

POLICY ISSUE NOTATION VOTE

May 16, 2002

SECY-02-0085

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: RECENT ISSUES WITH RESPECT TO DECOMMISSIONING FUNDING
ASSURANCE THAT HAVE ARISEN AS PART OF LICENSE TRANSFER
APPLICATIONS AND OTHER LICENSING REQUESTS

PURPOSE:

To discuss the policy issues and provide the Commission with options with respect to the potential withdrawal or non-transfer of decommissioning trust funds in excess of the generic formula amounts in 10 CFR 50.75(c) as part of nuclear power plant license transfers and other licensing actions.

BACKGROUND:

In a staff requirements memorandum dated August 14, 1996, the Commission directed the staff to keep it informed of significant developments related to industry restructuring. This paper discusses the subject issues in compliance with that directive.

In two recent nuclear plant license transfer applications involving plant sales, the sellers broached the possibility of retaining decommissioning trust funds in excess of those required under the generic decommissioning cost formulas in 10 CFR 50.75(c) in order to demonstrate assurance of funds for decommissioning. In one license transfer, the sellers ultimately decided not to retain excess funds because they believed that the policy issue raised might impact the transfer's schedule.

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In the other license transfer, although the sales agreement allowed the seller to retain excess funds, the decommissioning trust did not contain funds in excess of the formula amounts. Thus, all funds were to be transferred at the consummation of the transfer, rendering the issue moot in these instances.

In an action not involving a license transfer, a licensee requested permission to transfer decommissioning funds in excess of the amount determined by the generic formulas in 10 CFR 50.75(c) to a wholly owned subsidiary that would not be a licensee. The purpose of this transfer was to avoid payment of State taxes on the earnings on the decommissioning funds. Because the funds were in excess of the generic formula amounts and because they would still be used solely for decommissioning, the staff approved the licensee's request with conditions to which the licensee has agreed. In a second action, the licensees of a multi-unit site sought an exemption so that they could transfer decommissioning funds in excess of the amounts determined under 10 CFR 50.75 from the decommissioning trust of one unit to the decommissioning trust of another unit, which is slightly underfunded with respect to the terms of the joint owners' agreement, but not with respect to the generic formulas in § 50.75(c). Because the funds were merely being transferred to another decommissioning trust fund and would still be used to decommission one of the units, the staff approved the request. In both of these cases, the approval was documented in a safety evaluation and a letter indicating approval. Another licensee recently requested NRC approval of the withdrawal of decommissioning trust funds that, according to the licensee, had been mistakenly deposited by the licensee for disposal of steam generators that have been replaced at an operating plant. The licensee subsequently withdrew this request.

The staff believes that similar proposals are likely to arise in future license transfers and other licensing actions. A current rulemaking on decommissioning trust provisions is expected to address some, but not all of the funding assurance concerns raised by these proposals.¹ That rule, if adopted, would require advance notification to the NRC of withdrawals from decommissioning trusts; however, it does not address whether licensees may withdraw funds in excess of the generic formula amounts. The staff therefore requests near-term Commission guidance on the issue of withdrawal of decommissioning funds in excess of the amounts required by the formulas in § 50.75(c) for licensing actions that may be requested before the effective date of the final rule or that may not be covered by the provisions of the final rule.

This paper also addresses other decommissioning funding assurance issues that have been raised by licensees and license applicants. These issues have generally emerged as a result of electric generation deregulation and were not fully anticipated by the staff and have not been explicitly addressed in earlier rulemaking and other regulatory initiatives.

¹ On April 20, 2001, the Commission approved issuance of a proposed rule that would, among other things, require advance notice to the NRC of any withdrawals from decommissioning trust funds other than for routine administrative expenses and taxes. The NRC would have 30 days after receipt of a notice to object to a proposed withdrawal. (See "Staff Requirements - SECY-01-0049 - Proposed Rule on Decommissioning Trust Provisions." The proposed rule was published in the *Federal Register* on May 30, 2001.) The staff believes that, in many instances, this rule, if adopted as proposed, could provide a means for ensuring that funds remain in the decommissioning trusts, once deposited. However, the rule is not effective until one year after its publication, so the NRC would lack an explicit process for disapproving withdrawals of decommissioning funds in excess of the formula amounts until then. Also, the rule would not apply in those cases in which the transferor, which would no longer be a NRC licensee after the transfer, withheld decommissioning funds from the transfer and then withdrew the funds. However, if the Commission agrees, the staff could act in those cases through the license transfer approval process to deny the transfer unless all decommissioning funds were transferred to the buyer.

