

September 30, 2003

MEMORANDUM TO: William D. Travers  
Executive Director for Operations

FROM: James E. Dyer, Director */RA/*  
Office of Nuclear Reactor Regulation

SUBJECT: DIRECT FINAL RULE ON DECOMMISSIONING TRUST PROVISIONS

Attached for your signature is a direct final rule (Attachment 1) that amends the final rule having the same title and published on December 24, 2002, (67 FR 78332) by correcting and clarifying several points within the rule. These include the perceived exclusion of administrative expenses in the rule, the effective date of the rule, licensees' ability to retain existing license conditions, and the investment prohibition including *de minimis* limitations and both operators' and owners' securities being subject to investment provisions.

Background: On December 24, 2002, the Nuclear Regulatory Commission (NRC) published in the *Federal Register* (67 FR 78332) a final rule amending its regulations relating to decommissioning trust provisions for nuclear power plant licensees. Subsequent to the final rule being published, the Nuclear Energy Institute (NEI) suggested that an administrative rulemaking be undertaken to correct what it perceived to be administrative errors in the rule. The staff believes that changes should be made, but that they should be achieved through the use of the following direct final rule.

The final rule was written to establish objectives and criteria considered essential by the Commission for decommissioning trust agreements. The rule required licensees that are no longer rate-regulated, or who no longer have access to a non-bypassable charge for decommissioning, to have decommissioning trust agreements 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. The rule has an effective date of December 24, 2003.

Subsequently, NEI wrote<sup>1</sup> to the Director of the NRC's Office of Nuclear Reactor Regulation (NRR) on July 1, 2003, and stated that NEI identified "four important instances" in which "administrative errors involving errors or omissions in drafting . . . if uncorrected . . . could affect efficient implementation of the new rule." The four instances identified by NEI were: Notification Requirement for Administrative Expenses, Effective Date of the New Rule, Preserving the Option to Retain Existing License Conditions, and Investment Prohibition.

NEI's first comment stated that the NRC failed to exclude withdrawals for payment of ordinary administrative expenses from the new rule's general requirement that withdrawals from trust funds require prior NRC notice.

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<sup>1</sup>Marvin Fertel, NEI, to Samuel Collins, NRC on "Administrative Changes to NRC Final Rule on Decommissioning Trusts," July 1, 2003.

The staff believes that the present rule language does exclude withdrawals for payment of ordinary administrative expenses from the general prior notice requirements. However, in order to eliminate any further confusion, the staff believes that the rule language in §§ 50.75(h)(1)(iv) and 50.75(h)(2) should be revised.

The second point NEI raised related to the effective date of the new rule. NEI's position is that certain changes made by the rule, other than those changes in 10 CFR 50.75(h)(1)-(3), should be made immediately effective, rather than on December 24, 2003, as now called for in the rule. The staff believes that there is no substantive reason not to make the generic "no significant hazards consideration" determination (50.75(h)(4)) effective immediately, since the same reasoning underlying this provision would be applicable before December 24, 2003. Therefore, the staff is making this particular change. The staff does not believe that the effective date of other provisions identified by NEI should be changed because the Commission has already determined that the December 24, 2003, date is appropriate and NEI has not presented a compelling reason for changing the effective date of the other provisions.

NEI's third point related to licensees being able to retain their existing license conditions. NEI stated that the rule language does not reflect the intent of the Commission that individual licensees should have the option of retaining their existing license conditions. The staff agrees with the comment and is amending the rule by adding a new section, 10 CFR 50.75(h)(5).

Finally, NEI discussed the investment prohibition requirements of the rule. NEI stated that the rule failed "to include a general prohibition against investments in nuclear plant owners, although such a prohibition was intended . . .," and proposed the following change in § 50.75(h)(1)(i)(A) which, as revised, would read: ". . . is prohibited from investing the funds in securities or other obligations of the licensee or any other owner or operator of *any* power reactor . . ." (emphasis added.) The staff agrees and is making the proposed change (with the modification "any nuclear power reactor" to be consistent with the rest of the rule) through this direct final rule effort. In addition, the staff is clarifying the applicability of the *de minimis* limitation contained in the investment prohibition, so that the *de minimis* proviso will now read ". . . and provided further that no more than 10 percent of trust assets may be indirectly invested in securities of any entity owning or operating one or more nuclear power plants." Further, the staff is making an editorial change to clarify that the securities of operators, as well as owners, of nuclear power plants are subject to the investment provisions in their entirety. Finally, the staff is correcting § 50.75(e)(1) so that the term "permanent termination of operations" is used in full where the term "permanent termination" now appears, and is correcting § 50.75(h)(1)(i)(B) so that "in the absence of any such care" will read "in the absence of any such standard of care."

Notices: A notice to the Commission that the Executive Director for Operations (EDO) has signed the attached direct final rule is attached (Attachment 4). Appropriate congressional committees will also be notified.

Coordination: The Office of the General Counsel has no legal objection to this rulemaking. The Office of the Chief Financial Officer has no resources-related objection to this rulemaking. The Chief Information Officer concurs that there will be no information technology impacts.

Attachments:

1. *Federal Register* Notice of Direct Final Rulemaking
2. *Federal Register* Notice of Proposed Rulemaking
3. Approved for Publication
4. Notice of Direct Final Rule Signed by EDO

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