

November 5, 2008
Summary Notes

Public Meeting to Discuss Comments Provided by the Nuclear Energy Institute (NEI) During the Public Comment Period on the Decommissioning Planning rule, for clarification purposes

1. The Meeting Notice was posted October 24, 2008 to the NRC public meeting web site.
2. The agenda for the meeting was distributed to known meeting participants on November 4, 2008. The agenda included a section on the ground-rules for the meeting, stating that (a) discussion topics would be limited to specific issues raised in an NEI comment submitted during the proposed rule public comment period, and (b) people attending the meeting but not on the agenda would be provided time at the end of the meeting, as time permits, to make a statement or to ask questions.
3. The NRC made an opening statement noting that the Decommissioning Planning final rule package is currently with the Commission with a recommendation from the staff that the Commission approve the final rule for publication in the *Federal Register*. The NRC also said that the rule package was made publicly available on October 7, 2008, and that during a noticed public meeting on October 9, 2008 between NRC senior managers and the NEI, the NRC agreed to hold a public meeting at a later date (later scheduled for November 5) to allow NEI to clarify their comments submitted during the public comment period on the proposed rule.
4. Item 1 on the agenda was an Introduction by NEI. As stated in its comments on the proposed rule, the NEI said that the Decommissioning Planning rule appears to address a problem or a perception of a problem that does not exist – namely, the prevention of legacy sites. Legacy sites have occurred at materials facilities, not power reactors, and there have been only a very small number of legacy sites, on the order of 7. The NEI argues that current regulations are adequate to address decommissioning planning. The NEI argues that the rule presents a backfit. And the NEI stated that the NRC should get back to addressing fundamental concerns in this rule, in particular (a) clearly articulating the problem; (b) clearly articulating what the NRC expects licensees to do as a result of the new rule with “how to” descriptions in related guidance documents; and (c) providing a fair disposition of stakeholder comments on the proposed rule with a full and thorough response to each comment in the final rule.
5. Item 2 on the agenda was on the topic of Power Reactor History. As stated in its comments on the proposed rule, the NEI argues that (a) no power reactor has defaulted on its financial obligations for decommissioning, and (b) the process is well known within industry to estimate the funds necessary for future decommissioning and to perform the work scope to complete decommissioning. The NEI says that the Decommissioning Planning final rule places special emphasis on subsurface contamination at an operating site, and that this level of emphasis by rule is not necessary because (a) the cost associated with subsurface contamination at decommissioning sites is only about 9 percent of the total radiological decommissioning cost and as a result subsurface contamination is not a significant contributor to decommissioning cost; and (b) although there is no evidence that there is a problem with subsurface contamination at power reactors, there is no reason this type of problem could not be addressed by the NRC on a case-by-case basis if the problems occur in the future. NEI stated that, based on experience at Connecticut Yankee, subsurface contamination remediation costs were about \$80 million. The total decommissioning cost

was about \$850 million, however, that total included cleanup and site restoration activities beyond the requirements imposed by NRC. Of the \$80 million spent on subsurface contamination remediation, roughly \$20 million was due to NRC requirements.

6. Item 3 on the agenda was on the topic of Current Financial Assurances for Power Reactor Decommissioning. The NEI identified that there are two classes of reactors for which assurances are required: (a) reactors under state cost of service regulation; and (b) merchant plants that must provide 100 percent payment of the decommissioning cost estimate for which most provide funds through a prepayment method. At times, for various reasons, there is a reduction of available funds in one or more funding mechanisms and these reductions are offset with an increase in funding assurance in another mechanism. NEI considers the current regulations to be adequate, and considers the Parent Guarantee to be a valuable option available to power reactor licensees to cover any shortfalls in the decommissioning assurance funding amount. NEI said that there is a substantial cost to a power reactor licensee in its obtaining a letter of credit for use as a short-term supplement to their decommissioning financial assurance, instead of using the Parent Guarantee. NEI said that having the Parent Guarantee mechanism is important to power reactor licensees.

7. Item 4 on the agenda was on the topic of Legacy Site Decommissioning Issues. NEI stated that the premise of the need for the Decommissioning Planning rule is based on the existence of 7 legacy sites of former materials licensees. The NEI stated that the NRC staff described no concern in the basis for the rule for power reactors or other types of materials facilities as potential legacy sites. The NEI believes the NRC staff needs to place more focus on the experience of power reactors to include this group of licensees within the scope of the rule. The NEI believes the process to follow in establishing a rule is (a) the NRC cannot be arbitrary or capricious in its documentation of a technical basis for a new rule; and (b) new burdens on licensees are not imposed without an analysis of the improvement in safety or other basis within the jurisdiction of the NRC. The NEI tried to identify the 7 legacy sites noted in the rule by the NRC staff, but was able to identify only one. The other 6 legacy sites are unknown. The NEI summarizes this effort on their part as “the secret 6 plus 1”, and that this indicates that there is an insufficient basis for the rule. The NEI says that an analysis of legacy site conditions shows that these are sites that shut down years ago and operated under a different regulatory structure. Since then, new regulations and guidance documents have been published that are effective, and a substantial regulatory structure exists to assure decommissioning financial assurance. The NEI has not seen any evidence that the current regulations are lacking and the NEI does not believe this has been demonstrated in the Decommissioning Planning proposed rule.

