ENCLOSURE

Industry Comments on Certain Information Collection Requirements in the NRC Proposed Rule Concerning Decommissioning Planning

I. Background

By way of background, this proposed rule is the product of efforts by the NRC staff to develop measures to prevent future legacy sites (essentially licensed sites for which licensees are unable to complete decommissioning because of technical or financial reasons). In response to the staff's 2003 proposal to undertake such efforts, [1] the Nuclear Regulatory Commission ("Commission") approved going forward with such efforts, but indicated that the staff "should only ask for limited information" from licensees.[2]

Subsequent staff efforts culminated in the issuance of a draft proposed rule,[3] which the Commission approved for issuance for public comment. However, the Commission directed the NRC staff to "aggressively encourage public comments so that the decision on the final rule will appropriately consider all relevant issues and identify and resolve unintended consequences if they exist."[4] As discussed below, whether unintended or not, it appears that there are potentially significant consequences, including consequences directly related to the generation, collection, and retention of records, which have not been adequately considered in the context of the Paperwork Reduction Act.

II. NRC's Justification for Imposing New Requirements to Collect Information is Flawed

The record generation, collection and retention provisions in the Decommissioning Planning proposed rule of concern to NEI and addressed in this letter relate:

> (1) to the imposition of new requirements on current licensees related to the conduct of operations in a manner that would "minimize the introduction of residual radioactivity into the site, including the subsurface..." (see 10 C.F.R. §20.1406(c))[5] and

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[1] See SECY-03-0069, "Results of the License Termination Rule Analysis," May 2, 2003.
[2] See e.g., NRC Regulatory Issue Summary 2004-08, "Results of the License Termination Rule Analysis," May 28, 2004, at Att. p. 10.
[3] See SECY-07-0177, "Proposed Rule: Decommissioning Planning," October 3, 2007.
[4] See the NRC Commission Memorandum to the NRC staff: "Staff Requirements-Secy-07-0177-Proposed Decommissioning Planning," December 10, 2007.
[5] 10 C.F.R. §20.1406(c) Minimization of Contamination.
(c) Licensees shall, to the extent practical, conduct operations to minimize the introduction of residual radioactivity into the site, including the subsurface, in accordance with the existing radiation protection requirements in Subpart B and radiological criteria for license termination in Subpart E of this part.

(2) to the conduct of surveys that are "reasonable under the circumstances" to evaluate residual radioactivity and to maintain records regarding the same for decommissioning (see 10 C.F.R. §§20.1501(a) and (b)).[6]

With respect to 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b), the NRC sets forth primarily as justification the existence of historical difficulties with a few licensees' adequacy of decommissioning funding in light of additional contamination discovered at the sites, thereby resulting in decommissioning costs higher than what had been provided for by the licensees.

NEI recognizes the importance of providing adequate decommissioning funding assurance for the protection of the public health and safety. NEI believes that the NRC has developed a comprehensive and workable regulatory scheme to provide such assurance. However, NEI believes that the cited examples do not support the broad brush approach proposed by the NRC in these particular aspects of the proposed rule.

In the first instance, the cited examples relate to licensees which had been operating long before the current regulations, comprehensive guidance and discipline in reviewing applications, licensee practices and awareness, and decommissioning funding requirements were in place. For example, provisions allowing burial in soil of radiological waste on site, even if exceeding "exempt" regulatory limits at the time of burial, were permitted for over 20 years without prior agency review (see 10 C.F.R. §20.304, which was first adopted in 1957,[7] but later withdrawn in 1980 because of health and safety concerns and the absence of prior agency review).[8] This is one example of significant changes to the historical regulatory scheme with respect to onsite radiological waste disposal. We believe that such practices were at least factors in some of the site-specific examples of legacy sites of concern to the NRC.

In addition, far more detailed guidance and reviews of initial license applications and amendments are now provided compared to historical practices. Furthermore, the Commission oversight of licenses during facility operation is significantly more rigorous than historically was the case.

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[6] 10 C.F.R. §20.1501 General.
(a) Each licensee shall make or cause to be made, surveys of areas, including the subsurface, that –
* * * * * *
(2) Are reasonable under the circumstances to evaluate –
* * * * * *
(ii) Concentrations or quantities of residual radioactivity; and
(iii) The potential radiological hazards of the radiation levels and residual radioactivity detected.
(b) Records from surveys describing the location and amount of subsurface residual radioactivity identified at the site must be kept with records important for decommissioning.

[7] 22 Fed. Reg. 548 (January 29, 1957).

[8] 45 Fed. Reg. 71761 (October 30, 1980).

Similarly, there is more detailed guidance with respect to the content and review of decommissioning plans. And, significantly, decommissioning funding obligations were not established as detailed regulations until 1988, well after many of the licensees of concern had already operated for years.

