



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

OFFICE OF THE  
SECRETARY

November 21, 2002

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0084

TITLE: FINAL RULE ON DECOMMISSIONING TRUST  
PROVISIONS

The Commission (with all Commissioners agreeing) approved the final rule as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of November 21, 2002.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook".

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-02-0084

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MESERVE	X				X	7/22/02
COMR. DICUS	X				X	8/2/02
COMR. DIAZ	X					11/1/02
COMR. McGAFFIGAN	X				X	11/13/02
COMR. MERRIFIELD	X				X	10/29/02

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the final rule as noted in an Affirmation Session and reflected in the SRM issued on November 21, 2002.

AFFIRMATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook  
Secretary of the Commission

FROM: CHAIRMAN MESERVE

SUBJECT: SECY-02-0084 - FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS

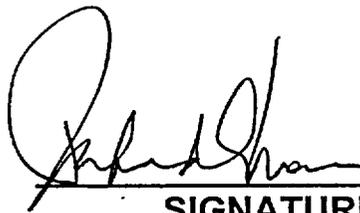
Approved  X w/ edits  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

**COMMENTS:**

I approve the final rule with the attached edits. The revisions to 10 C.F.R. § 50.75 should provide the necessary assurances that funds set aside for the decommissioning process will be available when necessary.

The text of the Federal Register notice includes a discussion at page 30 that bears on distributions from trusts, which is the subject of Secy-02-0085. I have inserted some text to reflect my vote on Secy-02-0085, but recognize that this text may need to be modified once voting is completed on this paper.

  
\_\_\_\_\_  
SIGNATURE

July 22, 2002  
\_\_\_\_\_  
DATE

Entered on "AS" Yes  X  No \_\_\_\_\_

downloaded electronically via the interactive rulemaking website established by NRC for this rulemaking at <http://ruleforum.llnl.gov>.

### 1. General comments on the proposed action

#### Comments:

Several of the commenters supported the NRC's goal to maintain regulatory oversight over nuclear decommissioning trust funds, where necessary, and agreed that the NRC may need to take a more active oversight role regarding 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. Similarly, one commenter said it understands and agrees with the NRC's concern that the decommissioning trust corpus be safeguarded from investment risks. The Nuclear Energy Institute (NEI) stated 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. One of those commenters also endorsed the comments submitted by Winston & Strawn on behalf of the Utility Decommissioning Group and the Tennessee Valley Authority. However, one licensee stated that the NRC should withdraw the notice of proposed rulemaking because existing regulations from the NRC, the Internal Revenue Service (IRS), and the State regulatory agencies are more than adequate to protect the public health and safety. In their view, the proposed rulemaking is duplicative of existing requirements and would add unnecessary regulatory burden without a corresponding safety benefit.

This licensee also believes that the proposed rule is inconsistent with the 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 that if the NRC intends to continue to impose decommissioning funding conditions in individual licenses, there is no need for the rule.

Five commenters noted that given the wide variety of trust instruments in effect, it is fitting that the NRC not develop a uniform trust fund agreement that would be mandatory for all licensees. Another commenter stated that the NRC's proposed approach in adopting standard rules regarding decommissioning trust funds is superior to the existing NRC practice of applying specific license conditions on a case-by-case basis.

A commenter stated that NRC's discussion of Test 4 in the statement of considerations for the proposed rule describes that licensees "generally" prepare annual reports, etc. and does not specifically list annual calculation of the estimated cost as required by 10 CFR 50.75(b)(2). Further, the Test 4 description specifies that "...these reports can be supplied to the NRC upon request..." This availability upon request and the biennial reporting appear sufficient. The Test 4 discussion should justify removing 10 CFR 50.75(b)(2), or an explanation of the benefit of annual adjustments to the calculation vs. the biennial frequency of the funding status should be provided. ✓

**Response:**

With respect to the comments calling for the NRC to withdraw the rule, the Commission does not intend to do so. The Commission's position, as stated in the proposed rule (66 FR 29244) is that, "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 ✓

other binding arrangements governing" so that it would read: "Licensees using prepayment or an external sinking fund to provide financial assurance shall provide in the terms of, investment guidelines for, or other binding arrangements governing, the trust, escrow account, Government fund, or other account used to segregate and manage the funds . . ."

