NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150-AG52

Decommissioning Trust Provisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations relating to decommissioning trust provisions for nuclear power plants. The NRC proposes 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 typically exercised such authority. With deregulation, this oversight may cease and the NRC may need to take a more active oversight role.

DATES: Submit comments on the proposed rule and accompanying regulatory guide (75 days after publication in the Federal Register). Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. ATTN. : Rulemakings and Adjudications Staff.

Deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 p.m. on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking website at http://ruleforum.llnl.gov. This site provides the capability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking website, contact Ms. Carol Gallagher, (301) 415-5905 (e-mail: CAG@nrc.gov).

Certain documents related to this rulemaking, including comments received, the draft regulatory analysis and the draft Regulatory Guide, DG-1106, "Proposed Revision 1 of Regulatory Guide 1.159, Assuring the Availability of Funds for Decommissioning Nuclear Reactors," may be examined, and/or copied for a fee, at the NRC's Public Document Room, One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. These same documents also may be viewed and downloaded electronically via the interactive rulemaking website established by NRC for this rulemaking.

Documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at http://www.nrc.gov/NRC/ADAMS/index.html. From this site, the public can gain entry into the NRC's Agency wide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, (301) 415-4737, or by email to pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Brian J. Richter, Office of Nuclear Reactor Regulation, Washington, DC 20555-0001, telephone (301) 415-6835, e-mail bjr@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Until recently, rate regulators have generally exercised direct oversight of the terms and conditions of decommissioning trust agreements. Extensive NRC involvement was not necessary. Because this oversight may cease with deregulation, the NRC believes it needs to take a more active oversight role. 10 CFR 50.75(e) allows sinking fund payment or prepayment into external decommissioning trusts as two of several acceptable financial assurance methods. These methods are used by virtually all nuclear power plant licensees. The NRC 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"), but the NRC's regulations do not explicitly require that specific terms and conditions be included in the decommissioning trust agreements or that the decommissioning trust agreements be in a form acceptable to the NRC. This proposed rule attempts to remedy this situation.

II. Rulemaking Initiation

In a staff requirements memorandum (SRM) dated August 10, 1999, the Commission directed the NRC 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 NRC 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 NRC staff believes that efficiency would be increased if the NRC codified this practice generically in the regulations. Also, based on experience with approving the transfers of the operating licenses of the Three Mile Island Unit 1, Pilgrim, Clinton, Oyster Creek, and other nuclear power stations, the NRC staff believes this rulemaking could expedite similar transfers in the future by providing increased regulatory predictability. The proposed rule and accompanying revisions to regulatory guidance, if adopted, would provide uniform decommissioning trust terms and conditions for all power reactor licensees. The NRC staff issued a rulemaking plan for Decommissioning Trust Provisions, SECY-00-0002, on December 30, 1999. The plan called for amending 10 CFR 50.75 and a revision to Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors." The Commission approved the plan on February 9, 2000, directing the NRC staff to include specific trust fund terms and conditions necessary to protect funds fully in the rule itself and suggested that sample language for trust agreements consistent with the terms and conditions within the rule be provided in the associated regulatory guide.

III. Proposed Action

The NRC is proposing to amend its regulations on decommissioning trust agreements. The proposed action would state that the trust provisions must be acceptable to the NRC and contain general terms and conditions that the NRC believes are required to ensure that funds in the trusts will be available for their intended purpose. To accomplish this objective, the NRC is proposing to modify paragraphs 10 CFR 50.75(e)(1)(i) and (ii), and to add a new paragraph,

10 CFR 50.75(h) to its regulations. The changes in §50.75(e) specify that the trust should be an external trust fund in the United States, established pursuant to a written agreement and with an entity that is a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency. Paragraph 50.75(h) will reference the other paragraphs in § 50.75 where necessary and will discuss the terms and conditions that the NRC believes are necessary to ensure that funds in the trusts will be available for their intended purpose. As an accompaniment to this rulemaking, the NRC intends to update Regulatory Guide 1.159 to include sample trust fund language containing these terms and conditions.

IV. Discussion

The NRC believes that certain decommissioning trust language should be standardized to increase assurance of the protection of public health and safety by requiring that the decommissioning trusts: (1) ensure that special care is taken to safeguard the trust corpus from investment risks, (2) provide adequate information concerning the trust to the NRC, and (3) provide safeguards against improper payments from the trust.