As a result, although the NRC cites two examples in its regulatory analysis, and asserts several more exist, it does not provide any analysis of the impact of the more extensive licensing scheme related to operation, decommissioning and decommissioning funding that exists today might have had on those licensees which operated their facilities in whole or in part under older and admittedly less comprehensive historical regulatory schemes. And the NRC has not adequately, if at all, explained why more direct involvement on its part, through inspections of existing facilities' plant records or development of more focused guidance would not be sufficient to address its concerns in these areas. Moreover, the cited examples relate to unusual factual and financial circumstances which cannot be generalized to broad classes of Commission licensees.

The NRC presents further justification for these new provisions by asserting that "licensees practices vary widely" and therefore (apparently) require further direction for consistency.[9] And, the NRC further contends that while licensees maintain many of the records of interest not all licensees are required to submit those records to the NRC.[10] These arguments are similarly flawed. With respect to the first, that argument does not support a conclusion that new regulations are required. Perhaps additional clarity in guidance to licensees, guidance to inspectors, or consistency in inspection might be justifiable, but not an entirely new regulatory scheme. And with respect to the latter argument, all such records are available at the licensees' sites for NRC inspection. In fact, the NRC does not even request that all documents generated under these new requirements be transmitted to the NRC in the first place. Thus, there is no meaningful analysis of the rationale for certain licensees to provide records directly to the NRC.

III. The Proposed Information Gathering and Recordkeeping Requirements Are Not Justified

With respect to gathering and keeping records important for decommissioning, as noted above the NRC recognizes in its Regulatory Analysis that current NRC requirements applicable to both materials licensees and power reactor licensees require the collection of data with respect to spills, leaks and other unusual occurrences that result in the spread of contamination.[11]

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[9] The NRC's "Regulatory Analysis for Proposed Rulemaking – Decommissioning Planning," Draft for Comment (December 2007) ("Regulatory Analysis") states, at p. 10, as follows:
10 CFR 30.35(g), 40.36(f), 50.75(g), 70.25(g), and 72.30(d).require the licensee to collect and maintain records important for decommissioning. These records should be kept for spills, leaks and other unusual occurrences that result in the spread of contamination, after cleanup procedures, or if the contamination is likely to have spread to inaccessible areas. Licensees' practices vary widely concerning what should be documented because of the great diversity of radioactive materials handled and different site conditions.

[10] See id.

[11] See id.

The NRC itself paints a picture that there is likely little need for additional requirements to gather key information with respect to power reactor licensees, noting that current monitoring and survey processes and related reports "likely would provide sufficient information to satisfy the proposed amendments" to 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b).[12] Similar conclusions are reached with respect to other categories of materials licensees, either finding that the licensees would not be impacted or that any impacts would occur only if "significant residual radioactivity" above current levels (not currently anticipated) is later discovered.[13] The NRC further acknowledges that licensee practices in recent years have resulted in a significant drop in radiological releases.[14]

In addition, in the draft OMB supporting statement, the NRC acknowledges that current regulations are viewed as addressing the fundamental concerns, but require clarification with respect to their scope concerning subsurface contamination.[15] Nonetheless, the NRC does not explain why a wholly new set of regulations and guidance are essential to achieving this specific goal.

In short, the NRC would seek to impose a wholly new set of regulations and create additional guidance when in fact it concludes that the current regulations address the considerations of concern, but require clarification. That such clarification cannot be achieved in a less burdensome manner is not addressed by the NRC.[16]

In fact, it appears that such "clarification" is nothing but an effort to impose what amounts to an expansive regulatory scheme of "ongoing decommissioning" where activities that would normally take place at the time of decommissioning with respect to detailed site characterization and potential remediation occur during plant or facility operation, rather than following cessation of operations. Justification for creating such broad ongoing programs across the nuclear industry, where only a limited subset of licensees may actually warrant additional regulatory attention, is simply not justified.

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[12] See id. at 11.

[13] See id at 11 – 18, examining each of the classes of materials licensees.

[14] See id at 9 -10, and Figure 2-1.

[15] With respect to 10 C.F.R. §20.1406(c), the NRC asserts that "no current licensees are affected because this provision merely clarifies requirements already present in 10 CFR 20.1101(b) that licensees use procedures to achieve occupational doses and doses to the public that are as low as is reasonably achievable (ALARA). That section requires minimization of waste generation during operations to achieve doses that are ALARA. The proposed rule clarifies that minimization of waste generation includes residual radioactivity in the subsurface." (NRC's Draft OMB Supporting Statement for Proposed Rule. . . Decommissioning Planning. Revision at 2).