Another commenter stated that it is not clear whether provisions in the proposed rule will supersede license conditions previously imposed in license transfer proceedings, or whether licensees with existing license conditions governing decommissioning trusts must apply to amend their licenses and whether these amendment applications would then be subject to hearings. The inference is that the proposed rule would be applicable to all existing and future reactors, as the rule is silent on the matter.

**Response:**

The NRC acknowledges that the proposed rule could be burdensome for licensees still regulated by PUCs and FERC, with no significant improvement in the public health and safety. Therefore, the final rule will only apply to licensees that are no longer regulated by State PUCs or FERC, with the exception that 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 reason for this is that some licensees, even though continuing to be rate regulated, may make withdrawals without their rate regulator's knowledge. Given that any such withdrawals before permanent cessation of operations are likely to be very rare, the NRC believes that this requirement <sup>should</sup> ~~would~~ not be burdensome. The NRC also excludes from this requirement any withdrawals from one decommissioning fund that are immediately deposited in another decommissioning trust fund either for one unit or between units (e.g., from a non-qualified to a qualified trust fund). This change would essentially eliminate the potential for conflicts of standards between NRC, and

10 CFR 50.75(h)(4) should be modified so that subsection (h) would not apply to any plant which already has an NRC-approved decommissioning plan. Another commenter stated that licensees who have docketed a PSDAR and a site-specific cost estimate under 10 CFR 50.82 should be exempt from the reporting requirements and adjustments to cost estimates of 10 CFR 50.75.

Several commenters noted that "ordinary expenses" or "ordinary administrative expenses" should be defined, and that those paid periodically from the trust should be exempt from the 30-day disbursement notification. Or, as a commenter noted, the NRC should clarify which specific expenses paid from a fund would require NRC notification. One commenter stated the definition should be consistent with Internal Revenue Code section 468A(e)(4)(B) where expenses are defined as "administrative costs (including taxes) and other incidental expenses of the fund (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the fund."

**Response:**

With respect to the comments on the 30-day notification for disbursements, the NRC needs to have this information in a timely fashion in order to effectively monitor licensees, especially when a licensee is not in decommissioning under the PSDAR or an approved license termination plan under 10 CFR 50.82.

<sup>Or</sup> Another concern with the 30-day disbursement notice was the problems it would potentially cause for licensees during the process of decommissioning or decommissioning planning. The proposed rule did not explicitly indicate that licensees who have complied with 10 CFR 50.82(a)(4) would be exempt from restrictions on disbursements. The NRC agrees with this comment and this change has been made in the final rule because, as a commenter

noted, the proposed requirement would not add any assurances that funding is available and would duplicate notification requirements at § 50.82.

*Other*  
The next comments focused on the need for definitions of “ordinary expenses” and “ordinary administrative expenses.” The NRC, as a matter of consistency and expediency, decided to make use of the IRS Code section 468A(e)(4)(B) definition of expenses where they are defined as “administrative costs (including taxes) and other incidental expenses of the fund (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the fund.”

For clarification and consistency, the final rule includes the words of Section 2.2.2.4 of DG-1106 in 10 CFR 50.75(h)(1)(iii), as suggested by one commenter. Further, the rule language has been changed throughout from “30 days” to “30 working days.”

#### 4. Restrictions on Funds

##### A. “Investment Grade.”

###### Comments:

Another major area of concern for twelve commenters in the proposed 10 CFR 50.75(h)(1)(i)(B) was the requirement that the trust hold only “investment grade” securities. As one commenter noted, a requirement of “investment grade” investments in the trust is unnecessary because of applicable standards under State law, the proposed 10 CFR 50.75(h)(1)(i)(C), and the “prudent investor” standard used and defined by the FERC. Adoption of a different standard by another regulatory agency would be problematic. The “prudent investor” standard should apply in situations where other regulators have not mandated an investment standard or specific investment restrictions to eliminate the possibility of conflicts between NRC and other requirements. Also, this requirement goes beyond conditions imposed in license transfer orders. Another commenter suggests that the

One final related comment was that licensees, and trustees in the absence of directions from licensees, should be authorized to prudently allocate trust assets across the entire risk/return spectrum. Prudent diversification can be beneficial for all stakeholders.

