

December 30, 1999

SECY-00-0002

FOR: The Commissioners

FROM: William D. Travers /RA/
Executive Director for Operations

SUBJECT: PART 50 RULEMAKING PLAN FOR DECOMMISSIONING TRUST
PROVISIONS

PURPOSE:

To obtain Commission approval to proceed with rulemaking to revise 10 CFR Part 50, in accordance with the attached rulemaking plan.

DISCUSSION:

This rulemaking effort responds to an August 10, 1999, staff requirements memorandum (SRM), "Summary of Decommissioning Fund Status Reports," in which the Commission directed the staff to initiate a rulemaking to require that decommissioning trust agreements be in a form acceptable to the NRC in order to increase assurance that an adequate amount of decommissioning funds will be available for their intended purpose. Until recently, direct NRC oversight of the terms and conditions of the decommissioning trusts was not necessary, because rate regulators exercised such authority. With deregulation, this oversight may cease and the NRC may need to take a more active oversight role. Also, based on the experience gained with approving the transfers of the operating licenses of the Three Mile Island Unit 1 and Pilgrim nuclear power stations, the staff believes this rulemaking would expedite similar transfers in the future by providing regulatory predictability and stability for license transfers. The staff also intends to develop guidance that will specify more fully the provisions of the decommissioning trust agreements.

CONTACT:
Brian J. Richter, NRR
(301) 415-1978

COORDINATION:

The Office of the General Counsel has no legal objection to this rulemaking plan.

The Office of the Chief Financial Officer has reviewed the rulemaking plan for resource implications and has no objections. The resources to conduct this rulemaking effort and develop guidance will be approximately 0.5 FTE spread over a 2-year period. Further, the staff estimates contractual support in the range of \$50,000 to \$100,000 to assist in the development of the regulatory guide. However, this rulemaking effort will be done as scheduling permits because this is a low priority item.

The Office of the Chief Information Officer has reviewed the rulemaking plan for information technology and information management implications and concurs in it. However, the plan suggests changes in information collection requirements that must be submitted to the Office of Management and Budget at the same time the rule is forwarded to the Federal Register for publication.

RECOMMENDATION:

The staff recommends that the Commission approve the plan to proceed with the Part 50 rulemaking using Option 1 in the attached rulemaking plan. The staff will take no further action until the SRM is issued.

Original /s/ by P. G. Norry for
William D. Travers
Executive Director
for Operations

Attachment: As stated

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Attachment: As stated

Rulemaking Plan

10 CFR Part 50

Regulatory Issue:

In a staff requirements memorandum (SRM) dated August 10, 1999, the Commission directed the staff to initiate a rulemaking to require that decommissioning trust agreements be in a form acceptable to the NRC in order to increase assurance that an adequate amount of decommissioning funds will be available for their intended purpose. This SRM was in response to SECY-99-170 (July 1, 1999), "Summary of Decommissioning Fund Status Reports," in which the staff noted that it intended to continue to review decommissioning trust agreements in license transfers on a case-by-case basis and impose appropriate conditions in the orders approving these transfers. However, the staff believes that efficiency would be increased if the NRC codified this practice generically in the regulations. Also, based on the staff's experience with approving the transfers of the operating licenses of the Three Mile Island Unit 1 and Pilgrim nuclear power stations, the staff believes this rulemaking would expedite similar transfers in the future by providing regulatory predictability. In addition, the proposed rule and accompanying revisions to regulatory guidance would strengthen decommissioning trust language for other power reactor licensees that become economically deregulated apart from any license transfer actions.

Existing Regulatory Framework:

Until recently, rate regulators exercised direct oversight of the terms and conditions of the decommissioning trusts, and NRC involvement was not necessary. Because this oversight may cease with deregulation, we believe the NRC needs to take a more active oversight role. 10 CFR 50.75 allows external decommissioning trusts as one of the acceptable financial assurance methods and that method is used by virtually all nuclear power plant licensees. However, although the staff included sample language for decommissioning trust agreements in guidance issued in August 1990 (Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors"), the NRC's regulations do not require that specific terms and conditions be included in the decommissioning trust agreements. As an accompaniment to the rulemaking, the staff intends to update Regulatory Guide 1.159 to include provisions that the staff believes are necessary in light of economic deregulation.

How the Regulatory Problem Will Be Addressed by Rulemaking:

The staff intends to develop proposed rule provisions applicable to those nuclear power plant licensees that use decommissioning trust funds to comply with the decommissioning funding assurance requirement in 10 CFR 50.75(e). (Virtually all power reactor licensees use this method of assurance.) The proposed rule would state that the trust provisions must be acceptable to the NRC and would contain general objectives and criteria that the NRC believes are required to ensure that funds in the trusts will be available for their intended

purpose. These objectives and criteria would be broad and performance-based. The rule would be applicable to all power reactor licensees, not only those licensees that are transferring their licenses or have undergone or are undergoing rate deregulation. As under the current regulations, the trust agreements would not be subject to formal NRC review and approval, although material changes to trust agreements arising from this rule change would be reported to the NRC as part of the biennial decommissioning fund status reports pursuant to 10 CFR 50.75(f)(1).

