



SECY-R 180

March 9, 1971

PART 140 FINANCIAL PROTECTION REQUIREMENTS AND INDEMNITY AGREEMENTS -
CLARIFYING AMENDMENTS

Note by the Secretary

The Director of Regulation has requested that the attached report by the Director of State and Licensee Relations be circulated for consideration by the Commission at an early Meeting.

W. B. McCool

Secretary of the Commission

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PART 140 FINANCIAL PROTECTION REQUIREMENTS
AND INDEMNITY AGREEMENTS

CLARIFYING AMENDMENTS

Report to the
Director of Regulation
by the
Director, Division of State and Licensee Relations

THE PROBLEM

1. To consider publishing for public comment (a) a proposed endorsement to the facility form of nuclear liability insurance policy furnished as proof of financial protection, and (b) proposed amendments to the forms of indemnity agreements in 10 CFR Part 140. Both the endorsement and the amendments would clarify that waivers of defenses are available to employees of the licensee employed at the licensee's indemnified reactor station in the construction of follow-on units where the first unit is operating.

BACKGROUND AND SUMMARY

2. At Regulatory Meeting 287 on August 3, 1970, the Commission discussed SECY-R 7, "Indemnification of Power Reactors". That paper discussed our present practice with regard to limiting the boundaries of the indemnity location to operating indemnified reactors so as to leave the construction areas for adjacent follow-on units off the location and thereby covered by indemnity and underlying financial protection. We concluded in the paper that our present practice should be modified so that at such time as the construction permit is issued for the second unit to be constructed adjacent to an existing reactor, the indemnity location of the existing unit should be expanded to include the construction area of the second unit. We also discussed criteria that might be taken into account in determining the boundaries for the indemnified location for multi-reactor sites.

[REDACTED]

3. SECY-R 7 was not addressed to our practice with respect to facilities that are in the same building, or where the nuclear systems are so intermingled as to be inseparable for purposes of setting indemnity location boundaries. The "broad location", including construction areas within the indemnified location of an operating unit, has been used twice in the past because of particular problems involved in placing construction areas offsite. At Dresden in December 1969, the Unit 3 construction area was added to the indemnity agreement covering Units 1 and 2 when the indemnity agreement was extended to cover Unit 2. Because Units 2 and 3 were both located in the same building and the various systems of the reactor were combined or intermingled so as to make infeasible a clear delineation of boundaries between the two units, we were unable to place the construction area for Unit 3 offsite to Units 1 and 2. Similarly, in October 1970, we found that for the two units of Wisconsin Electric/Wisconsin Michigan's Point Beach plant there was no reasonable separation between the two units (except for the primary containment) so as to place the construction area of Unit 2 offsite to Unit 1.

4. One of the two questions identified in paragraph 11. of SECY-R 7 involved the legal rights of the employees of the licensee who are working at the reactor construction site if the indemnified location were broadened to include construction areas. A strict reading of the "waivers of defenses" provisions of the facility form of the nuclear liability insurance policy used by the liability pools for providing financial protection and the forms of indemnity agreement led to the conclusion that the rights to "waivers of defenses" of employees of the licensee working at construction areas might be foreclosed in the event of an "extraordinary nuclear occurrence" because of their being physically on the indemnified location.

[REDACTED]

5. The Commission deferred action on SECY-R 7 pending the results of staff discussion with (a) officials of the AFL-CIO with respect to the "waiver of defenses" problem, and (b) the Joint Committee on Atomic Energy staff with respect to the overall modification of our practices regarding indemnified locations as discussed in SECY-R 7.

6. This paper is concerned solely with the question of the right to waivers of defenses of construction workers employed by an indemnified licensee when a "broad location" is used. SECY-R 7 will be revised and brought to the Commission separately for a discussion of the issues raised in that paper. Any action taken by the Commission on this paper is separate from the other policy questions identified in SECY-R 7.