DISCUSSION:

The NRC's decommissioning funding assurance regulations in 10 CFR 50.75 require licensees to demonstrate that they will have, by the time of permanent shutdown, at least the amount of funds for decommissioning specified in the generic formulas in § 50.75(c), either through a prepaid account or, if the licensee's rates are regulated, through an external sinking fund that accumulates over the projected life of the reactor. (NRC regulations also allow the use of third-party guarantees such as a parent company guarantee, accompanied by a financial test, a surety bond, insurance, or some combination of assurance mechanisms. However, almost all power reactor licensees use prepayment or sinking fund external trust accounts.)

In recent license transfers involving sales of entire nuclear plants, all of which have been to non-rate-regulated companies, the sellers have typically transferred the entire amounts accumulated in external decommissioning trusts. Generally, these amounts have exceeded the minimums calculated with the generic formulas in § 50.75(c). Normally, licensees have used site-specific estimates that include decommissioning of non-radiological structures, restoration of a site to "greenfield" condition, interim management and storage of spent fuel, and other activities excluded from the NRC's definition of decommissioning in § 50.2. Even for the radiological part of the plant, site-specific costs are sometimes greater than the generic formula amount. As a result, in most nuclear plant sales so far, decommissioning funds in excess of the minimum NRC formula amounts have been deposited in external trust accounts reserved for decommissioning.

However, the staff expects that applicants may soon propose to transfer only enough funds to meet the NRC formulas and to retain for their own non-decommissioning uses funds exceeding the formula amounts, even though the funds have already been deposited in decommissioning trusts. Once a license transfer is consummated, the funds in excess of the formula amounts would presumably be used by the transferor for whatever purposes (decommissioning or otherwise) it and its rate regulator chose. In many cases, funds have been collected to complete non-radiological decommissioning activities based on State or Federal rate regulatory requirements. Such costs, and the funds reserved for them, are generally beyond the NRC's jurisdiction. However, some licensees have performed site-specific estimates with costs for decommissioning (as defined in § 50.2) that are greater than the generic formula amounts. The staff's primary concern is the possible future withdrawal or non-transfer of funds designated for radiological decommissioning (as defined in § 50.2) that are greater than the generic formula amounts, but which, nevertheless, have been identified in a site-specific study as being necessary to complete radiological decommissioning.

There is no requirement in § 50.75 to maintain more than the minimum amount in a decommissioning trust. There is no mechanism for withdrawing any of the funds accumulated in excess of the formula amounts from a decommissioning fund, but there is no explicit prohibition against it, either. However, in 1988, in conjunction with the promulgation of § 50.75, the Commission considered whether to permit the use of internal reserves as a decommissioning funding method, and expressed its concern that, because the funds are not designated for decommissioning, licensees might be tempted to use the funds for other unrelated purposes (53 FR 24018; June 27, 1988). The Commission determined that the decommissioning funds should only be used for decommissioning, as defined by the NRC. Furthermore, in discussing the minimum amounts required, the Commission has frequently

noted that a licensee may, under § 50.75, certify the minimum amounts *or greater*. In fact, the Commission has, on three occasions, turned down the staff's request to amend § 50.75 to permit licensees to certify a lesser amount if based on site-specific studies.²