These issues are now of particular interest to the NRC because deregulation of the electric utility industry can potentially lead to several changes in the structure of ownership of nuclear power reactors that could affect reactor decommissioning trust funds. These changes include the following:

- Relaxation or elimination of regulatory oversight by State Public Utility Commissions (PUCs) or the Federal Energy Regulatory Commission (FERC). With utility industry deregulation, State PUCs and/or FERC may no longer have jurisdiction over electricity rates of the kind that they now exercise. Under regulation, utilities are reimbursed for their costs, including nuclear

decommissioning trust fund costs, from approved rates charged ratepayers. If, under deregulation, PUCs and/or FERC no longer approve rates they will also no longer have a basis for establishing stringent accounting and financial controls. Without these controls, PUCs may determine that they have no basis for specifying terms and conditions for nuclear reactor decommissioning trust funds or for monitoring those trust funds.

- Changes in ownership of nuclear generating facilities. Under deregulation, vertically integrated public utilities that generate electricity, own and manage the transmission system, and sell power to the ultimate consumers may gradually become less prevalent. Instead, generating facilities may be separated (i.e., "spun off") within a holding company structure or sold to power-producing companies that sell electricity as a commodity to other companies that service consumers. Currently, certain energy companies that are non-utility suppliers of electricity have announced their intention to acquire nuclear power plants. After these acquisitions, State PUCs and/or FERC may no longer have jurisdiction over the energy company obtaining the reactors. NRC is required to determine the suitability of transferring reactor licenses from the former licensee to a new licensee.

To date, as part of its review of requests for license transfer in connection with the sale of nuclear power reactors, the NRC staff has examined whether reasonable assurance of decommissioning funding will continue to be provided. As a result, the NRC staff is proposing to both codify existing practice and consider enhancements to trust agreements to strengthen these agreements in the future environment of deregulation. As a condition for NRC staff approval, the NRC has required certain clauses (some that parallel criteria in Regulatory Guide 1.159 and others that parallel FERC requirements) to be included in decommissioning trust

funds. The NRC staff has essentially been using these evaluative tests in its review of decommissioning trusts in license transfers involving an unregulated license. In view of deregulation, the NRC staff believes that these tests are also appropriate for evaluating the trust agreements of all NRC power reactor licensees.

This section of the paper presents a set of evaluative tests for assessing whether particular terms and conditions for decommissioning trust funds will help meet NRC's goals of providing "reasonable assurance that adequate funds are available," and that lack of funds will not result in delays in decommissioning creating public health and safety problems.

The following tests do not address the amount of funds in the decommissioning trust, a topic that NRC dealt with in its 1998 rule (63 FR 50465). However, the tests address how to assess the certainty that assured funds will be available. The tests were obtained by reviewing existing requirements of the NRC, the Internal Revenue Service, FERC, and several States that currently apply to decommissioning trusts, as well as non-binding recommendations created by those agencies for those trusts.

Certainty can be evaluated under several basic tests:

Test (1) Is the trust fund valid and enforceable?

The trust instrument should be required to include information that helps to ensure and to demonstrate its validity. A requirement that the instrument be valid under State law, while helpful, does not identify any features of the trust that demonstrate its validity. The trust must be in writing and include the names and signatures of the parties entering into the agreement; their titles; the dates of signing (and the effective date, if different); notarization of the signatures; a description of the basic agreement being entered into; and an affirmative statement that the trustee accepts the appointment.

An important measure of the enforceability of the trust is whether the trustee is clearly able to remain financially solvent and capable of providing the necessary services over the period that the trust is in effect. Factors that address the trustee's reliability include requirements that the trustee be qualified or licensed, and demonstrate that it has a particular level of financial backing. The financial condition of an institutional trustee may be addressed in licensing of the trustee through requirements for specified levels of operating capital or reserves.

Test (2) Do the terms of the instrument ensure that funds can be used only for certain key activities — reactor decommissioning and specified administrative costs of the trust — rather than a broad range of potentially conflicting uses?

This test is to ensure that the trust contains provisions that use of the decommissioning trust funds is reserved for decommissioning and routine and minor administrative expenses.

Test (3) Is the trust protected against events, such as amendment or cancellation, that could lessen NRC's ability to direct the use of necessary funds in a timely manner?

To address this particular problem, the following features of the trust are very important. The trust should contain provisions describing procedures for its amendment and cancellation. NRC approval should be required for both these actions when amendment or cancellation could materially affect timely access to decommissioning funds. Because disagreements over interpretation of the trust could delay payment, the trust should contain rules of interpretation

that specify how disagreements should be resolved. Payment should occur upon the happening of triggering events, even if differences of opinion about the trust have not been resolved.