**Response:**

The proposed prohibition of ownership in securities of other nuclear power reactor licensees was instituted to forestall members of the nuclear industry from solely investing their nuclear decommissioning funds in each other's securities. Contrary to one commenter's *assertion*

*position*

~~that~~ the prohibition implies that nuclear power is a risky investment and possibly out of the NRC's jurisdiction, the NRC believes that this requirement is consistent with fund diversification.

The NRC agrees with the suggestion that the requirement permit a *de minimis* investment in otherwise prohibited mutual fund investments. The final rule sets the *de minimis* level at 10 percent of the total value of a decommissioning trust account, at or below which investments in securities of companies owning nuclear power plants would be allowed.

With respect to the comment referring to the ambiguity of the proposed restriction as it would apply to fixed income investments, the Commission continues to believe that such a restriction should apply. However, because the rule will not apply to licensees that meet the definition of "electric utility" and that a *de minimis* level of investment is now permitted, any effect of such a restriction should be substantially mitigated.

As to the comment suggesting that the proposed prohibition in the trust's ownership of municipal or State-owned nuclear power plants be deferred to applicable State law, by having the rule apply to only those licensees meeting the NRC's definition of "electric utility" that includes cooperatives and public power entities, this issue is rendered moot. The concern relating to the proposed rule not allowing a municipal licensee from investing in securities

safe storage, final dismantlement, and license termination in the rule because the regulatory guidance is creating a requirement not directed by the rule.

**Response:**

First, it should be noted that §50.75(e)(1) and (2) also require full funding of decommissioning "at the time termination of operation is expected." Thus, the commenters have not provided a complete picture of the situation. Second, the generic formulas are based on immediate dismantlement as the assumed method of decommissioning. Therefore, those licensees certifying to formulas can not take a 2-percent credit into a SAFSTOR period. However, a 2-percent credit can be used when a site-specific estimate is explicitly based on deferred dismantlement. Third, credits may be timed for outlays for decommissioning expenses. Licensees certifying only to the formula amounts (i.e., not a site-specific estimate) can take credit into the dismantlement period (e.g., the first 7 years after shutdown.)

*The final rule has been revised to reflect these points*

**E. Modifications to trusts.**

**Comments:**

Eight commenters stated that the NRC should define what is meant by a "material" modification to a trust that would require a 30-day advance notification to the NRC in more detail. If the proposed rule is adopted as written, the redundant reporting requirements should be deleted. The commenter further stated that the 30-day notification for licensees making material changes to trust agreements should not apply to those changes caused by State or Federal mandated changes. Lastly, the NRC should be required to notify licensees if there were no objections to proposed amendments.

Two commenters noted that the NRC should be aware that certain amendments to trust agreements in the proposed rule may require PUC approval. As an example, two other commenters noted that their PUCs approved the way the different types of decommissioning

and funding plan. This commenter stated that combining radiological decommissioning, non-radiological, and spent fuel funds has been economically and functionally advantageous.

**Response:**

The first comment in this section calls on the NRC to encourage the accumulation of trust funds for the purposes of spent fuel management and non-radiological decommissioning costs. The collection of funds for spent fuel management is already addressed in 10 CFR 50.54(bb) where it indicates that licensees need to have a plan, including financing, for spent fuel management. Any NRC requirements with respect to the accumulation of funds for non-radiological decommissioning costs would be beyond the range of the NRC's legal authority. The NRC does not object to licensees mingling funds for decommissioning activities as defined by the NRC and for other activities outside the NRC's definition. However, if funds are mingled in this way, licensees need to ensure that separate sub-accounts are established so funds for each type of activity are appropriately identified.