8. Item 5 on the agenda was on Stakeholder issues, including backfit, financial concerns, draft regulatory guidance, and a “chilling effect” concern. NEI removed from the agenda its discussion of the January 2007 public workshop.

On backfit comments, the NEI stated that they consider this rule to be a turning point in the agency’s process to address backfit concerns during the rule process. In its comments on the proposed rule, the NEI stated that the NRC should consider its comments to be a backfit appeal, consistent with the processes spelled out in NRC procedures for individual licensees’ appeal of a proposed plant-specific backfit. The NEI said on November 5, 2008 that this appeal is an appropriate approach for NEI to express concern. NEI said that the Decommissioning Planning rule would impose new requirements on power reactor licensees. The NEI said that the NRC staff is relying on the actions taken by power reactor licensees under the voluntary ground water protection initiative to impose regulatory

requirements. The NEI said that it strains credibility that the rule be considered a clarification of requirements under existing regulations, and that it is analytically incorrect to suggest that there are only information collection requirements in other parts of the rule. The NEI said that the effort by licensees will be substantial. The NEI requested the NRC comply with its own regulations in 10 CFR 50.109. The NEI stated that NRC said in the SECY transmittal of the draft final rule that the staff had provided the draft final rule to the NRC Committee to Review Generic Requirements (CRGR) for information purposes. The NEI contends the Staff Requirements Memorandum (SRM) referenced in the SECY for the final rule was in error based on the individual Commissioner votes which NEI contends did not support waving CRGR review of backfit issues during the rule process. The NEI was under the assumption during the rule process that CRGR would perform a substantive review of the rule.

On financial assurance concerns in stakeholder issues, the NEI discussed its comments on rule changes to the Parent Guarantee and power reactor licensee accumulation of funds during a SAFSTOR period. On the Parent Guarantee, the NEI said that, in a 1998 final rule (63 FR 50465), 10 CFR 50.75(e) was amended to cross reference to 10 CFR Part 30, Appendix A for use of the Parent Guarantee. Appendix A was changed in that final rule so that the financial test would be based on the specific amount for which the licensee was applying for the Parent Guarantee. Prior to the 1998 rule, the financial test was based on 100 percent of the necessary amount for financial assurance. NEI said that the Decommissioning Planning final rule would require the guarantor of the Parent Guarantee to accept joint and several liability for the full amount of decommissioning, which is a significant policy change and a problem. The NEI considers the Parent Guarantee a low cost, orderly mechanism for power reactor licensees to make up a shortage of decommissioning financial assurance funding, and that the current regulations are adequate. NEI stated that the NRC's reference in the draft final rule to a different rule (62 FR 44074) which stated that NRC reserves the right to impose joint and several liability on co-owners of nuclear power plants could be argued, but a co-owner is under NRC jurisdiction. A corporation providing a Parent Guarantee for a power reactor licensee is often not an NRC licensee. The NEI said that NRC has always respected the corporate form, except in a few instances when the NRC had to take specific action. On licensee accumulation of funds, 10 CFR 50.82(c) provides that for a facility that has been prematurely shut down, the collection period of financial assurance funds will be determined with the NRC on a case by case basis. This is from a 1996 rule. The NRC, in new 50.82(a)(8)(vi), is introducing a new regulatory requirement that the licensee must provide 100 percent assurance every year following shut down of the reactor. For a prematurely shut down power reactor, this is a conflict with existing 50.82(c).