7. The strict interpretation (see paragraph 4. above) was discussed with representatives of NELIA and MAELU. We learned that the insurance pools had not intended a strict interpretation of section 11 w(i) of the Act which would have placed workers of an indemnified licensee in an indemnified construction area into the category of workers "who are employed at the site of and in connection with the activity where the nuclear incident occurs". The pools expressed a willingness to add to their facility form of insurance policy a clarifying endorsement to this effect. We believe that a similar clarifying amendment should be made to Part 140 to cover the waivers provisions of the standard forms of indemnity agreements. These changes would clarify that a licensee's workers who are constructing on an indemnified site an additional nuclear reactor with respect to which no operating license has been issued and who are not employed in connection with the possession, storage, use or transfer of nuclear material at the facility will maintain their rights under the waivers of defenses provisions of the nuclear liability form and the indemnity agreement.

[REDACTED]

8. The site boundary question arises at this time in connection with the impending issuance of a facility operating license to Duke Power Company for the operation of the first unit of the Oconee plant. Here again, the physical location of each of the three reactors with respect to the others is such that all should be included in a single indemnity location. This is Duke's view and we agree. Oconee differs significantly from Dresden and Point Beach in that Oconee represents the first time that the construction workers (estimated at up to 1700) on an indemnified site are employees of the licensee.* A clarification of the waivers question regarding construction workers who are licensee employees is desirable before the issuance of the facility license to Duke for Oconee 1.

9. The other question identified in paragraph 11. of SECY-R 7 related to the possible increase in workmen's compensation insurance premiums for coverage of the construction workers to be included in the construction area of the indemnified location. Presently, NELIA and MAELU will reimburse the workmen's compensation carrier for any claims paid to "offsite" workers. In paragraph 11. of SECY-R 7 it was postulated that the cost of workmen's compensation coverage might increase since the workmen's compensation carrier would, as a result of the construction workers being placed "onsite", bear the entire cost of claims paid, with no reimbursement from NELIA-MAELU.

* At Dresden, for example, the principal construction force on the follow-on units were employees of independent contractors; some Commonwealth Edison supervisory employees were also in the construction area of the indemnified site. Arthur Gehr, Esq., has informally stated that he believes the Commonwealth Edison policy is that its employees in the construction area should have the same right to the waivers of defenses as employees of an independent construction contractor.

[REDACTED]

10. In telephone conversations with the insurance manager for Duke Power Company, in which the question of workmen's compensation premium cost was discussed, it was learned that Duke Power Company is a self-insurer with respect to workmen's compensation, and Duke, therefore, pays no premiums. It was further learned that Duke is of the view that licensees' employees working in the construction area should have the same right to waivers of defenses as employees of an independent contractor.

11. TVA is the only other present construction permittee employing its own construction work force. When fuel is brought onsite at Browns Ferry Unit 1 (estimated to take place in the fall of 1971), the indemnity location will include the construction area for all three units. Informal discussion with TVA representatives concerning the desirability of clarifying the form of indemnity agreement with regard to waivers of defenses as described herein has indicated that TVA would favor the clarification.

12. With respect to the AFL-CIO (see paragraph 5. above), we indicated in our first meeting the nature of the problem with construction workers if a strict interpretation were made of the phrase, "employed at the site of and in connection with the activity where the nuclear incident occurs". We indicated to the AFL-CIO that, as long as such an interpretation would deprive workers of the benefits of waivers of defenses, staff would prefer not to change site boundaries in such a way as to force that result. After the discussions with NELIA-MAELU were completed, staff again met with the AFL-CIO staff to bring them up-to-date on the

[REDACTED]

proposed clarifying amendment. It was agreed that the amendment as described mooted the construction worker question. The AFL-CIO staff expressed its satisfaction that a solution to the "problem" has been found. AFL-CIO comment was invited on any proposed clarifying amendment that the AEC might publish.

13. The staff has also met with the JCAE staff on the general question of modifying the Commission's policy regarding delineation of adjacent, indemnified locations. Mr. Bauser has indicated that he will inform us of his views when he has completed his consideration of the question. We also discussed with Mr. Bauser the "waivers" question with which this paper deals. He saw no problem with going forward with this matter at this time since it does not involve the broader policy question of delineation of indemnified locations.

14. Attached as Appendix "A" is the notice of proposed rule making which staff proposes to publish in the Federal Register for public comment. The notice includes the proposed clarifying endorsement to the pools' facility form of nuclear liability insurance, as well as the proposed modification to the standard form of indemnity agreement.