The staff believes this rulemaking would be consistent with the Office of Nuclear Reactor Regulation's (NRR) "four pillars of regulation." First, in those cases where rate regulators' oversight of decommissioning trust agreements would cease because of deregulation, this action would maintain the public health and safety by giving NRC an enhanced ability to provide the needed decommissioning trust oversight. (The NRC would develop the necessary oversight expertise in-house or obtain contractual support, as needed.) Second, by codifying requirements that decommissioning trust agreements must meet certain objectives and criteria, public confidence would increase because the oversight process would be more predictable, consistent, and objective. Third, this action would improve effectiveness and efficiency of the NRC oversight process because it would reduce the burdens associated with the current practice of addressing provisions of decommissioning trusts on a case-by-case basis, and imposing appropriate conditions in the orders approving the transfers. Fourth, this action would reduce unnecessary regulatory burden on licensees, as they will be able to use a standard approach in developing their decommissioning trust agreements.

Rulemaking Options:

The staff has identified two rulemaking options. Option 1 is for the staff to develop a rulemaking that would require explicitly, in 10 CFR 50.75, that decommissioning trust agreements meet certain specified objectives and criteria acceptable to the NRC without specifying in the regulation itself actual trust wording. Concurrently, we would revise Regulatory Guide 1.159 to incorporate recommended terms and conditions that we believe are necessary to fully protect the funds in the decommissioning trusts for their intended purpose. Option 2 is a variation of Option 1 under which the staff would incorporate specific trust fund terms and conditions themselves directly in the regulations. It is anticipated that a revision to Regulatory Guide 1.159 would still be necessary under Option 2 to provide guidance supplementary to the regulation.

Alternatives:

Usually, the no-action alternative also exists. However, in this case, it is not appropriate for inclusion since the Commission has already directed the staff, in the Staff Requirement Memorandum (SRM) SECY-99-170, to develop a rulemaking plan.

Impact(s) on Licensees:

We estimate that either rulemaking option would impose a one-time burden of about 40 to 80 additional hours for each licensee to prepare an initial review of, and revisions to, its trust agreement to assure the trust agreement's consistency with the objectives and criteria of the rule and to fully consider the related guidance in revised Regulatory Guide 1.159. In those cases in which the licensee's trust is consistent with the NRC's revised guidance, less licensee

effort would be needed. (Based on previous staff review of trust agreements, most appear to contain provisions consistent with sample trust terms and conditions contained in current Regulatory Guide 1.159. However, those sample terms and conditions need to be updated and expanded to address issues that have arisen as a result of deregulation and increased license transfer activity). Therefore, we believe there will not be a significant increase in burdens on licensees as a result of either of the rulemaking options. With respect to our proposed oversight activities, licensees are already required by NRC regulations to execute decommissioning trusts (if that is the financial assurance option they choose) regardless of whether the trusts are required to be reported to a rate regulator. Also, with respect to license transfers, we would impose such financial assurance conditions as we deemed necessary in the orders approving the transfers, whether the licensee is required to do it because of a regulation or because we require it on a case-by-case basis.

Benefits:

The greatest benefit of this rule would be the increased assurance that decommissioning funds would be available for their intended purpose. Further, by addressing this issue generically through rulemaking, rather than continuing the current case-by-case approach, it is expected that the burden on staff resources would be reduced. Another benefit would be increased predictability in the regulatory structure for license transfers.

As discussed above, the additional burden on a licensee is expected to be modest (on the order of 40 to 80 hours). The staff does not believe this burden would vary depending upon the option chosen. However, the staff recommends Option 1 because it would be a much more performance-based approach than Option 2, which would be quite prescriptive. Option 1 is consistent with the Commission's "White Paper on Risk-Informed and Performance-Based Regulation" (March 1999).

Office of the General Counsel (OGC) Legal Analysis:

The Staff proposes to revise the regulations to state that nuclear power plant decommissioning trust agreements must be acceptable to the NRC and to establish certain objectives and criteria that must be satisfied by the agreements. Recommended trust terms and conditions for the typical case would be included in a revised Regulatory Guide 1.159 to be issued as a draft concurrently with the proposed revision to the regulations. The staff's primary reason for developing such standardized objectives and criteria and recommended terms and conditions is to minimize case-by-case review of decommissioning trust agreements. The Staff believes that such case-specific reviews would otherwise be increasingly necessary as the electric power industry is deregulated. Traditionally, State rate regulators have exercised direct oversight of the terms and conditions of decommissioning trusts, and the NRC has not been involved. However, since the rulemaking is to provide reasonable assurance that licensees of nuclear power plants in an increasingly deregulated environment will have adequate sources of funds to pay for decommissioning of their plants, OGC concludes that Sections 103, 104, 161, and 182 of the Atomic Energy Act of 1954, as amended, provide the Commission with the authority to promulgate the contemplated rule.

