

## **RULEMAKING ISSUE NOTATION VOTE**

March 23, 2001

SECY-01-0049

FOR: The Commissioners

FROM: William D. Travers  
Executive Director for Operations

SUBJECT: PROPOSED RULE ON DECOMMISSIONING TRUST PROVISIONS

PURPOSE:

To request Commission approval to publish a proposed rule in the *Federal Register* on decommissioning trust agreement requirements.

BACKGROUND:

The staff presented a rulemaking plan (SECY-00-0002) to the Commission on December 30, 1999. The plan discussed two actions relating to amending nuclear power reactor decommissioning trust provisions i.e., to amend 10 CFR 50.75 and revise Regulatory Guide 1.159. Subsequently, in a February 9, 2000, staff requirements memorandum (SRM) to the Executive Director for Operations (Attachment 1), the Commission authorized the staff to proceed with the rulemaking plan. Further, the Commission instructed the staff that "any specific trust fund terms and conditions necessary to protect the funds fully should be set out in the rule itself, not in the regulatory guide. Sample language for trust agreements consistent with the terms and conditions within the rule may be provided within the associated regulatory guide." The attached *Federal Register* notice (FRN) responds to the SRM.

DISCUSSION:

The goal of this rulemaking is to establish objectives and criteria considered essential by the Commission for decommissioning trust fund agreements, applicable to all power reactor licensees, not only to licensees that are transferring their licenses or have undergone or are

Contact:  
Brian Richter  
NRR/DRIP/RGEB  
301-415-1978

undergoing rate deregulation. The objectives and criteria will help ensure that all licensees understand what trust provisions are acceptable to the NRC. NRC will not formally review and approve trust agreements, but must be informed of material changes to trust agreements in biennial decommissioning fund status reports. The oversight process is expected to become more predictable and consistent because the objectives and criteria for decommissioning trust fund agreements will be codified. Similarly, the effectiveness and efficiency of NRC oversight will be enhanced because NRC will be able to reduce the burden of addressing provisions of decommissioning trust agreements on a case-by-case basis. Licensees will be able to use a standard approach in developing their decommissioning trust agreements.

The staff believes that decommissioning trust language can be enhanced to increase assurance of the protection of public health and safety by requiring that the trust agreements (1) take special care to safeguard the trust corpus from investment risks, (2) provide adequate information about the trust to the NRC, and (3) provide safeguards against improper payments from the trust. Further, the staff believes that assurance can be enhanced by specifying essential terms and conditions of the decommissioning trust agreements.

Concurrent with the issuance of the proposed rule, the staff will issue a Draft Guide (DG) for comment DG-1106, "Proposed Revision 1 of Regulatory Guide 1.159, Assuring the Availability of Funds for Decommissioning Nuclear Reactors."

The criteria that have been required as conditions of license transfer in connection with the sale of nuclear power reactors will be incorporated in the proposed new section of 10 CFR 50.75 as conditions for reactor decommissioning trust fund agreements. The conditions are as follows:

- The trust must be an external trust fund held in the United States, established pursuant to a written agreement with an entity that is a State or Federal government agency or whose operations are regulated by a State or Federal agency.
- The trust agreement must prohibit trust investments in securities or other obligations of the reactor owner or its affiliates, successors, or assigns.
- The trust agreement must prohibit investments in any entity owning one or more nuclear power plants, except for investments tied to general market indices or non-nuclear sector mutual funds.
- The trust agreement must stipulate that the agreement cannot be amended in any material respect without 30-days prior written notice to the NRC, and that no amendment to the trust may be made if the trustee receives written notice of objection from the NRC within the notice period.
- The trust agreement must stipulate that the trustee, investment advisor, or anyone else directing investments made by the trust should adhere to a "prudent investor" standard.

- The trust agreement must provide that no disbursements or payments from the trust may be made by the trustee until the trustee has first given the NRC 30-days prior written notice, and that no disbursements or payments from the trust may be made if the trustee receives written notice of objection from the NRC within the notice period (other than for payment of routine administrative expenses).
- The person directing the investment of the funds can not use the licensee or its affiliates or subsidiaries as the investment manager for the funds or accept day-to-day management direction of the funds' investments or direction on individual investments by the funds from the licensee or its affiliates or subsidiaries.

