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STATE OF ILLINOIS
DEPARTMENT OF NUCLEAR SAFETY

1035 OUTER PARK DRIVE • SPRINGFIELD, ILLINOIS 62704
217-785-9900 • 217-782-6133 (TDD)

George H. Ryan
Governor

Thomas W. Ortciger
Director

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PROPOSED RULE PR 50
(66FR 29244)

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OFFICE OF SECRETARY
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USNRC

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Rulemakings and Adjudications Staff

RE: Proposed Rule
Decommissioning Trust Provisions
66 Federal Register 29244 (May 30, 2001)

Dear Madam Secretary:

The Illinois Department of Nuclear Safety (Department) has reviewed the above-referenced proposed rule and submits these comments. The Department is responsible for implementing Illinois' responsibilities as an Agreement State and additional responsibilities under Memorandums of Understanding with the Nuclear Regulatory Commission (NRC) regarding commercial nuclear power plants in Illinois. The Department has primary State responsibility for formulating a comprehensive emergency preparedness and response plan for any nuclear accident and is also required to train and maintain an emergency response team.

The Department agrees that the NRC may need to take a more active oversight role regarding decommissioning trust agreements for nuclear power plants due to decreased oversight from public utilities commissions as a result of deregulation. Failure to collect and maintain sufficient funds for decommissioning nuclear power plants could have serious adverse consequences both for the public health and safety and state treasuries.

The Department's main concern with the proposed rule is that the rule is poorly written and does not correspond to the Discussion and Section-by-Section Analysis in the Federal Register notice. In particular, it is unclear whether the use of decommissioning trust funds is mandatory under Section 50.75 (e) or other less formal arrangements are also acceptable. We recommend that use of decommissioning trust funds be mandatory

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absent compelling reasons that less formal arrangement can provide equivalent protection. Properly created and maintained trusts provide a considerably higher guarantee of assurance than less formal arrangements.

The Discussion section of the Proposed Rule focuses entirely on decommissioning trusts, and sets forth five tests to assess the certainty that assured funds will be available in decommissioning trusts. Under the first test, NRC addresses the validity of trust instruments and the qualifications of trustees. The Department is in agreement with NRC's analysis. The focus on decommissioning trusts is not, however, reflected in NRC's proposed rule.

The prepayment and external sinking fund methods of financial assurance are specified in section 50.75 (e)(1)(i) and (ii), and the regulatory provisions for the two methods are very similar. Despite the statements in the Discussion section of the Federal Register notice regarding decommissioning trusts (and indeed the title, "Decommissioning Trust Provisions"), it is clear that the proposed rule itself would not require decommissioning trusts. An arrangement that is not a trust will not have a trust instrument and may not entrust decommissioning funds to someone with the fiduciary obligations of a trustee.

Proposed section 50.75 (e)(1)(i) provides, in part, as follows:

> (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.

The Department has no objection to this language, but points out that the rule requires deposit of cash or liquid assets sufficient to pay decommissioning costs. Proposed section 50.75 (e)(1)(i) continues,

> 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.

The Department submits that this language, which we recognize is existing language, makes little sense and should be revised. It does not make sense to state that prepayment "may be in the form of a trust, escrow account [or] Government fund." "Trusts," "escrow accounts" and "Government funds" are simply not forms of

prepayment. The previously quoted sentence specifies the required form of the prepayment--cash or liquid assets. Proposed section 50.75 (e)(1)(i), states further that,

> "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 relating to the prepayment deposit are regulated and examined by a Federal or State agency." 66 Federal Register 29250 (emphasis added).

This provision is inconsistent with its description in the Section-by-Section Analysis, which reads,

> "The sentence 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 [sic] Federal agency." 66 Federal Register 29247 (emphasis added).

The above-quoted language from proposed section 50.75(e)(1)(i) also makes little sense. First, the apparent intent of the rule is to require decommissioning trusts for both prepayments and external sinking funds. Escrow accounts and certificates of deposit are not the same as trusts, although a certificate of deposit could be held within a trust. Second, government funds, certificates of deposit, government securities and other payments are not "established pursuant to a written agreement" but rather are types of funding. The language is confusing, inconsistent with the discussion regarding decommissioning trusts, and should be rewritten to make sense. Third, the Department is unaware of decommissioning funding arrangements utilizing government funds. If such arrangements do not exist and are not expected to be created, reference to government funds should be deleted. If they do exist, the rule should be modified to allow use of government funds provided that they ensure the same level of certainty as decommissioning trusts. Government funds are, however, typically within the control of government bodies and may be used for the purposes allowed by law. Judicial enforcement of amended statutory provisions could be much more problematic than judicial enforcement of a trust agreement.

The foregoing comments also apply to proposed section 50.75(h)(1), which provides, in part, that,

> "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 ...." 66 Federal Register 29250 (emphasis added).

This language is inconsistent with language in the Section-by-Section Analysis, which repeatedly states what the trust agreement must prohibit, stipulate and provide. 66 Federal Register 29247-48. Escrow accounts, government funds and "other accounts" are not trusts and do not have trust agreements. While we can appreciate the reason for allowing use of appropriate government funds for decommissioning if such funds exist (which we have questioned above), escrow accounts and "other accounts" would not appear to provide the same certainty as a decommissioning trust.

If sinking fund payments and prepayments into external decommissioning trusts are used by virtually all nuclear power plant licenses (66 Federal Register 29245), there would appear to be no good reason for confusing language that would allow less certain arrangements to maintain decommissioning funds. NRC should consider whether it is desirable to allow use of escrow accounts, certificates of deposit, government funds, and "other accounts" for reactor decommissioning funds. NRC should eliminate the inconsistencies between the proposed rule and the description of the rule and rewrite provisions of the rule (both existing and proposed) that do not make sense. Finally, appropriate changes should be made to Regulatory Guide 1.159 to correspond to the final rule.

If you have any questions regarding the Department's comments please contact Stephen J. England, the Department's Chief Legal Counsel, at 217/524-5652.

Sincerely,

Thomas W. Ortciger
Director

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