PR 20, 30, 40, 50, 70 and 72
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ADJUDICATIONS STAFF

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EXECUTIVE VICE PRESIDENT AND
CHIEF NUCLEAR OFFICER

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May 8, 2008

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 200555-0001

Attention: Rulemaking and Adjudications Staff

Subject: RIN 3150-AH45: Comments for Decommissioning Planning Rulemaking and Guidance Documents.

Project Number: 689

Dear Madam Secretary:

The Nuclear Energy Institute (NEI)[1] is submitting these comments on the Nuclear Regulatory Commission's (NRC) Decommissioning Planning rulemaking on behalf of the nuclear energy industry.

NEI assembled a team of industry experts to assist in developing these comments. This team consisted of staff with expertise in decommissioning, health physics, groundwater, environmental protection, legal affairs, finance, and licensing.

The nuclear industry is firmly committed to planning, funding, and conducting decommissioning of licensee facilities safely, efficiently, and protective of public health and the environment. The nuclear industry believes that NRC decommissioning regulations should, and currently do, contain appropriate requirements to provide reasonable assurance that legacy sites will be prevented. In fact, NRC licensees have extensive programs in place that comply with the NRC's current decommissioning regulations to provide such assurance. These programs address all aspects of decommissioning planning, including conduct of operations to minimize contamination, monitoring and surveillance, recordkeeping, and financing. These programs are subject to NRC inspection and oversight. Indeed, there have been few issues identified with

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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respect to conformance with the requirements of NRC's decommissioning regulatory system among current licensees.

NEI believes that the very limited 'examples' cited by the NRC of licensees for which some concern has existed[2] do not support the broad brush approach proposed by the NRC in this rulemaking. The cited examples generally relate to licensees which had been operating long before the current regulations, comprehensive guidance, and discipline in reviewing license applications, contemporary licensee practices and awareness, and current 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,[3] but later withdrawn in 1980 because of health and safety concerns and the absence of prior agency review).[4] This is one example of significant changes to the historical regulatory scheme with respect to onsite radiological waste disposal. There is a strong likelihood that such practices were at least factors in some of the site-specific examples of legacy sites of concern to the NRC. These examples have been addressed within the current regulatory framework.

The proposed rule and supporting guidance go well beyond the Commission's stated goal of reducing the likelihood that licensed facilities will become legacy sites. Furthermore, we believe that key elements of the proposed rule and related guidance are impractical, unnecessarily burdensome, and will not add substantive value beyond what is currently in regulations in addressing the Commission's concerns. The NRC currently has in place an effective oversight process and appropriate regulations and authority to provide reasonable assurance of protection of the public health, safety, and the environment in this area. The NRC should effectively utilize the agency's existing regulatory framework to address concerns for specific licensees, should they occur, rather than mandate excessively restrictive and burdensome requirements for all licensees.

In summary, for the reasons outlined in this letter and described in detail in the enclosed comments, we believe there is no compelling case for these proposed rules. As such we recommend this rule making should not go forward. Should the NRC wish to continue with the proposed rule and accompanying draft regulatory guidance should be held in abeyance until the issues identified in these comments have been addressed. In our view, a complete and careful response to these issues will, at a minimum, entail a substantial rewriting of the proposed rule and regulatory guides that would necessitate its re-issuance for public comment.

The current decommissioning rules provide reasonable assurance of adequate protection of public health, safety and the environment related to decommissioning. Based on the experience and record of the industry the existing regulations are adequate. The current decommissioning and recordkeeping criteria in 10 CFR 20, 30, 50, 70 and 72 has proved to be effective and reasonable. The current decommissioning

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[2] Regulatory Analysis, at pp. 10-18, discussing the limited need for any new regulations for different classes of NRC licensees.
[3] 22 Fed. Reg. 548 (January 29, 1957).
[4] 45 Fed. Reg. 71761 (October 30, 1980).

funding mechanisms have provided effective financial assurance for decommissioning planning and completion. For example, NRC's own experience (SECY-03-0069) indicates that "no licensee providing a parent company or self-guarantee has entered bankruptcy or has failed to proceed with decommissioning projects in an adequate manner".

The proposed rule applies the same requirements to all types of licensees despite the inherent differences in how each type of licensee safely manages radioactive material and/or the financial assurance instruments for decommissioning. Throughout the preamble to the proposed rule, NRC acknowledges that only a few sites have identified contamination and been faced with hurdles to releasing the site for unrestricted use. Nuclear generating facilities have all been successful in their decommissioning to date.

The proposed NRC regulations could have the unintended consequences of initiating extensive characterization and remediation efforts, without regard to the degree of actual health, safety, and environmental impact. The proposed regulations would require the evaluation of subsurface contamination based on future decommissioning exposure scenarios, even though no foreseeable operating exposure limits would be exceeded.

The requirements for extensive subsurface soil characterization (or remediation for that matter) during an operating facility's lifetime is largely unrealistic and impractical. It is not feasible to perform subsurface characterization without risking the breech of barriers that contain radioactivity, disrupting the operation essential equipment, or exacerbating the migration of contaminants already in the environment. Even in the case of a reactor undergoing decommissioning, these areas usually cannot be accessed until late in the decommissioning process, when many of the SSCs and higher levels of contaminants sources have been removed. Based on industry decommissioning experience, the majority of subsurface contamination (by volume and concentration) would likely be located directly under the systems, structures, and components (SSCs) that have leaked, where it cannot be safely or adequately accessed for characterization purposes. Due to these access constraints, it is unlikely that subsurface characterization efforts at an operating reactor and many other facilities would provide any better Decommissioning Cost Estimate input data (i.e., volumes and locations of subsurface media exceeding decommissioning criteria) than that produced by experienced decommissioning experts making engineering judgments using information currently available as 10 CFR 50.75 (g) file data.

