



REQUEST REF ID: 10112104  
~~UNITED STATES~~

**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001

COMSECY-04-0068

SECRETARY

I disapprove, subject to the attached comments.

*Nils J. Diaz*  
\_\_\_\_\_  
Nils J. Diaz 8/11/05

October 28, 2004

MEMORANDUM FOR: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: Annette Vietti-Cook, Secretary *Annette Vietti-Cook*

SUBJECT: COMSECY-04-0068 - USE OF INSURANCE AS A METHOD TO PROVIDE FINANCIAL ASSURANCE FOR DECOMMISSIONING NUCLEAR POWER REACTORS

At the request of Commissioner Merrifield, we have converted the subject memorandum from the Executive Director for Operations dated October 26, 2004, to a COMSECY. Please reply to SECY by COB Friday, November 12, 2004.

Attachments:  
As stated

- cc: EDO
- OGC
- DOC
- OCA
- OPA
- CFO

## COMMENTS OF CHAIRMAN DIAZ ON COMSECY-04-0068

I agree with my fellow Commissioners in disapproving the draft supplement to the Standard Review Plan (SRP) criteria relating to use of insurance for decommissioning funding purposes, subject to the following comments. I also agree with Commissioners Merrifield and Lyons that a regulatory guide, rather than the SRP, could provide broader instruction for external parties, and for staff, to assess complex issues that are arising or could arise.

I am not persuaded that work should be suspended pending further developments as recently suggested by the staff. Our regulations allow for the use of insurance for decommissioning funding purposes and there appears to be no disagreement that the NRC's limited regulatory direction and guidance need to be supplemented. Thus, I believe progress can and should be made.

As a near-term step, I recommend that the Commission consider scheduling a public meeting with one or more panels of experts and representatives of affected interests (assembled by SECY in consultation with the staff) on the issues associated with development of expanded criteria. The Commission could obtain information and views that might not otherwise be available for some time. In particular, the Commission could pursue in more depth divergent public comments on the draft SRP and related questions associated with the staff's resolution of the comments. This meeting could inform further staff work and support further Commission direction beyond that resulting from action on this pending paper. As another near-term step, I believe that the staff should engage in direct consultation with EPA to analyze further the use of insurance in connection with the RCRA program and determine applicable lessons for its use in decommissioning funding under NRC regulations.

The development of a regulatory guide could be resource intensive and various external factors may also affect the degree of interest in the advancement of insurance proposals. Therefore, I am open to the staff's use of a phased approach that could take into account developments in the level of interest and progress associated with such proposals. Such developments may result, for example, from Internal Revenue Service rulings, tax legislation, and the number, variety, and completeness of proposals submitted to the NRC for consideration.

Ultimately, it seems clear that the staff needs to develop more in-depth justifications for proposed supplemental criteria, with due consideration of any direction from the Commission. At this point, I offer the following additional steps for the staff to pursue in further development of broadened proposed criteria:

- a. Explore more fully the use of claims management in hazardous cleanup activities under the purview of other regulatory entities and potential opportunities for increased efficiency in the management of decommissioning costs by the use of claims management as an aid to NRC oversight. Allowing a limited form of claims management (e.g. selection of vendor or contractor or acceptable cost range) should be considered and approved if appropriate efficiencies would result. The resolution should directly address the contention by some commenters that insurers cannot offer insurance without some claims management and the ability to determine whether a claim is legitimate (covered and incurred) cost.
- b. Require the insurer to possess an appropriate state license to transact the business of insurance that includes the proposed type of insurance. I believe that this can be in lieu of the proposed requirement that the insurer either be licensed in the States where the plants are located or obtain approval or statement of no-objection from such state authorities. The former seems to be more consistent with current insurance industry operation under state law. If approvals from additional state insurance commissions are required in some

instances, the staff should identify such circumstances for the Commission and consider requiring evidence of compliance at an appropriate time.

- c. When licensees have access to non-bypassable charges, require certification that state public utility commission (PUC) requirements have been or will be met and the provision of documentary evidence of required approvals in advance of entering an insurance contract or paying premiums. This would be in lieu of the proposed NRC requirement of prior PUC approval or non-objection; as such this would avoid imposing NRC requirements of approval when they are not necessary and avoid logistical issues and possible stalemates associated with the need for multiple regulatory approvals. As part of the reconsideration in this area, the staff should provide a more in-depth review of typical PUC requirements and jurisdiction that would affect an existing facility's use of accumulated funds for acquisition of insurance or a new facility's proposed use of insurance for decommissioning funding.
- d. Disapprove the use of captive insurers, use specific measures or indicators of financial strength for risk retention groups, and more fully assess whether such measures are needed for mutual insurance companies.
- e. Propose to include sublimits regarding the amount of funds available for NRC's radiological purposes in policies with multiple purposes. While I believe that this is most consistent with NRC's other financial insurance mechanisms and I question the effectiveness of a priority clause, I also support having the NRC staff invite further comment on the possibility of some limited priority clause that would permit unused or unneeded funds to pass from nonradiological cost coverage to radiological or vice versa.
- f. Allow judicious use of insurance proceedings to pay litigation costs.