With respect to 10 C.F.R. §§20.1501(a) and (b), the OMB statement provides: "No current licensees are affected because there are no records indicating that significant residual radioactivity is present at a site. The proposed rule clarifies that surveys may need to be performed of residual radioactivity in the subsurface to comply with regulations or to evaluate a potential radiological hazard." (NRC's OMB Draft Supporting Statement for Proposed Rule. . . Decommissioning Planning. Revision at 2.)

[16] Indeed, it stretches the concept of "clarification" when the proposed rule consists of 70 pages in the Federal Register, 69 pages in a Regulatory Analysis, 35 pages in draft guidance regarding Surveys, 10 pages in a draft environmental assessment, and 350 pages of draft guidance related to additional decommissioning financial assurance.

IV. These Information Collection Provisions of the Proposed Decommissioning Planning Rule Do Not Satisfy the Paperwork Reduction Act

A. Paperwork Reduction Act Requirements

The requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. (the "Act"), are implemented by OMB. This federal statute is intended primarily to minimize the paperwork burden for individuals and businesses resulting from the collection of information by or for the federal government and to ensure the greatest possible public benefit and maximum utility from such collected information. The Act is also intended to improve the "responsibility and accountability" of OMB and all other federal agencies to Congress and to the public for reducing the burden of federal reporting and information collection requirements. (See 44 U.S.C. 3501(1), (2), (11)).[17]

The Act specifies the criteria that each federal agency must apply in determining whether or not to approve the proposed collection of information. These criteria include the following:

- an evaluation of the need for collection of the information
- a functional description of the information to be collected
- a plan for the collection of the information
- a specific, objectively supported estimate of burden
- a test of the collection program through a pilot program, if appropriate, and
- a plan for the efficient and effective management of the information to be collected, including resources. (See 44 U.S.C. §3506(c)(1)(A)).

The Act defines "burden" broadly as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a federal agency."[18]

OMB approval of an agency action that seeks to impose new or additional paperwork requirements is to be based on an affirmative determination that "the collection of information by the agency is necessary for the proper functions of the agency, including whether the information shall have

[17] See 44 U.S.C. 3502(2). See also the OMB's implementing regulations at 5 CFR § 1320.3(b)(1). OMB regulations include in the definition of "burden" the resources expended for following actions:
- Reviewing instructions;
- Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information;
- Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information;
- Adjusting the existing ways to comply with any previously applicable instructions and requirements;
- Training personnel to be able to respond to a collection of information;
- Searching data sources;
- Completing and reviewing the collection of information; and
- Transmitting, or otherwise disclosing, the information.

Note, however, that time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) will be excluded from the "burden" if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary." See 5 C.F.R. § 1320.3(b)(2).

[18] See 44 U.S.C. §3502.

practical utility." (See 44 U.S.C. 3508; 5 CFR § 1320.5(e)). Section 3508 of the Act also prohibits an agency from collecting information if it is "unnecessary for any reason." OMB has interpreted the Act to require an agency to demonstrate that it has taken every reasonable step to ensure that the proposed collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives; is not duplicative of information otherwise accessible to the agency; and has practical utility.[19] This OMB regulation also states that "the agency shall also seek to minimize the cost to itself of collecting, processing and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public."[20]

Thus, the standard for approval of additional information collection under the Paperwork Reduction Act warrants balancing necessity against the burden on the entities supplying the information. In this context, "burden" is defined broadly. The clear intent of Congress was to ensure that agencies seeking to impose a new or expanded burden of information collection demonstrate that the burden is clearly outweighed by the need for the information to be produced and provided.

B. NRC's Justification for the Information Gathering and Recordkeeping Requirements in Question Does Not Satisfy the Paperwork Reduction Act

As noted above, the Act directs federal agencies to weigh the need for new or additional information collection and recordkeeping requirements, as well as the burden that such requirements would impose on affected entities (in this case, nuclear facility licensees regulated by the NRC). As discussed elsewhere in these comments, and further below, NEI does not believe that the information collection requirements as proposed Sections 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b) are needed.

1. *Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?*

   No. The NRC's current regulatory scheme is sufficiently robust and thorough to provide assurance that virtually all licensees will be able to perform their activities in a manner that will minimize the introduction of residual radioactivity into the site, adequately define potential issues related to appropriate responsive actions concerning radiological spills, and provide for adequate decommissioning funding.

   The NRC's inspection program allows for inspection of current utility activities and records of plant activities. This would include inspection results, event reports, QA/QC records, and radiological records of concern, any of which would reflect the occurrence and evaluation of a radiological spill. Further, licensees are already required to keep records of events that

[19] See 5 CFR § 1320.5(d)(1) (emphasis added).
[20] Id. at Section 1320.5(d)(1)(iii).

could impact decommissioning.[21] These already-existing regulatory provisions provide for a full opportunity for the NRC and licensees to identify and assess radiological spills, including those with the potential for impacting the subsurface, and evaluate actions, as appropriate, including planning for future actions during decommissioning.