On draft regulatory guidance, the NEI stated that following plant shut down the area of concern with respect to protection of public health and safety from radiation exposure is the contaminated area under the power block. It is not practical to get estimates of this volume of subsurface soil to support a decommissioning cost estimate, and as discussed earlier the subsurface cleanup activity is not a significant cost in the overall cost of decommissioning. The NEI said that the guidance document makes numerous references to MARSSIM and MARLAP, and that the application of these programs during facility operations would replace the existing QA program at power reactors for analysis of radiological materials on-site. The NEI said that application of DCGLs as a screening method to determine the extent of contamination is a conservative approach and the NEI believes it is not likely that any of the current fleet of reactors would trigger these levels; thus, the DCGLs would only be applicable in the worst situations at a power reactor. With this in mind, and with the

guidance providing a description of considerations to make with respect to remediation, the NEI is having a hard time seeing the benefit of the final rule guidance document because the rule leaves the status quo in place with respect to remediation but is imposing requirements that have no impact on public health and safety. Going back to points made during the Introduction, the NEI questions that the rule will accomplish its purpose of preventing legacy sites with respect to power reactors. The NEI said that the NRC staff has acknowledged that contamination concentrations at sites are not at levels that would affect decommissioning, and as a result no extensive monitoring should be required. It also appears to the NEI that the NRC is requiring licensees to perform monitoring to determine if they need monitoring. On the topic of remediation, the NEI stated that the broad experience of the voluntary ground water protection initiative to date is that power reactor licensees have maintained contamination concentrations low.

On what NEI has termed “the chilling effect,” the NEI said that the NRC through the Decommissioning Planning rule has chosen to codify into regulations the actions voluntarily undertaken by the power reactor industry. Since about 1987 and the formation of NUMARC prior to NEI, there have been about 25 of these voluntary industry initiatives, which are undertaken with the approval of the Chief Nuclear Officer of each reactor site. The NEI said that any action to codify activities being performed on a voluntary basis will be a deterrent to future initiatives. The NEI also said that the basis for the NRC rule is to prevent legacy sites, and the basis for the voluntary ground water protection initiative is to improve public confidence in plant operations.

9. Item 6 on the agenda was for Summary and Closing. The NEI does not believe the final rule actions will be focused on resolving a problem of power reactors as potential legacy sites. The regulatory process has other means to adopt these actions that could be effective, for example Generic Communications or guidance. The NEI referenced a prior document from the NRC invoking five principles that must be addressed for rulemaking, and the NEI believes the NRC did a poor job on each for this rule. These are (a) independence -- this rule did not start with documentation of the actual legacy sites to form a regulatory basis for change; openness – the backfitting process was not open and the NEI considers there was no resolution in the responses provided in the draft final rule to NEI’s comments on the proposed rule; (c) efficiency – there is no demonstrated risk reduction in this rule; (d) clarity – the basis for the rule is not documented therefore the objective of the rule is not clear; and (e) reliability – the rule is not based on current information but rather on sites that operated many years ago under a different regulatory structure. The conclusion NEI reaches therefore is that this rule is fundamentally flawed; the rule is fundamentally in conflict with the Administrative Procedures Act; the rule is fundamentally in conflict with backfitting regulations. The NEI stated that the NRC has failed to comply with its own backfitting requirements, which in NEI’s opinion is unprecedented. This instance is the first time for either NUMARC or NEI to file an appeal for a backfit decision made by the NRC.
10. Item 7 on the agenda was Statements or Questions of Others Attending the Meeting. Four meeting attendees made statements: (a) John Ernst of the University of Missouri and also representing the National Organization of Test Research and Training Reactors (TRTR) said that he supports the concerns and comments raised by NEI, that this rule is important to the operations of research and test reactors, and that he would like to support open communication in finalizing the survey and monitoring guidance documents. (b) Scott Murry, representing the Fuel Cycle Facility Forum (FFCF), said that FFCF believes existing regulations are effective for financial assurance, that the process to submit a Decommissioning Funding Plan is effective and financial tests in 10 CFR Part 30

Appendices A and C are an economical way for licensees to provide financial assurance for those Funding Plans, and that any regulatory changes should be made on an individual basis as needed by license condition rather than by rulemaking. (c) Janice Dean, of Office of the New York State Attorney General, asked when the Summary Notes of the meeting would be available on the NRC website (the response was within 10 days), and asked the NRC to confirm receipt of a letter from the State of New York dated November 4, 2008, with supplemental information for consideration as a comment on the rule (the response was that the NRC staff did receive the letter and will enter the letter as a rulemaking comment in the ADAMS system), and asked what is the next step following the November 5 meeting (the response was that staff would prepare notes of the meeting and deliberate internally to identify any new information learned from the meeting that would change a position taken in the final rule. If there is a change in position, the staff will notify the Commission of that change.), and asked what prompted the scheduling of the November 5 public meeting (the response was as described in item 3). (d) John Greeves of Talisman International said that he had never attended a public meeting when industry would claim that a rule was fundamentally flawed, that the character and tone of the meeting on November 5 was much different than meetings NRC held with stakeholders in the past, and that more openness is needed with respect to understanding the basis of the rule with respect to what prompted creation of the current legacy sites.

11. Item 8 on the agenda was completed by closing remarks from the NRC. The meeting started around 8:35 am and ended around 10:45 am.