Test (4) Do the terms of the trust ensure that NRC will receive timely notice of all important information concerning the trust?

Trustees generally prepare annual reports and accounting summaries indicating the sums on hand, investment results, taxes due, and payments into the trust. These reports can be supplied to NRC, upon request, if NRC determines that it has a need for the information. In general, however, NRC determined in its rulemaking in 1998 that biennial reports of any material changes in the trust, plus information on the status of funds in the trust, were sufficient to monitor the trust funds. Thus, no changes to the current frequency of reporting requirements are being proposed.

Test (5) Do the terms of the trust place appropriate limits on the investments that the trustee may make?

This is typically accomplished by specifying allowed or disallowed investments and by defining a “prudent” investment. If the NRC relies upon a “prudent investment” standard adopted by investment specialists (e.g., the Third Restatement of Trusts) it will need to track how that standard is being interpreted in practice. In the past, standards for the definition of prudent investments have evolved over time. For example, increasing use of diversified investment portfolios led to changing standards about whether each investment in a portfolio, rather than the portfolio as a whole, needed to be prudent. Similarly, increasing use of mutual

funds led to relaxation of the prohibition on delegation of investment decisions by a trustee to a fund manager. Because of these and other evolving changes to the then-existing "prudent man" rule, the American Law Institute adopted a new "prudent investor" rule in the Restatement of the Law Third, Trusts in 1992 (Third Restatement). In addition, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Prudent Investor Act in 1994, and numerous States have since adopted the entire Act or amended their State laws to reflect it. However, the rule cannot be said to be completely uniform across the country, and continued evolution can be expected.[1]

In view of the above tests, the NRC believes that assurance can be enhanced by specifying in 10 CFR 50.75 essential terms and conditions of the decommissioning trusts that address the following topics:

- The trust must be an external trust fund held in the United States, established pursuant to a written agreement and with an entity that is any appropriate State or Federal government agency or whose operations are regulated by a State or Federal agency.

- The trust agreement must provide that trust investments are prohibited in securities or other obligations of the reactor owner or its affiliates, successors, or assigns.

[1]See Train, J. and Wolfe, T., Investing and Managing Trusts under the New Prudent Investor Rule, Harvard Business School Press, 1999.

– The trust agreement must provide that trust investments are prohibited 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 provide that the agreement cannot be amended in any material respect without 30-days prior written notification to the NRC, and there is no objection from the NRC within the notice period.

– The trust agreement must provide 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 ordinary administrative expenses).

– The person directing the investment of the funds is prohibited from engaging the licensee or its affiliates or subsidiaries as investment manager for the funds or from accepting 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 NRC currently does not include an extensive set of prescriptive requirements in its regulations for the terms and conditions of reactor decommissioning trusts. Rather, the NRC requires only that the funds be segregated from the licensee's assets and outside the licensee's administrative control. A trust fund used to accomplish these purposes must be acceptable to the NRC. This overall approach gives licensees great flexibility in how they set up a decommissioning trust fund, but it provides little guidance to them concerning what trust provisions NRC will find acceptable. NRC's Standard Review Plan NUREG-1577, Rev. 1 contains references to recent regulatory amendments, as well as useful explanations of certain key regulatory terms, that are not found in the older Regulatory Guide 1.159. However, Regulatory Guide 1.159 contains a model trust that provides an example of the trust terms that NRC finds acceptable. As a result, Regulatory Guide 1.159 is being expanded and updated. The NRC is seeking public comment on the draft revised regulatory guide. Comments may be submitted as indicated under the ADDRESSES heading.

An alternative approach would be for the NRC to specify the precise wording of the trust provisions in its regulations. The NRC does not believe it would be either feasible or desirable to change its overall approach by specifying mandatory wording in regulations for the entire decommissioning trust fund. Based on the wide variety of trust instruments that are currently in use for decommissioning trust funds, it appears that, at a minimum, several of these trust fund templates would be needed (e.g., a model master trust fund agreement; a model for a qualified fund under Internal Revenue Code Section 468A; and a model for a non-qualified fund). Substantial time and considerable costs, both to licensees and to the NRC, would be necessary to fit the disparate trust instruments currently in use into any templates established by NRC. In addition, the requirements in 10 CFR 50.75 would become more prescriptive.