The regulations concerning termination of a license in § 50.82 prohibit withdrawal of funds from decommissioning trusts until specified stages of the decommissioning process are met. Paragraph 50.82(a)(8)(i) permits decommissioning funds to be used if the expenses are for legitimate decommissioning activities, would not reduce the value of the decommissioning trust to an amount below that necessary to place and maintain the reactor in safe storage, and would not inhibit the licensee's ability to make up complete funding of any eventual shortfalls in the decommissioning trust. Section 50.82(a)(8)(ii) permits a maximum of three percent to be used for decommissioning planning prior to the submission of a site-specific decommissioning cost estimate.³ In the statement of consideration accompanying the 1996 rulemaking that established this three percent limit, the Commission wrote, "The final rule permits licensees to withdraw up to three percent of the generic formula amount for planning at any time during the decommissioning planning process, including planning that occurs while a plant is still operating." (Emphasis added; see 61 FR 39284; July 29, 1996)

Although this statement clarifies that withdrawals are allowable only up to three percent of the formula amounts, and is applicable to those withdrawals made by licensees of operating plants, the statement does not appear to explicitly prohibit those situations in which funds in excess of the formula amounts are kept by a licensee selling its plant and are not transferred as part of a plant sale.⁴ In other words, it can be argued that such a situation does not constitute a "withdrawal" for the purposes of § 50.82. Nevertheless, because of the statement of consideration cited above, and because of the provisions in § 50.75 that provide that licensees may certify to more, but not less than the generic formula amounts, the staff believes that the Commission intended that funds designated for radiological decommissioning, once deposited in external trust accounts, must remain in the trusts and cannot be withdrawn (or retained) by licensees or used for other purposes, even if such funds are in excess of the formula amounts. Stated another way, the generic formula amounts in § 50.75(c) are to be considered as a

² A summary of the staff's previous rulemaking proposals with respect to decommissioning costs is contained in a memorandum from William D. Travers to Commissioners Dicus, Diaz, McGaffigan, and Merrifield, dated October 6, 1999 ("Recent Developments With Respect to a Proposed Rule on Nuclear Power Reactor Decommissioning Cost"). As indicated in that memorandum, the staff intends to continue to accumulate cost data from plants that are undergoing decommissioning. However, since the data will not likely be available for several years, the staff intends to defer rulemaking either to revise the generic formulas in § 50.75(c) or to rely only on site-specific estimates (for which the data would provide a basis for staff evaluation). In the interim, informal feedback from the nuclear power industry and from the staff's review of the biennial decommissioning fund status reports suggests that the generic formulas continue to estimate radiological decommissioning costs with reasonable accuracy, although site-specific factors or unpredictable developments, such as technological improvements or a lack of low-level waste disposal capacity, could increase or decrease future decommissioning costs.

³ In addition to the 3 percent of the generic formula amounts allowed to be withdrawn for decommissioning planning, another 20 percent may be withdrawn 90 days after the licensee submits its post-shutdown decommissioning activities report (PSDAR). The staff has assumed that the 3 percent for planning may be withdrawn at any time, including before permanent cessation of operations.

⁴ In the recent license transfer of Indian Point 3 and FitzPatrick, the seller asked to retain decommissioning trusts, ostensibly for tax reasons after it had sold its nuclear plant and was no longer an NRC licensee. The NRC acceded to this request after conditioning the sale to ensure that funds held by the seller would remain available for decommissioning. Future requests may propose the retention and use of "excess" funds by former licensees for non-decommissioning purposes.

minimum or a “floor,” with the Commission recognizing, through acceptance of higher, site-specific estimates that additional funds may be needed.

Notwithstanding the staff’s view, because of the potential ambiguities in current decommissioning regulations, the staff believes it would be beneficial for the Commission to clarify when and to what extent withdrawals may be made or funds retained by a former licensee.

Options

In view of these concerns, the staff has developed three options for the Commission’s consideration. Options 2(A) and 3(A); and 2(B) and 3(B), respectively, are closely related and, in the staff’s view, can be used in sequence together.

Option 1

The Commission allows all withdrawals from decommissioning trusts whose funds exceed the amounts currently required under the generic formulas in § 50.75. (The staff believes that it is possible to distinguish between direct or indirect withdrawals of funds as a result of a license transfer action and withdrawals by licensees not involved in transfers.)

