is not part of the Recipient's bankruptcy estate. Several commenters asked for the removal of this provision. After consideration by DOE, the revised provision states that the parties will, if the plan of reorganization or liquidation calls for the Award Property to be sold or otherwise disposed of, cooperate to assure (a) the Award Property or Equity Interests, as applicable, are sold for maximum value subject to a restriction on a sale to a Restricted Entity as defined in the GCA and (b) the Proceeds are distributed as contemplated in the GCA and applicable regulations.
9. Several commenters asked for the laws of the State of New York to provide the applicable state laws to the extent state law supplies the federal rule of decision, instead of the laws of the State of Virginia as originally stated in section 3.11. After consideration by DOE, the revised section 3.11 makes this requested change. Several commenters asked that actions not subject to the exclusive jurisdiction of the United States Court of Federal Claims will be brought in the United States District Court for the Southern District of New York instead of the United States District Court for the Eastern District of Virginia, as included in the original section 3.11. The revised section 3.11 provides that actions not subject to the exclusive jurisdiction to the United States Court of Federal Claims will be brought in the United States District Court for the District of Columbia.