With respect to the issuance of DG-1106, "Proposed Revision 1 of Regulatory Guide 1.159, Assuring the Availability of Funds for Decommissioning Nuclear Reactors," the NRC:

– Incorporates material from NUREG-1577, Rev. 1, “Standard Review Plan on Power Reactor Licensee Financial Qualification and Decommissioning Financial Assurance” that provides criteria for determining the meaning of the terms “acceptable to NRC,” “under the administrative control of the licensee,” and other terms used in the pertinent regulations that are currently not defined in the regulatory guide.

– Develops a list of trust provisions, based on the model trust language contained in Regulatory Guide 1.159 that identifies key provisions in the model language that currently are not described in the text of the regulatory guide. The NRC has also provided explanations of these provisions.

– Provides explanations or definitions of other terms and conditions such as “subsidiaries,” “ affiliates,” “successors,” “assigns,” and similar terms. In addition, an explanation is provided of the types of investments tied to market indices or non-nuclear mutual funds that will be acceptable.

– Provides explanation of what is likely to constitute a “material” change or amendment to the trust instrument.

– Provides explanations of certain concepts that are currently ambiguous. For example, the current regulatory guide suggests that licensees “should” ensure that trust funds meet certain requirements, such as effectiveness under pertinent State trust law. This may be confusing to licensees who believe that trusts must be legally effective.

– Explains the intent and effect of cross references to other sources of authority, such as Internal Revenue Service, 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 that they address (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 be sufficient, by itself, to constitute acceptability to the NRC.

– Provides a clear and consistent description of the investment guidelines pertinent to decommissioning trust funds. Current references in the regulatory guide to State law, FERC requirements, and other standards appear to create some ambiguity concerning the precise limits of the investment guidelines and what they include.

– Revises the Sample Parent Guarantee to eliminate NRC as a direct beneficiary within the guarantee. This modification reflects current NRC practice.

Section-by-Section Analysis

50.75(e)

This subsection would be amended by the addition of a sentence to both paragraphs 50.75(e)(1)(i), which deals with the prepayment method of financial assurance, and

50.75(e)(1)(ii), which deals with the external sinking fund method of financial assurance. The sentences would call for the trust to 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 of Federal agency. These amendments would be used by the NRC staff in evaluating the first test addressed in the Discussion Section relating to trust agreement validity and enforceability.

50.75(h)

This is a new subsection which would implement the following conditions. 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. This is proposed to address the concerns raised in Test 5 relating to the appropriate limits on investments. The investment may, however, be 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 that notice period. This is being proposed to address the lessening of NRC's ability to direct the use of necessary funds in a timely manner as discussed in Test 3. 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 (other than payment of routine administrative expenses) 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 that notice period. This would ensure

that the funds can be used only for certain key activities as identified in Test 2. The person directing the investment of the funds may 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.

V. Finding of No Significant Environmental Impact: Environmental Assessment

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required. The basis for this determination reads as follows: This action is being proposed 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 would be available for their intended purpose. Because of deregulation within the electric power generation industry, the NRC will need to take increased responsibility to oversee decommissioning trust funds as State Public Utility Corporations may no longer oversee these funds.

This revision to the NRC's regulations would provide licensees with a codification of requirements and guidance that will specify more fully the provisions of the decommissioning trust agreements. 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 would be available for their intended purpose. These proposed changes would not lead to any increase in the effect on the environment of the decommissioning activities considered in the final rule published on June 27, 1988 (53 FR

24018) as analyzed in the Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586, August 1988).[2] Therefore, promulgation of this rule would not introduce any impacts on the environment not previously considered by the NRC. The NRC staff is not aware of any other documents related to the environmental impact of this action. The foregoing constitutes the environmental assessment and finding of no significant impact for this proposed rule.

The determination of this environmental assessment is that there would be no significant offsite impact to the public from this action. However, the general public should note that the NRC welcomes public participation. The NRC has also committed to complying with Executive Order (EO) 12898-Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, dated February 11, 1994, in all its actions. Therefore, the NRC has also determined that there are no disproportionate, high, and adverse impacts on minority and low-income populations. In the letter and spirit of EO 12898, the NRC is requesting public comment on any environmental justice considerations or questions that the public thinks may be related to this proposed rule but somehow were not addressed. The NRC uses the following working definition of "environmental justice:" the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture, income, or educational level with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Comments on any aspect of the environmental assessment, including environmental justice, may be submitted to the NRC as indicated under the ADDRESSES heading.