The proposed rule would require preparation of an environmental assessment (EA), as it appears that there are no categorical exclusions in 10 CFR 51.22(c) which would apply to this rulemaking.

In its backfit analysis, the Staff indicates that the contemplated rule may be a backfit. We agree that the rulemaking would likely constitute a backfit as defined in 10 CFR 50.109(a)(1) since the rule would establish minimum standards for decommissioning trust agreements where none are currently explicitly stated in the regulations. The staff indicates that it believes that the rule would constitute a substantial increase in safety whose costs are justified. OGC believes that the determination as to the category of backfit (*i.e.*, “safety enhancement” or “adequate protection”) should be made after the proposed revision to the regulations has been developed.

The rule does not appear to constitute a “major rule” under the Small Business Regulatory Enforcement Fairness Act, inasmuch as it is unlikely that the rule would result in a \$100 million impact upon nuclear power plant licensees. Although the total dollar amount of nuclear power plant decommissioning trust instruments is well in excess of \$100 million, the contemplated rule would be focused on assuring that certain objectives and criteria are met by licensees’ trust agreements. It is not expected that the rule would affect the overall value of the trust funds. If the rule is not a major rule, then the mandated 60-day period prior to effectiveness of major rules is not applicable and the normal 30-day period in the Administrative Procedure Act applies.

The rule would likely require some licensees to revise their decommissioning trust terms and conditions. Accordingly, the change would require OMB review for purposes of the Paperwork Reduction Act.

Decommissioning trust standards are not “technical standards” within the meaning of the National Technology Advancement and Transfer Act of 1995, P.L. 104-113. Accordingly, the provisions of that Act would not apply to this rulemaking and the NRC need not request comments on whether there are “voluntary consensus standards” that should be adopted in lieu of the standards prepared by the agency.

In conclusion, OGC has determined that there are no known bases for legal objection to the contemplated rulemaking at this time.

Category of Rule:

This rulemaking is not expected to have any significant impact on licensees’ costs. Therefore, the staff does not consider it to be a major rule.

Backfit Analysis:

The staff believes that this action may be a backfit. Some licensees will likely need to revise their trust agreements to meet the objectives and criteria in the revised regulations. The staff will determine at a future point whether to treat this backfit as a safety enhancement or as an adequate protection backfit.

Supporting Documents Needed:

A Paperwork Reduction Act clearance package, to be forwarded to the Office of Management and Budget at the time the proposed rule is forwarded to the Federal Register for publication, along with an environmental assessment, and a regulatory analysis will be prepared as part of the rulemaking. Concurrent with the issuance of this rule, we intend to revise Regulatory Guide

1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Power Reactors," to incorporate the recommended terms and conditions that we believe are necessary to fully protect the funds in the decommissioning trusts for their intended purpose.

Issuance by Executive Director for Operations or Commission:

Consistent with the SRM SECY-99-170, the staff intends to present the proposed rule for Commission approval.

Interoffice Management Steering Group:

No interoffice management group is necessary for this rulemaking.

Public/Industry Participation:

Although we expect industry to comment on this rulemaking, we do not anticipate any significant opposition to it. Based on staff experience with the license conditions for amending decommissioning trust fund terms and conditions in the Pilgrim and TMI-1 license transfers, it does not appear that licensees would find the contemplated supplementation of the regulations and the related revisions to the guidance onerous or controversial. We do not currently expect any significant public interest in this rulemaking.

Resources:

NRR Lead:	Brian J. Richter, Senior Cost Analyst Generic Issues, Environmental, Financial and Rulemaking Branch Division of Regulatory Improvement Programs
OGC Contacts:	Stephen H. Lewis and Susan L. Uttal, Senior Attorneys
Technical Contact:	Robert S. Wood, Senior Licensee Financial Policy Advisor Generic Issues, Environmental, Financial and Rulemaking Branch Division of Regulatory Improvement Programs, NRR
Contractual Assistance:	The staff expects to use contractual assistance for the rulemaking and related revisions to guidance. The staff estimates the contractual support level to be in the range of one quarter to one half of a contractor staff-year and cost from \$50,000 to \$100,000. As this rulemaking moves forward, the staff would also evaluate the need for contractual support for the review of trust agreements in unusual cases.

Schedule:

Proposed Rule and Regulatory Guide to EDO	12 months after rulemaking plan is approved
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Clearance package
to OMB

At the same time the proposed rule is forwarded to the Federal Register for publication

Final Rule and Regulatory
Guide to EDO

24 months after rulemaking plan is approved