Pros

1. Option 1 can be read as being consistent with the literal requirements of § 50.82.
2. Option 1 would not unnecessarily burden licensees or their rate regulators with costs for retaining funds in excess of the NRC formula amounts.
3. Even if the generic formulas were later found to underestimate decommissioning costs, additional conservatism is contained in 10 CFR 50.75 -- that is, the regulations require licensees to fully fund decommissioning before they expect to permanently cease operations. (As stated previously, a rate-regulated licensee has until permanent shutdown to fully accumulate estimated decommissioning funds. A non-rate-regulated licensee is required to have fully funded or otherwise guaranteed decommissioning when its rates ceased to be regulated.) Five years before expected permanent shutdown, licensees are required to consider site-specific factors in making up any shortfalls in decommissioning funds by the time operations cease. (If a licensee permanently ceases operations prematurely -- that is, before the end of its expected 40-year life -- any funding shortfalls are to be addressed on a case-by-case basis pursuant to § 50.82(c).) If a shortfall subsequently develops because the generic formulas underestimate decommissioning costs, the fund has up to 60 years to accrue additional funds through deposits and earnings (or earnings alone) to complete decommissioning. This assumes that trust fund earnings will exceed the rate of escalation in decommissioning costs. To date, there has been no indication that this assumption is wrong.

Cons

1. If the generic formulas turn out to have underestimated decommissioning costs, withdrawals could reduce the cushion that would otherwise be available to meet cost increases. Although the staff is reasonably confident of the accuracy of the generic formulas, some future event could cause decommissioning costs to increase unexpectedly, which could lead to a lack of funds to complete decommissioning.
2. If licensees filed for bankruptcy protection, bankruptcy courts might more readily allow the withdrawal of “excess” decommissioning trust funds to pay the non-decommissioning-related claims of creditors if the Commission issues guidance supporting this interpretation.

Option 2(A)

The Commission approves staff issuance of a regulatory information summary (RIS) and revised guidance that would state that, based on the statement of consideration for the 1996 rule cited above, the Commission’s intent has been not to allow any withdrawals from or non-transfer of trust funds when the withdrawal would cause the fund to drop below the amount of the generic formulas in § 50.75(c) by the time of permanent cessation of operation. (Withdrawals would be allowed for routine tax and administrative expenses and the three percent allowed for decommissioning planning in § 50.82(a)(8)(ii).) In addition, when trust funds exceed the amounts calculated from the generic formulas because they are based on site-specific decommissioning cost estimates, the RIS would also clarify that NRC regulations prohibit withdrawals or non-transfer of any funds needed to meet the higher site-specific estimates. The RIS would further distinguish between funds reserved for decommissioning as defined by the NRC and funds clearly earmarked by a licensee and its rate regulator for decommissioning activities not included in the NRC’s definition. Thus, withdrawals of funds would not be allowed when the funds exceed the generic formula amounts but are based on a site-specific cost estimate tied to activities included in the NRC’s definition of decommissioning. (Because many licensees hold funds in decommissioning trusts both for “decommissioning” costs as defined by the NRC in § 50.2 and for other decommissioning-related activities such as spent fuel management and “greenfield” costs, the staff believes that expenses not encompassed by the NRC’s definition of “decommissioning” must be specifically earmarked before withdrawals can be allowed, so that the staff can accurately determine the amounts left in the trust fund for “decommissioning.”) To clarify such distinctions, the staff would issue revised guidance to ensure that licensees understand that amounts in their decommissioning trusts, including any sub-accounts under the trusts, should be clearly designated. Although the existing guidance contains this information, the staff will revise guidance to emphasize the importance of clearly identifying spending categories. Any intended withdrawal (other than for routine tax and administrative expenses and for decommissioning planning as described above) should require written notification to the NRC at least 30 working days prior to the intended withdrawal. If the person responsible for managing the funds receives a written objection from the NRC during that time period, the withdrawal would not be allowed.