STAFF JUDGMENTS

15. The Office of the General Counsel concurs in the recommendations of this paper. The Office of Congressional Relations concurs in the draft letter to the Joint Committee on Atomic Energy. No public announcement is proposed.

RECOMMENDATIONS

16. The Director of Regulation recommends that the Atomic Energy Commission:

- (a) Approve publication in the Federal Register of proposed amendments to 10 CFR Part 140 which would clarify the right to
- [REDACTED]



waivers of defenses of an operating licensee's construction workers constructing follow-on nuclear reactors on the indemnity location.

(b) Note that the proposed amendments to 10 CFR Part 140 as set out in Appendix "A" will be published in the Federal Register and will allow 30 days for public comment.

(c) Note that the Joint Committee on Atomic Energy will be informed by letter such as Appendix "B".

(d) Note that in view of the minor nature of the amendments, we do not believe that a public announcement is warranted.

(e) Note that, if after expiration of the comment period no adverse comments or significant questions have been received and no substantial changes in the text of the rule are indicated, the Director of Regulation will arrange for publication of the amendment in final form. If adverse comments or significant questions have been received or substantial changes in the text of the rule are indicated, the revised amendment will be submitted to the Commission for approval.

LIST OF ENCLOSURES

APPENDIX	<u>PAGE NO.</u>
"A" Waiver of Defenses Endorsement.	9
"B" Draft Letter to the Joint Committee on Atomic Energy.	17



APPENDIX "A"

ATOMIC ENERGY COMMISSION

[10 CFR Part 140]

WAIVER OF DEFENSES ENDORSEMENT

The Atomic Energy Commission has under consideration the amendment of 10 CFR Part 140, Financial Protection Requirements and Indemnity Agreements, and a proposed endorsement to the facility form of nuclear liability insurance policy furnished as financial protection, to clarify the waiver of defenses provisions in the facility form and in the AEC indemnity agreement forms. The proposed endorsement to the facility forms and the proposed amendments to the Commission indemnity agreement forms would clarify that a licensee's workers who are employed at an indemnified site exclusively in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission, and who are not employed in connection with the possession, storage, use or transfer of nuclear material at the facility, will maintain their rights under the waivers of defenses provisions of the nuclear liability form and of the Indemnity agreement. The waivers of defenses provisions in the event of an "extraordinary nuclear occurrence" are also intended to be available to an indemnified licensee's employees engaged at an indemnified location in the construction of a follow-on production or utilization facility (nuclear power reactor) for which no operating license has been issued.

It is the intention of the insurers and the Commission that claimants employed exclusively in connection with the construction of a nuclear reactor include those employees engaged in maintaining a facility, the construction of which is essentially complete in an appropriate state of readiness pending the receipt by the applicant of the operating license, even though the maintenance duties in connection with the facility may not be full time.

The insurers who provide nuclear liability insurance, Nuclear Energy Liability Insurance Association and Mutual Atomic Energy Liability Underwriters, have agreed to the addition of the clarifying endorsement to the forms of insurance policies issued by them. The proposed amendments would reflect that agreement in the Commission's regulations. The Commission forms of indemnity agreement would correspondingly be amended.

Pursuant to the Atomic Energy Act of 1954, as amended, and section 553 of Title 5 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Part 140 is contemplated.

All interested persons who desire to submit written comments or suggestions for consideration in connection with the proposed amendments should send them to the Secretary of the Commission, United States Atomic Energy Commission, Washington, D. C. 20545, Attention: Chief, Public Proceedings Branch, within 30 days after publication of this notice in the FEDERAL REGISTER. Comments received after that period will be considered if it is practicable to do so, but assurance of consideration cannot be given except as to comments filed within the period specified. Copies of comments received by the Commission may be examined at the Commission's Public Document Room, 1717 H Street, N. W., Washington, D. C.

1. Section 140.91 is amended by adding to the Waiver of Defenses Endorsement a new paragraph 6 to read as follows:

§140.91 Appendix A - Form of nuclear energy liability policy for facilities.