The staff prepared the following proposed revisions to the Draft Regulatory Guide 1.159, Rev. 1 (DG-1106):

- Incorporated material from NUREG-1577, Rev. 1, "Standard Review Plan on Power Reactor Licensee Financial Qualification and Decommissioning Financial Assurance" to provide criteria for determining the meaning of "acceptable to NRC," "under the administrative control of the licensee," and other terms that are currently not defined in the regulatory guide.
- Developed a list of trust provisions and concomitant explanations based on the model trust language in Regulatory Guide 1.159 that are currently not described in the text of the regulatory guide.
- Explained or defined other terms and conditions such as "subsidiaries," "affiliates," "successors," and "assigns." Explained acceptable types of investments tied to market indices or nonnuclear mutual funds.
- Explained a "material" change or amendment to the trust instrument.
- Explained certain concepts. For example, the current regulatory guide suggests that licensees "should," rather than "must" ensure that trust funds meet certain requirements, such as effectiveness, under pertinent State trust law. Thus, the Regulatory Guide reflects the requirements of the proposed rule, where applicable.
- Explained the intent and effect of cross-references to other sources of authority, such as the Internal Revenue Service, the Federal Energy Regulatory Commission (FERC), and State requirements. In some cases, the current regulatory guide suggests that trust funds that meet the requirements of these other sources of authority will be acceptable to NRC. The revised guidance explains that compliance with these other sources of authority will be acceptable within the scope of the topic addressed (e.g., investment criteria or amount of annual payment into the trust fund), but are not measures of the overall acceptability of the trust instrument to NRC. In some cases, compliance with these requirements will not, by itself, constitute acceptability to NRC.

- Gave a clear and consistent description of the investment guidelines for decommissioning trust funds. Current references in the regulatory guide to State laws, FERC requirements, and other standards are somewhat ambiguous.
- Revised the Sample Parent Guarantee to eliminate NRC as a direct beneficiary within the guarantee. This modification reflects current NRC practice.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections. The Committee to Review Generic Requirements (CRGR) has agreed to delay CRGR review of the proposed rule until public comments have been resolved and the final rule is prepared.

RECOMMENDATION:

That the Commission:

1. Approve the notice of proposed rulemaking for publication (Attachment 2).
2. Certify that this rule, if promulgated, will not have a negative economic impact on a substantial number of small entities in order to satisfy requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b).3.

Note:

1. The rulemaking will be published in the *Federal Register* with a 75-day public comment period.
2. A draft regulatory analysis will be available in the Public Document Room (Attachment 3).
3. A draft of Regulatory Guide 1.159, Rev. 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," will be available for public comment (Attachment 4).
4. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the basis for it, as required by the Regulatory Flexibility Act.
5. Copies of the *Federal Register* notice of proposed rulemaking will be distributed to all affected Commission licensees. The notice will be sent to other interested parties upon request.
6. A public announcement will be issued.
7. The appropriate Congressional committees will be informed.
8. This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule is

The Commissioners

-5-

being sent to the Office of Management and Budget for review and approval of the paperwork requirements.

*/RA/*

William D. Travers  
Executive Director  
for Operations

Attachments:

1. SRM dated 02/09/00
2. Federal Register Notice
3. Regulatory Analysis
4. Draft Regulatory Guide 1.159  
Rev. 1

8. This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule is being sent to the Office of Management and Budget for review and approval of the paperwork requirements.

**/RA/**

William D. Travers  
Executive Director  
for Operations

Attachments:

1. SRM dated 02/09/00
2. Federal Register Notice
3. Regulatory Analysis
4. Draft Regulatory Guide 1.159  
Rev. 1

**Package: ML010440114**  
**Commission Paper: ML010440120**  
**SRM: ML003682531**  
**Federal Register Notice: ML010440168**  
**Regulatory Analysis: ML010440204**  
**Draft Regulatory Guide: ML010470183**

\*See previous concurrence

**DOCUMENT NAME:O:\NRR\DRIP\RGE\RS\RICHTER\COMPAP2.WPD**

<b>OFC</b>	*RGE:DRIP	*Tech. Ed.	*RGE:DRIP	*RGE:DRIP	*RGE:DRIP
<b>NAME</b>	BRichter:ayw	PKleene	RWood	BZalcman	MMalloy
<b>DATE</b>	12/15/00	12/05/00	12/18/00	12/21/00	12/19/00
<b>OFC</b>	*RGE:DRIP	*REX:DRIP	*PMAS/PPRB	*DLPM/LPD4	*OCIO
<b>NAME</b>	CCarpenter	TMarsh	MCase	SRichards	BShelton
<b>DATE</b>	01/03/01	02/06/01	01/31/01	02/06/01	01/16/01
<b>OFC</b>	*OCFO	*D:DRIP	*D:DLPM	*ADIP	*D:NMSS
<b>NAME</b>	JFunches	DMatthews	JZwolinski	JJohnson	WKane
<b>DATE</b>	01/23/01	01/08/01	02/08/01	02/12/01	01/23/01
<b>OFC</b>	*OGC	*ADM	*D:NRR	EDO	
<b>NAME</b>	JGray	MLesar	SCollins	WTravers	
<b>DATE</b>	02/07/01	01/22/01	02/15/01	3/23/01	

**OFFICIAL RECORD COPY**