Option 2(B)

In addition to the disallowance of withdrawals covered under Option 2(A), the RIS would also clarify that the NRC asserts jurisdiction over withdrawals of funds, even if such funds were specifically reserved for decommissioning activities beyond the NRC's definition of decommissioning. The RIS would also distinguish funds deposited to cover, and specifically earmarked for, interim spent fuel management costs, which are excluded from the NRC's definition of decommissioning but for which general provisions for funding assurance exist in § 50.54(bb).

Pros

1. Funds in trust accounts, including those exceeding the generic formula amounts but tied to the NRC's definition of "decommissioning," would clearly be available for decommissioning. If the withdrawal or non-transfer of any trust funds, including those reserved for non-NRC-defined decommissioning activities were prohibited, all funds, once deposited in a decommissioning trust, would be available for NRC-defined decommissioning before any other purpose. An additional margin of certainty would be provided if future decommissioning cost estimates unexpectedly increase.
2. Using the process established by the decommissioning trust rulemaking, assuming the NRC issues it as a final rule essentially as proposed with respect to this issue, would avoid additional rulemaking effort.

Cons

1. An interpretation of the regulations that could be construed by some to go beyond their apparent literal wording might lead to legal challenges, particularly if Option 2(B) were chosen. As noted above, distinguishing between NRC-defined decommissioning and other decommissioning costs mandated by rate regulators should help to minimize any challenges.
2. Some licensees might reduce, or their rate regulators might allow the reduction of, future decommissioning collections to compensate for the inaccessibility of funds already in decommissioning trusts. Alternatively, licensees might designate all excess decommissioning funds for non-radiological decommissioning in order to circumvent NRC policy on this issue. Thus, the overall amount of decommissioning funds over the long term might not change with Options 2(A) or 2(B).

Option 3(A)

The Commission approves staff initiation of rulemaking that would explicitly prohibit any withdrawals from or non-transfer of trust funds when the withdrawal would cause the fund to drop below the amount of the generic formulas in § 50.75(c) by the time of permanent cessation of operation. (Withdrawals would be allowed for routine tax and administrative expenses and the three percent allowed for decommissioning planning in § 50.82(a)(8)(ii).) In addition, when trust funds exceed the amounts calculated from the generic formulas because they are based on site-specific decommissioning cost estimates, the rulemaking would also clarify that

withdrawal or non-transfer of any funds needed to meet the higher site-specific estimates would be prohibited. The rulemaking would further distinguish between funds reserved for decommissioning as defined by the NRC and funds clearly earmarked by a licensee and its rate regulator for decommissioning activities not included in the NRC's definition. Thus, withdrawals of funds would not be allowed when the funds exceed the generic formula amounts but are based on a site-specific cost estimate tied to activities included in the NRC's definition of decommissioning. (Because many licensees hold funds in decommissioning trusts both for "decommissioning" costs as defined by the NRC in § 50.2 and for other decommissioning-related activities such as spent fuel management and "greenfield" costs, the staff believes that expenses not encompassed by the NRC's definition of "decommissioning" must be specifically earmarked before withdrawals can be allowed, so that the staff can accurately determine the amounts left in the trust fund for "decommissioning.") To clarify such distinctions, the staff would issue revised guidance to ensure that licensees understand that amounts in their decommissioning trusts, including any sub-accounts under the trusts, should be clearly designated. Although the existing guidance contains this information, the staff will revise guidance to emphasize the importance of clearly identifying spending categories. Any intended withdrawal (other than for routine tax and administrative expenses and for decommissioning planning as described above) should require written notification to the NRC at least 30 working days prior to the intended withdrawal. If the person responsible for managing the funds receives a written objection from the NRC during that time period, the withdrawal would not be allowed.

Option 3(B)

In addition to rulemaking to address the disallowance of withdrawals covered under Option 3(A), rulemaking under this option would also clarify that the NRC asserts jurisdiction over withdrawals of funds, even if such funds were specifically reserved for decommissioning activities beyond the NRC's definition of decommissioning. The rulemaking would also distinguish between funds deposited to cover, and specifically earmarked for, interim spent fuel management costs, which are excluded from the NRC's definition of decommissioning but for which general provisions for funding assurance exist in § 50.54(bb).