* * * * *

6. It is agreed that in construing the application of paragraph 2.(b) of the Waiver of Defenses Endorsement (NE-33) with respect to an extraordinary nuclear occurrence occurring

at the facility, a claimant who is employed at the facility in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission shall not be considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) the claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) no operating license has been issued by the AEC with respect to the nuclear reactor, and

(3) the claimant is not employed in connection with the possession, storage, use or transfer of nuclear material at the facility.

2. Section 140.92 is amended by adding a proviso at the end of subparagraph 5(c) of Article II to read as follows:

§140.92 Appendix B - Form of indemnity agreement with licensees furnishing proof of financial protection.

* * * * *

Provided, however, that with respect to an extraordinary nuclear occurrence occurring at the facility, a claimant who is employed at the facility in connection with the construction

of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission shall not be considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) the claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) no operating license has been issued by the AEC with respect to the nuclear reactor, and

(3) the claimant is not employed in connection with the possession, storage, use or transfer of nuclear material at the facility.

3. Section 140.93 is amended by adding a proviso at the end of subparagraph 5(c) of Article II to read as follows:

§140.93 Appendix C - Form of indemnity agreement with licensees furnishing proof of financial protection in the form of licensee's resources.

* * * * *

Provided, however, that with respect to an extraordinary nuclear occurrence occurring at the facility, a claimant who is employed at the facility in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission shall not be

considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) the claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) no operating license has been issued by the AEC with respect to the nuclear reactor, and

(3) the claimant is not employed in connection with the possession, storage, use or transfer of nuclear material at the facility.

4. Section 140.94 is amended by adding a proviso at the end of subparagraph 5(c) of Article II to read as follows:

§140.94 Appendix D - Form of indemnity agreement with Federal agencies.

* * * * *

Provided, however, that with respect to an extraordinary nuclear occurrence occurring at the facility, a claimant who is employed at the facility in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission shall not be considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) the claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) no operating license has been issued by the AEC with respect to the nuclear reactor, and

(3) the claimant is not employed in connection with the possession, storage, use or transfer of nuclear material at the facility.

5. Section 140.95 is amended by adding a proviso at the end of subparagraph 3(c) of Article II to read as follows:

§140.95 Appendix E - Form of indemnity agreement with nonprofit educational institutions.

* * * * *

Provided, however, that with respect to an extraordinary nuclear occurrence occurring at the facility, a claimant who is employed at the facility in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Atomic Energy Commission shall not be considered as employed in connection with the activity where the extraordinary nuclear occurrence takes place if:

(1) the claimant is employed exclusively in connection with the construction of a nuclear reactor, including all related equipment and installations at the facility, and

(2) no operating license has been issued by the AEC with respect to the nuclear reactor, and

(3) the claimant is not employed in connection with the possession, storage, use or transfer of nuclear material at the facility.

(Secs. 161, 170, 68 Stat. 948, 71 Stat. 576; 80 Stat. 891; 42 U.S.C. 2201, 2210)

Dated at _____ this _____ day of _____,
1971.

FOR THE ATOMIC ENERGY COMMISSION

W. B. McCool
Secretary of the Commission

APPENDIX "B"

DRAFT LETTER TO THE JOINT COMMITTEE ON ATOMIC ENERGY

Enclosed for the information of the Joint Committee on Atomic Energy is a copy of a notice for publication in the Federal Register of a proposed endorsement to the facility form of nuclear liability insurance policy furnished as proof of financial protection, and proposed amendments to the forms of indemnity agreement in 10 CFR Part 140.

Both the proposed endorsement and the proposed amendments would clarify that a licensee's workers who are employed at an indemnified site exclusively in connection with the construction of a nuclear reactor with respect to which no operating license has been issued by the Commission, and who are not employed in connection with the possession, storage, use or transfer of nuclear material at the facility, will maintain their rights under the waivers of defenses provisions of the nuclear liability insurance policy and of the indemnity agreement. The waivers of defenses provisions in the event of an extraordinary nuclear occurrence are also intended to be available to an indemnified licensee's employees engaged at an indemnified location in the construction of a follow-on production or utilization facility for which no operating license has been issued.

The notice allows 30 days for public comment. In view of the minor nature of the amendments, we do not plan to issue a public announcement.