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[2]Copies of NUREG-0586 are available for inspection or copying for a fee from the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20555-0001. Copies may be purchased at current rates from the U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20402-9328 (telephone (202) 512-1800); or from the National Technical Information Service (NTIS) by writing NTIS at 5285 Port Royal Road, Springfield, VA 22161.

The NRC has sent a copy of this proposed rule to every State Liaison Officer and requested their comments on the environmental assessment.

VI. Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the Paper Work Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

The burden to the public for this information collection is estimated to average 80 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the information collection. The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in the proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?

2. Is the estimate of burden accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

Send comments on any aspect of this proposed information collection, including suggestions for reducing the burden, to the Records Management Branch (T-6 E6), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by Internet electronic mail at BJS1@NRC.GOV; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-1202, (3150-XXXX), Office of Management and Budget, Washington, DC 20503.

Comments to OMB on the information collections or on the above issues should be submitted by (insert 30 days after publication in the *Federal Register*). Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

VII. Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

VIII. Regulatory Analysis

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The draft analysis is available for inspection in the NRC Public Document Room,

One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Single copies of the analysis may be obtained from Brian J. Richter, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1878, e-mail bjr@nrc.gov.

The Commission requests public comment on the draft analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the **ADDRESSES** heading.

IX. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing, operation, and decommissioning of nuclear power plants. The companies that own these plants do not fall in the scope of the definition of "small entities" set forth in the NRC's size standards (10 CFR 2.810).

X. Backfit Analysis

The Regulatory Analysis for the proposed rule also constitutes the documentation for the evaluation of backfit requirements, and no separate backfit analysis has been prepared. As defined in 10 CFR 50.109, the backfit rule applies to

> . . . modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures

or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position. . . .

The proposed amendments to NRC's requirements for decommissioning trust provisions of nuclear power plants would 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. Also, as nuclear power reactors have been sold, NRC has stipulated, in connection with license transfers, that certain terms and conditions be added to decommissioning trust funds. These sales may involve transfers of nuclear power reactors from regulated public utilities to firms that are not regulated as public utilities. Because rate regulators may, as a consequence of utility deregulation, cease to exercise direct oversight over decommissioning trusts, the Commission directed the NRC staff to initiate a rulemaking to require that decommissioning trust agreements are in a form acceptable to the NRC.

Although some of the changes to the regulations are reporting requirements, that are not covered by the backfit rule, other elements in the changes are considered backfits because they would modify, supplement, or clarify the regulations with respect to: (1) the fact that the NRC will need to exercise greater oversight of decommissioning trust funds as State Public Utility Commissions reduce their oversight as a result of deregulation within the electric power generation industry, and (2) the NRC exercising more oversight of decommissioning trusts in evaluating license transfer applications. The NRC has concluded on the basis of the documented evaluation required by 10 CFR 50.109(4)(a)(4) and set forth in the regulatory analysis, that the new or modified requirements are necessary to ensure that nuclear power reactor licensees provide for adequate protection of the public health and safety in the face of a

changing competitive and regulatory environment not envisioned when the reactor decommissioning funding regulations were promulgated and that the changes to the regulations are in accord with the common defense and security. Therefore, the NRC has determined to treat this action as an adequate protection backfit under 10 CFR 50.109(a)(4)(ii). Consequently, a backfit analysis is not required and the cost-benefit standards of 10 CFR 50.109(a)(3) do not apply. Further, these changes to the regulations are required to satisfy 10 CFR 50.109(a)(5).

XI. National Technology and Transfer and Advancement Act

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. There are no consensus standards regarding the reporting of status of decommissioning trust funds because of revised trust agreements of nuclear power plant licensees nor relating to license transfers that would apply to the requirements imposed by this rule. Thus, the provisions of this Act do not apply to this rule.

XI. List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Criminal Penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, and Reporting and recordkeeping requirements.

PART 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

AUTHORITY: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955 as amended (42 U.S.C. 2131, 2235), sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80 - 50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In §50.75, the introductory text of paragraph (e)(1) and paragraphs (e)(1)(i) and (e)(1)(ii) would be revised, and a new paragraph (h) would be added to read as follows:

§50.75 Reporting and recordkeeping for decommissioning planning.

* * * * *

(e)(1) Financial assurance is to be provided by the following methods.