Pros

1. See Pro 1 under Options 2(A) and 2(B).
2. A rulemaking would explicitly clarify Commission policy in this area and would provide for the greatest stakeholder involvement.

Cons

1. See Con 2 under Options 2(A) and 2(B).
2. See Con 3 under Options 2(A) and 2(B).
3. Rulemaking effort might displace other work.
4. Rulemaking would take about 2 years from start to finish, and would thus delay clarification of Commission policy in this area.

Summary of Issue

On balance, the staff concludes that Option 2(A) should be pursued as an interim response to current and expected future requests to make certain withdrawals from decommissioning trusts. Over the longer term, the staff believes that rulemaking, as proposed in Option 3(A), should be pursued in order to provide a more complete regulatory basis for the Commission's policies in this area. The staff believes that there is an insufficient regulatory basis to assert jurisdiction over funds that are not included in the definition of "decommissioning" in § 50.2 and thus does not recommend adoption of Options 2(B) and 3(B). For either Option 1 or Option 2(A) and 2(B), based on the direction that the Commission gives the staff, the staff will prepare a regulatory information summary (RIS) to inform licensees of the Commission's policies in this area. If the Commission selects Options 3(A) or 3(B), the staff will also prepare a rulemaking plan. The staff will also update guidance, as appropriate.

The staff believes that this dual approach allows the most efficient and effective use of NRC resources while at the same time ensuring the adequate protection of public health and safety. Further, if withdrawals only of funds reserved for NRC-defined decommissioning activities (or are otherwise not designated for non-NRC-defined decommissioning) are prohibited, the impact on licensees should be minimal. Notwithstanding the lack of an explicit prohibition in the regulations, as described earlier in this paper it appears to have been the intent of the Commission, as reflected in the statement of consideration of the 1996 final rule, that licensees of operating plants cannot withdraw funds in excess of the generic formula amounts.

Unless directed otherwise by the Commission, with respect to any subsequent licensee requests to withdraw funds ostensibly deposited in error for disposal of previously replaced steam generators or other components or structures, the staff concludes that such withdrawals would be consistent with the underlying purposes of the existing rule as reflected in the statement of considerations as long as such withdrawals would not cause decommissioning trust funds to drop below either the generic formula amounts or NRC-defined decommissioning costs identified in a site-specific study. No funds would be "lost" to decommissioning. In making such determinations, the staff would also consider whether the requestor would remain an "electric utility" as defined in § 50.2.

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.

RECOMMENDATION:

That the Commission:

1. Select Options 2(A) and 3(A).
2. Note that, depending on the option(s) that the Commission chooses and the direction it gives to the staff, the staff will issue a RIS, revise guidance, as appropriate, and prepare a rulemaking plan.

The Commissioners

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/RA by William F. Kane Acting For/

William D. Travers
Executive Director for Operations

not recommend adoption of Options 2(B) and 3(B). For either Option 1 or Option 2(A) and 2(B), based on the direction that the Commission gives the staff, the staff will prepare a regulatory information summary (RIS) to inform licensees of the Commission's policies in this area. If the Commission selects Options 3(A) or 3(B), the staff will also prepare a rulemaking plan. The staff will also update guidance, as appropriate.

The staff believes that this dual approach allows the most efficient and effective use of NRC resources while at the same time ensuring the adequate protection of public health and safety. Further, if withdrawals only of funds reserved for NRC-defined decommissioning activities (or are otherwise not designated for non-NRC-defined decommissioning) are prohibited, the impact on licensees should be minimal. Notwithstanding the lack of an explicit prohibition in the regulations, as described earlier in this paper it appears to have been the intent of the Commission, as reflected in the statement of consideration of the 1996 final rule, that licensees of operating plants cannot withdraw funds in excess of the generic formula amounts.

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RECOMMENDATION:

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1. Select Options 2(A) and 3(A).
2. Note that, depending on the option(s) that the Commission chooses and the direction it gives to the staff, the staff will issue a RIS, revise guidance, as appropriate, and prepare a rulemaking plan.

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