In contrast, the proposed guidance specified in the NRC's "Draft Guidance to Implement Survey and Monitoring Requirements Pursuant to Proposed Rule Text in 10 CFR 20.1406 (c) and 10 CFR 20.1501 (a)" ("Survey Guidance") would create significant burdens and are not necessary to protect the public health and safety. For instance, the guidance contemplates documenting any subsurface contamination above background, even if it does not exceed regulatory limits and any leaks and spills within facilities, again without reference to exceeding any regulatory limits.[22] Creating thresholds not associated with actual regulatory criteria imposes a program scope that that far exceeds that necessary to protect the public health and safety, and as such, is not risk-informed. It appears the NRC has adopted these criteria from the NEI initiative (described in 2, below). However, that threshold is not associated with, and is far more conservative than, any existing regulatory threshold. It was not designed to address just regulatory requirements but to address other considerations, more specifically, stakeholder interactions and communications. It is not appropriate for the NRC to "adopt" the voluntary communication threshold from the industry initiative as a regulatory standard in that it goes far beyond what would be necessary for the protection of the public health and safety.

Thus, these new measures will have no independent practical utility. Instead, they will require licensees to establish new procedures, conduct new training, and as indicated in the draft guidance, operate under the presumption of establishing new equipment design approaches, installing new detection and alarm instrumentation, as well as new physical containment barriers.[23] Each of these actions are "burdens" as described in OMB regulations. Yet, the NRC has not produced an objective assessment of those burdens. All the while, in view of the NRC-recognized rarity of any expected releases of concern, the breadth of the new requirements, if applied to any single licensee, has not been shown to be reasonable compared to the risk and burden existing measures would seem to be adequate even in the NRC's eyes for assuring that such releases are rare.

2. *Is the estimate of burden accurate?*

No. The NRC has not demonstrated how their estimates of burden are fully reflective of the scope of or the actual potential impact of the proposed regulations.

[21] See 10 CFR 30.35(g), 40.36(f), 50.75(g), 70.25(g), and 72.30(d).
[22] See Survey Guidance, Section 1.3 at p. 5.
[23] See id. , Sections 2.1, 2.2.

To illustrate, it is noteworthy that, under the auspices of NEI, power reactor licensees recently undertook a voluntary initiative related to potential groundwater contamination, the Groundwater Protection Initiative (GPI). The voluntary implementation of the GPI by licensees is estimated to have an average cost of $500 thousand to $1 million thus far, for each plant. The activities undertaken in this voluntary initiative are in large measure comparable to the activities that would be undertaken by power reactor licensees pursuant to the proposed changes to 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b) and related regulatory guidance. In effect, the NRC is proposing to codify the voluntary industry initiative as regulatory requirements, while completely ignoring the related regulatory burden.

In sharp contrast, the NRC Federal Register notice indicates that for power reactor licensees, the new rule would result in a total of 9 annual responses for all power reactor licensees, with a total annual recordkeeping annual burden of 48 hours, apparently for all power reactor responses as a result of this rulemaking. (See 73 Fed. Reg. at 3834). That figure would include additional reporting obligations related to all the new requirements that would be imposed, including those with respect to decommissioning funding provisions (which NEI does not address in these comments). It appears that the potential costs actually attributable to the new NRC requirements are grossly understated by the NRC with respect to the impacts on power reactor licensees. In addition, the NRC's analysis does not appear to contemplate any power reactor licensee needing to implement these provisions. That being the case, it suggests with even more clarity that to promulgate a wholly new rule, with those potential costs, can be justified.

A similar analysis could be performed with respect to materials licensees. In that context, the NRC estimates that approximately 420 additional responses would be required by non-power reactor licensees. Again, however, this estimate appears to be premised on an assumed limited implementation of the programs created by 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b).

Finally, NEI also notes that it appears that the existence of the GPI and its associated costs were not mentioned in the OMB Supporting Statement.

3. *Is there a way to enhance the quality, utility, and clarity of the information to be collected?*

No. In NEI's view there is no way to achieve such a result. Any effort to refine the nature of the information collection requirements that result from 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b) and the underlying expectations related to the activities needed to generate and collect such information, would do little more than result in minor changes to what amounts to a potentially major program so long as the NRC maintains the underlying premise that the regulations as framed are necessary and the thresholds for additional actions are far below actual regulatory requirements.

4. *How can the burden of the information collection be minimized, including the use of automated collection techniques?*

   NEI does not believe that there are any efficiencies to be achieved with respect to the collection and generation of the information that would occur were 10 C.F.R. §20.1406(c) and 10 C.F.R. §§20.1501(a) and (b) to be implemented.