

RULEMAKING ISSUE AFFIRMATION

May 15, 2002

SECY-02-0084

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS

PURPOSE:

To request Commission approval to publish in the *Federal Register* a final rule on decommissioning trust provisions.

BACKGROUND:

The staff submitted "Proposed Rule on Decommissioning Trust Provisions," (SECY-01-0049) to the Commission on March 23, 2001. The Commission issued a staff requirements memorandum (SRM) on April 20, 2001, approving publication of the proposed rule. The proposed rule was published in the *Federal Register* on May 30, 2001 (66 FR 29244). The staff issued simultaneously DG-1106, "Proposed Revision 1 of Regulatory Guide 1.159, Assuring the Availability of Funds for Decommissioning Nuclear Reactors." The attached final rule has been revised in response to the comments received on the proposed rule. It contains the final amendments and will be published in the *Federal Register*. Also attached is Regulatory Guide 1.159, Revision 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors." The revision reflects comments received on the draft regulatory guide.

DISCUSSION:

The proposed rule was written to establish objectives and criteria considered essential by the Commission for decommissioning trust fund agreements. The proposed rule applied to all

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power reactor licensees, not just to licensees that are transferring their licenses or have undergone or are undergoing rate deregulation.

A total of 36 letters were received from 34 commenters. The letters contained approximately 280 comments on the proposed rule and draft regulatory guide. Seventeen of the commenters were licensees, 11 were representatives of utility groups (some of whose members are licensees), 3 were State agencies or commissions, 1 was the National Association of Regulatory Utility Commissioners (NARUC), and 2 were investment management companies. About half of the comments were unique. The comments were fairly equally divided between the proposed rule and the draft regulatory guide.

Several of the commenters supported the NRC's goal of maintaining regulatory oversight of nuclear decommissioning trust funds, where necessary, and agreed that the NRC may need to be more active in its oversight of decommissioning trust agreements. Two other commenters commended the NRC for undertaking this rulemaking and fully supported the NRC's efforts to ensure that a utility industry made more efficient through competition remains a safe and reliable industry. Another commenter agreed with the NRC's concern that the decommissioning trust corpus be safeguarded from investment risks. The Nuclear Energy Institute (NEI) said that "Upon taking into account the comments and suggestions for improvement . . . , NRC's proposed rulemaking and proposed guidance likely will enhance the assurance for decommissioning funding already provided by the industry and should improve public confidence that all nuclear power reactors will be properly decommissioned." Ten commenters endorsed NEI's comments and one also endorsed the comments submitted by Winston & Strawn on behalf of the Utility Decommissioning Group and the Tennessee Valley Authority. One licensee stated that NRC should withdraw the notice of proposed rulemaking because existing regulations from NRC, the Internal Revenue Service, and the State regulatory agencies are more than adequate to protect the public health and safety. In this licensee's view, the proposed rulemaking is duplicative of existing requirements, would add unnecessary regulatory burden without a corresponding safety benefit, and is inconsistent with NRC's regulatory burden reduction initiative. Another commenter expressed similar views and stated that the proposed rule may eliminate some of the flexibility of the existing rule. Yet another commenter opposing the rule said if the NRC intends to continue to impose decommissioning funding conditions in individual licenses, there is no need for the rule.

Most of the comments fit under the categories of applicability of the rule, notifications and disbursements, and restrictions on funds. The restrictions-on-funds category has eight subcategories: "investment grade," investment in nuclear power reactor licensees, fund management, credit for decommissioning trust earnings, modifications to trusts, foreign trustees, nonradiological decommissioning funds, and implementation of the rule.

An often repeated comment was that the proposed rules would apply to all licensees, even if they are under Federal Energy Regulatory Commission (FERC) or State regulation. The NRC

staff has reconsidered its earlier proposal and now agrees that the proposed rule may be burdensome for licensees who are still regulated, because NRC regulations would not significantly improve the public health and safety. As a result, the final rule will only apply to licensees that are no longer regulated by State Public Utility Commissions (PUCs) or FERC. However, all power reactor licensees, both rate regulated and otherwise, will be required to notify the NRC in advance of decommissioning trust withdrawals if these withdrawals are made before permanent cessation of operations.

The section of the proposed rule on notifying the NRC of disbursements from a trust brought the most comments (14). The commenters expressed concern that the NRC would impose requirements on licensees who are decommissioning under 10 CFR 50.82. This issue was resolved by explicitly stating in the rule that the rule does not apply to licensees whose plants are in decommissioning pursuant to 10 CFR 50.82. In a related matter several commenters wanted clarification on the use of the phrases “ordinary expenses” and “ordinary administrative expenses” as they relate to notification requirements. This was resolved by using the definition of such expenses in the Internal Revenue Service Code.

As mentioned above, various comments pertained to restrictions on funds. These comments were grouped into the eight subcategories identified above. The issue receiving the greatest number of comments under the fund restriction category is the proposed rule’s use of the term “investment grade.” Twelve commenters stated that NRC’s use of the term is problematic as it is not common or well-defined and that the commonly used “prudent investor standard” should be used in its place. Further, FERC already uses the “prudent investor standard” and defines it. For these reasons, the final rule uses “prudent investor standard” instead of the term “investment grade.”

Eight commenters stated that the final rule should clarify a “material” modification to a trust. A material modification requires a 30-day prior notification to the NRC. Examples of actions considered material and immaterial by NRC are provided in the statement of considerations for the final rule and the final revised regulatory guide.

Finally, 11 commenters called for transition plans from the existing provisions to the new requirements. Commenters stated that, because a small number of trustees act for a large number of licensees and their trusts, the normal implementation period should be extended to allow sufficient time to review and conform trust documents as necessary to comply with the rule. The rule now calls for an implementation period of 1 year from the date of publication of the final rule.

In response to a comment, the staff has revised §72.30(c)(5) in the final rule to make it consistent with §50.75(e) and (h). The NRC has also updated Regulatory Guide 1.159 to include sample trust fund language containing these terms and conditions.

RESOURCES:

After the rule is implemented, it is estimated to require between 60 to 80 NRC staff-hours within the following year. There should be no additional NRC staff costs.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has no objection to the resource estimates contained in this paper. The Chief Information Officer concurs that there will be no information technology impacts. The Advisory Committee on Reactor Safeguards decided not to review the rule and has no objection to publishing it in the *Federal Register*.

RECOMMENDATIONS:

That the Commission:

1. Approve, the final amendments to 10 CFR Parts 50 and 72 for publication in the *Federal Register* (Attachment 1).
2. Certify that this rule, if promulgated, will have no 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 that
 - a. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the reasons for it as required by the Regulatory Flexibility Act.
 - b. The appropriate congressional committees will be informed.
 - c. A public announcement will be issued.
 - d. A regulatory analysis (Attachment 2) will be available in the Public Document Room.
 - e. This rule amends information collection requirements that are subject to the Paperwork 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 paperwork requirements.

- f. It is estimated that this action would result in an additional one-time NRC burden of no more than 80 staff hours.
- g. Upon Commission approval of the publication of the final rule, the staff intends to issue "Assuring Availability of Funds for Decommissioning Nuclear Reactors," Regulatory Guide 1.159, Revision 1 (Attachment 3).

/RA/

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Attachments:

1. Federal Register Notice
2. Regulatory Analysis
3. Regulatory Guide 1.159, Rev. 1

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Commission Paper:ML020910202

Attachment 1:ML020910219

Attachment 2:ML020910259

Attachment 3:ML020910282

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* See Previous Concurrence

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