REQUEST REPLY BY: 11/12/04  
~~UNITED STATES~~

COMSECY-04-0068

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

SECRETARY

Disapproved subject re  
the attached  
Comments.

October 28, 2004

MEMORANDUM FOR: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: Annette Vietti-Cook, Secretary

SUBJECT: COMSECY-04-0068 - USE OF INSURANCE AS A METHOD TO  
PROVIDE FINANCIAL ASSURANCE FOR DECOMMISSIONING  
NUCLEAR POWER REACTORS

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## Commissioner Merrifield's Comments on SECY-04-0068

Although the staff has made considerable improvement in its understanding of the use of insurance for decommissioning purposes, the current staff proposal does not sufficiently address the issue. Therefore, I disapprove the proposed supplement to the Standard Review Plan (SRP). As written, the SRP narrowly focuses on the two proposals submitted by Marsh USA and Nuclear Electric Insurance Limited, and does not adequately address a variety of issues that could surface in future insurance proposals. Additionally, the format of a SRP does not promote discussion and resolution of all the unique issues associated with the use of insurance to provide financial assurance.

In order to remedy these problems, the staff should prepare a regulatory guide to provide guidance to stakeholders on the following:

- (1) the NRC's global view of how insurance can provide financial assurance for decommissioning purposes,
- (2) how 10 CFR 50.75(e)(1)(iii) should be implemented,
- (3) how the staff will evaluate proposals to use insurance,
- (4) data needed by the NRC staff for review of such proposals, and
- (5) the preferred standard format, in the form of a sample policy, for any insurance proposals.

This regulatory guide should help achieve stability in an area where the NRC staff is in the process of developing expertise. Incorporating a sample policy will encourage regulatory consistency by demonstrating to interested parties what is acceptable for providing adequate financial assurance. It will also place interested parties on notice that should they propose deviations from the sample policy, they must provide sufficient justification as to why the changes are acceptable.

In addition, the staff should not have removed the claims management provision from the SRP. Claims management is a fundamental aspect of insurance, and I believe that appropriate use of such a process will result in significant improvements to managing decommissioning costs. The staff should incorporate a claims process into the regulatory guide and sample policy. It should be a limited form of claims management that would allow an insurer to have input into how decommissioning activities are completed, i.e. what vendor/contractor will perform work or by establishing an acceptable cost range for activities. To assist in developing an appropriate level of insurer involvement, the staff should engage EPA on how it has allowed claims management in insurance policies. Claims management provisions should in no way allow an insurer to disapprove of any activity specifically approved by the NRC as part of a license termination plan.

With regard to non-NRC approvals, requiring insurers to obtain a letter of approval or non-objection from each state in which the company would have an insured licensee is contrary to how the insurance industry operates. Obtaining these other approvals would be extremely burdensome and would offer little in the way of further assurance that the insurer will remain financially viable until the completion of decommissioning. On this basis, the staff should remove this requirement when formulating the regulatory guide.

The staff should not require sublimits in proposed policies that would specify the amount of funds available strictly for radiological purposes. A priority clause, however, would be

appropriate to dictate that funds must first be paid out to cover radiological decommissioning activities. In conjunction with this, the regulatory guide should allow litigation expenses to be covered by the policy in a limited fashion. Such a limitation could be that no more than 10% of the policy value could be paid out for litigation expenses or that coverage of litigation would be limited to expenses arising from involvement in NRC proceedings.

In consideration of the solvency concerns raised by captive insurers and risk retention groups, I believe that captive insurers cannot provide the necessary financial assurance needed for decommissioning purposes, and policies provided by risk retention groups should be approved only under very limited circumstances. If a risk retention group included at least 25% of the nuclear fleet, it might be able to demonstrate that it was financially sound. Any risk retention group proposals would be closely scrutinized and may be required to provide a financial strength rating. Such ratings are not necessary for mutual insurance companies.

Finally, the draft regulatory guide should be published for public comment. The staff should directly seek comments from the Internal Revenue Service, State Public Utility Commissioners, State Insurance Commissioners, and other entities with relevant expertise. The staff should also engage the Environmental Protection Agency with respect to its experience using insurance for financial assurance for closure of RCRA facilities. The draft regulatory guide should be submitted to the Commission for information prior to publication, and the final regulatory guide should be submitted to the Commission for approval prior to publication.



5/11/05



12 112 104  
~~UNITED STATES~~  
**NUCLEAR REGULATORY COMMISSION**

WASHINGTON, D.C. 20555-0001

COMSECY-04-0068

Disapproved. See attached comments.