(i) Prepayment. Prepayment is the deposit made preceding the start of operation into an account segregated from licensee assets and outside the administrative control of the licensee and its subsidiaries or affiliates of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected. Prepayment may be in the form of a trust, escrow account, Government fund, certificate of deposit, deposit of Government securities or other payment acceptable to the NRC. Such trust, escrow account, Government fund, certificate of deposit, deposit of Government securities, or other payment shall be established pursuant to a written agreement and maintained at all times in the United States with an entity that is an appropriate State or Federal government agency or an entity whose operations in which the prepayment deposit is managed are regulated and examined by a Federal or State agency. A licensee may take credit for projected earnings on the prepaid decommissioning trust funds using up to a 2 percent annual real rate of return from the time of future funds' collection through the projected decommissioning period. This includes the periods of safe storage, final dismantlement, and license termination, if the licensee's rate-setting authority does not authorize the use of another rate. However, actual earnings on existing funds may be used to calculate future funds needs.

(ii) External sinking fund. An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the administrative control of the licensee and its subsidiaries or affiliates in which the total amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected. An external sinking fund may be in the form of a trust, escrow account, Government fund, certificate of deposit, deposit of Government securities, or other payment acceptable to the NRC. Such trust, escrow account, Government fund, certificate of deposit, deposit of Government securities, or other payment shall be established

pursuant to a written agreement and maintained at all times in the United States with an entity that is an appropriate State or Federal government agency or an entity whose operations in which the external sinking fund is managed are regulated and examined by a Federal or State agency. A licensee may take credit for projected earnings on the external sinking funds using up to a 2 percent annual real rate of return from the time of future funds' collection through the decommissioning period. This includes the periods of safe storage, final dismantlement, and license termination, if the licensee's rate-setting authority does not authorize the use of another rate. However, actual earnings on existing funds may be used to calculate future fund needs. A licensee, whose rates for decommissioning costs cover only a portion of such costs, may make use of this method only for that portion of such costs that are collected in one of the manners described in this paragraph, (e)(1)(ii). This method may be used as the exclusive mechanism relied upon for providing financial assurance for decommissioning in the following circumstances:

* * * * *

(h)(1) Licensees using prepayment or an external sinking fund to provide financial assurance shall provide in the terms of the trust, escrow account, government fund, or other account used to segregate and manage the funds that--

(i) The trustee, manager, investment advisor, or other person directing investment of the funds:

(A) Is prohibited from investing the funds in securities or other obligations of the licensee or any other owner or operator of the power reactor or their affiliates, subsidiaries, successors or assignees, or in securities of any other entity owning one or more nuclear power plants, except for investments tied to market indices or non-nuclear sector mutual funds;

(B) Is obligated to ensure that all investments are rated at least “investment grade” or equivalent;

(C) Is obligated at all times to adhere to a prudent investor standard in investing the funds; and

(D) Is prohibited from engaging the licensee or its affiliates or subsidiaries as investment manager for the funds or from accepting 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.

(ii) The trust, escrow account, Government fund, or other account used to segregate and manage the funds may not be amended in any material respect without written notification to the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as applicable, at least 30 working days prior to the proposed effective date of the amendment. The licensee shall provide the text of the proposed amendment and a statement of the reason for the proposed amendment. The trust, escrow account, Government fund, or other account may not be amended if the person responsible for managing the trust, escrow account, Government fund, or other account receives written notice of objection from the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as applicable, within the notice period; and

(iii) No disbursement or payment may be made from the trust, escrow account, Government fund, or other account used to segregate and manage the funds until written notice of the intention to make a disbursement or payment has been given the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as applicable, at least 30 working days prior to the date of the intended disbursement or payment. The disbursement or payment from the trust, escrow account, Government fund or

other account may be made following the 30 day notice period if the person responsible for managing the trust, escrow account, government fund, or other account does not receive written notice of objection from the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as applicable, within the notice period. Disbursements or payments from the trust, escrow account, Government fund, or other account used to segregate and manage the funds, other than for payment of ordinary administrative expenses, are restricted to decommissioning expenses or transfer to another financial assurance method acceptable under paragraph (e) of this section until final decommissioning has been completed.

(2) Licensees using a surety method, insurance, or other guarantee method to provide financial assurance shall provide that the trust established for decommissioning costs to which the surety or insurance is payable contains in its terms the requirements in paragraphs (h)(1)(i), (ii) and (iii) of this section.

Dated in Rockville, Maryland, this day of 2001.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.