As to the statement made by commenters that restrictions should not apply to funds held in trust for purposes other than radiological decommissioning, the Commission's position is that withdrawals for non-radioactive decommissioning expenses that do not affect the amount of funds remaining for radiation decommissioning costs are not covered by this rule. However, the Commission is not proposing that licensees institute separate trusts to account for the different types of activity. The Commission appreciates the benefits that some licensees may derive from their use of a single trust fund for all of their decommissioning costs, both radiological and not; but, as stated above, a licensee must be able to identify the individual amounts contained within its single trust.

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PO

that are clearly derived from funds that have been deposited to serve objectives other than compliance with NRC decommissioning regulations

The remainder of the comments relating to State jurisdiction and licensees already in decommissioning become moot because this rule will not apply to licensees under State or FERC regulation or to licensees withdrawing monies under 10 CFR 50.82.

#### H. Implementation of the new rule.

##### Comments:

Eleven commenters noted that the proposed rule does not contain any plans for transition from the existing provisions to the new requirements. The rule provides neither a period for an effective date nor any plans for transition from existing trust agreements to the requirements of the proposed rule. These commenters stated that it is also not clear if the new rule only applies to licenses in a deregulated environment or licensees who are pursuing renewal or license transfer of all licenses. The NRC should clarify what actions licensees must take with regard to existing trust agreements and when these actions must be completed if the proposed rule becomes final. The NRC should allow licensees sufficient time to review and conform trust documents to comply with the final rule to avoid, or at least minimize, adverse financial impact on decommissioning funds resulting from compliance with the proposed rule. These commenters suggested that grandfathering or a reasonable transition period should be allowed for existing decommissioning funding arrangements that cannot be amended or terminated without substantial penalties.

One commenter stated that the implementation period should be no shorter than 90 days and that the rule should permit case-by-case extensions where there is good cause. A second commenter stated that a transition period of at least six months before the new requirements are made effective is needed. Another commenter suggested that the implementation period should be extended to a period of "not less than one year" because a small number of trustees act for a large number of licensees and their trusts. Still another

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER DICUS  
SUBJECT: **SECY-02-0084 - FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS**

Approved  Disapproved  Abstain

Not Participating

COMMENTS: *See attached minor edits.*

*Pireta Jay Dicus*  
SIGNATURE

*August 2, 2002*  
DATE

Entered on "STARS" Yes  No

One final related comment was that licensees, and trustees in the absence of directions from licensees, should be authorized to prudently allocate trust assets across the entire risk/return spectrum. Prudent diversification can be beneficial for all stakeholders.

**Response:**

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that the prohibition implies that nuclear power is a risky investment and possibly out of the NRC's jurisdiction, the NRC believes that this requirement is consistent with fund diversification.

The NRC agrees with the suggestion that the requirement permit a *de minimis* investment in otherwise prohibited mutual fund investments. The final rule sets the *de minimis* level at 10 percent of the total value of a decommissioning trust account, at or below which investments in securities of companies owning nuclear power plants would be allowed.

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NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER DIAZ  
SUBJECT: SECY-02-0084 - FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_  
Not Participating \_\_\_\_\_

COMMENTS:

*[Signature]*  
SIGNATURE

Nov 1, 02  
DATE

Entered on "STARS", Yes  No \_\_\_\_\_

REC'D BY NJD--

17 MAY 02 11: 30

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MCGAFFIGAN  
SUBJECT: **SECY-02-0084 - FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS**

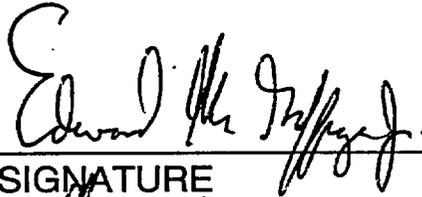
w/comment.

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS:

I..approve subject to the edits of the Chairman and Commissioner Dicus, except for the Chairman's edit on page 30.



SIGNATURE

November 13, 2002

DATE

Entered on "STARS" Yes  No \_\_\_\_\_

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MERRIFIELD  
SUBJECT: **SECY-02-0084 - FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS**

Approved  Disapproved  Abstain

Not Participating

COMMENTS:

I approve subject to the Chairman's and Commissioner Dicus' edits, except for the Chairman's edit on page 30.

  
\_\_\_\_\_  
SIGNATURE

October 29, 2002  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  No