SECRETARY

October 28, 2004

*G. B. Jaczko*  
Gregory B. Jaczko  
7/13/05  
Date

MEMORANDUM FOR: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: Annette Vietti-Cook, Secretary

*Annette Vietti-Cook*

SUBJECT: COMSECY-04-0068 - USE OF INSURANCE AS A METHOD TO  
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**Commissioner Jaczko's Comments on COMS-04-0068  
Use of Insurance as a Method to Provide Financial Assurance  
for Decommissioning Nuclear Power Reactors**

I disapprove of the staff's Standard Review Plan (SRP) criteria for evaluating the insurance method of providing financial assurance for decommissioning nuclear power reactors. While our regulations identify the use of insurance as an acceptable method of financial assurance for decommissioning, the use of any type of insurance presents certain additional risks for assuring the availability of decommissioning funds. I believe that any SRP criteria used by the staff to approve the use of insurance should ensure that the risks associated with the particular insurance is not substantially greater than prepayment or external trust funds.

  
\_\_\_\_\_  
Gregory B. Jaczko                      7/13/05  
Date



REGULATORY REPORT OF: 12 112 104  
UNITED STATES

**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001



See attached comment.

SECRETARY

October 28, 2004

*Peter B. Lyons* 6/29/05  
Peter B. Lyons Date

MEMORANDUM FOR: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: Annette Vietti-Cook, Secretary

*Annette Vietti-Cook*

SUBJECT: COMSECY-04-0068 - USE OF INSURANCE AS A METHOD TO  
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## Commissioner Lyons' Comments on COMSECY-04-0068

I agree with Commissioner Merrifield's and Commissioner McGaffigan's votes to disapprove the draft supplement to the SRP in favor of the development of a draft regulatory guide related to the use of insurance for decommissioning purposes. Before proceeding with a draft regulatory guide, however, the staff should consider the resource implications of this effort and prioritize it with other staff efforts. It does not appear that this effort presently merits the resources it would take to achieve. Should the staff initiate a draft regulatory guide, I agree that the public should have an opportunity to comment on the guidance.

With respect to the staff's removal of the claims management provision from the SRP, I agree with Commissioner Merrifield that claims management is a fundamental aspect of insurance and appropriate claims management will result in improvements to managing decommissioning costs. While this may be the case, I also agree with Commissioner Merrifield that claims management provisions should never allow an insurer to usurp decommissioning activities approved by the NRC. Any NRC guidelines that would allow a third party to influence how decommissioning activities are completed may in the end prove unwise and unworkable. Nevertheless, I am willing to consider some claims management proposals, provided they have been well-tested in hazardous clean-up activities. To this end, the staff should engage EPA on how it has allowed claims management, if at all, in its programs. The staff should also review state requirements that implement RCRA. I would be hesitant to permit claims management practices that have not been tested in the EPA, state RCRA, or other governmental settings.

With respect to non-NRC approvals, I agree with Commissioner McGaffigan that we should not be creating a requirement for new state approvals. However, if most states typically require insurers selling insurance products in their states to obtain some form of state approval (whether a letter of approval or non-objection statement from the state insurance commission) then I see no added burden to the process. The staff also intended to make it a condition of NRC approval that the PUC, if it continues to exercise oversight of decommissioning funds, agree to the proposed policy since the insurance policy, among other things, may be purchased with ratepayer funds. I believe that the insurers should go to the PUC for comment since it seems prudent to give the PUC at least an opportunity to review the policy in advance of its purchase.

Both Commissioner Merrifield and Commissioner McGaffigan addressed the solvency concerns raised by captive insurers (*i.e.*, a single or few companies insuring themselves indirectly) and risk retention groups (comprised of a greater number of owners). I agree that captive insurers should not be allowed to participate. Regarding risk retention groups, I agree that such proposals should receive close scrutiny. I agree with Commissioner McGaffigan that specifying that a risk retention group consist of a minimal percentage of the nuclear fleet may not be an acceptable measure of addressing financial soundness. The regulatory guides should require a review of scenarios that focus on common economic failures of risk retention group members to assure an adequate level of risk independence among the members of the group. It may be that risk retention groups, as a class, would not provide the necessary level of financial soundness needed for decommissioning funding assurance purposes.

Commissioner Merrifield stated that the staff should not require sublimits in proposed policies that would specify the amount of funds available strictly for radiological purposes, but that a priority clause would be suitable to state which funds are to be paid first for radiological decommissioning. I don't fully support this. A specific subaccount would have the benefit of being subject to certain restrictions on withdrawals. I think it may be difficult to draft a suitable priority clause for a single account that would cover all cases of acceptable withdrawals. A priority clause may not be adequate with respect to early-process, noncompeting claims on the corpus. Therefore, I believe that the use of subaccounts should be required so that we can essentially maintain control and oversight over decommissioning expenditures. (This becomes increasingly more important - as a counterbalance - should claims management be allowed in any varying degree.)

*John*  
6/27/05