The financial requirements of the proposed rule and the guidance document are overly conservative and unnecessary including the new restrictions on the use of parental and self guarantees and the requirements for the funding of a standby trust in very short periods of time. In the absence of a clear basis, the NRC should not eliminate an escrow account as an acceptable option for financial assurance. The escrow account is a sound financial instrument that is protected to the same extent as a trust fund during bankruptcy.

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 impact a very diverse population of NRC licensees and are not necessary to protect the public health, safety, and the

environment. For instance, the guidance suggest 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. 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 Groundwater Protection Initiative. However, the Groundwater Protection Initiative threshold is not associated with, and is far more conservative than, any existing regulatory threshold. It was not designed to address 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, safety, and the environment.

A distinct issue that needs to be addressed by the NRC is the applicability of 10 CFR 50.109, "Backfitting," to the proposed rule and regulatory guidance. The NRC has prepared a regulatory analysis related to this proposed rulemaking (73 Fed. Reg. at 3835-36). The NRC's analysis concludes that this rulemaking does not require the preparation of a backfit analysis because the new rules proposed to be adopted either "clarify existing requirements" or involve the collection and reporting of information " using existing equipment and procedures" and as such "are not regulatory actions to which the backfit rule applies." (73 Fed. Reg. at 3835)

The proposed revisions to the NRC's regulations and the adoption of extensive new guidance for implementing those new requirements contain, contrary to the NRC's view, provisions that would dictate the modification of plants or their operating procedures. Because of this erroneous assessment of the proposed rule's impact, the staff has avoided both prior public scrutiny of its "no backfit" determination, as well as any review by the Committee to Review Generic Requirements (CRGR).

Further, as a matter of policy as well as practice, when the staff undertakes its analysis of the proposed backfit, that analysis must assess the impact of new staff positions against current NRC requirements. Instead, the staff performed its analysis accompanying the rule against a more stringent set of actions undertaken as voluntary licensee actions. In taking that approach, the staff has ignored the true impact of the proposed rule over and above existing requirements. This approach not only is incorrect from a regulatory perspective, but has significant policy implications in that it could have a chilling effect on licensees' willingness to voluntarily undertake any future initiative when there is a risk the NRC would use that opportunity to backfit parallel requirements without performing a backfit analysis.

In light of the failure to perform an appropriate backfit analysis with this rulemaking, the NRC has arbitrarily ignored its own regulations. NEI submits that the NRC must first recognize that the proposed rule is in fact a backfit, and then perform the initial regulatory analysis directed by NRC guidance, including consideration of actual impacts compared to current regulations. If this rule goes forward as is, then we believe a backfit analysis is required to be performed in accordance with NRC procedures and the staff must not only afford an opportunity for public input, but the proposed backfits must also be reviewed by the CRGR.

To the extent the NRC fails to follow this path, NEI respectfully requests the NRC to consider these requests as a backfit appeal, consistent with the processes spelled out in NRC procedures for individual licensees' appeal of a proposed plant-specific backfit. As representative of the nuclear energy industry, including all NRC licensees that would be impacted by these new requirements, treatment of our request as an appeal would achieve administrative efficiency and would be consistent with the intent of the NRC and CRGR recognition that backfitting requirements apply to generic rulemakings and new regulatory guidance, as well as individual plant applications.

NEI has reviewed and generally supports the comments offered by the Council on Radionuclides and Radiopharmaceuticals (CORAR) and the Test, Research and Training Reactor (TRTR) Organization.

A detailed discussion of the industry's comments is provided in the enclosures including citations to the relevant sections in the proposed rule or guidance document text. NEI encourages the conduct of workshops with the affected stakeholders to fully explore NRC concerns and regulatory options responsive to those concerns with a continuing focus towards resolution. The proposed workshop should focus the need for changes to the existing regulation and the creation of new regulatory requirements. While this rulemaking is unnecessary, there may be issues of importance to the staff that would best be pursued in these workshops.

If we can provide further information that would assist you with regard to these comments, please contact Ralph Andersen at 202-739-8111; rla@nei.org or George Oliver at 202-739-8016; gxo@nei.org.

Sincerely,

Marvin S. Fertel

Enclosures

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Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
Parent Guarantee – Joint and several liability requirement	**The guarantor must agree that it is jointly and severally liable with the licensee for the full cost of decommissioning, and that if the costs of decommissioning and termination of the license exceed the amount guaranteed, the guarantor will pay such additional costs that are not paid by the licensee.**	10 CFR Part 30, Appendix A, Sec. III.E	Pursuant to 10 CFR 50.75(e)(iii)(B), a parent guarantee for a reactor licensee is expected to conform to the "guarantee and test . . . as contained in appendix A to 10 CFR part 30." Thus, a literal reading of the proposed rules would require reactors to conform any existing and future parent guarantee with the new joint and several liability requirement. This is a departure from the current practice, in which a guaranty is typically provided in a limited specified amount in combination with a trust fund or "external sinking fund." For example, if a licensee's trust balance were $350 million, and the NRC required amount of assurance were $360 million, the licensee might provide a parent guarantee in the amount of $10 million. The parent should not be guaranteeing the full $360 million. In 1998, NRC changed its rules to specifically permit the current practice of using a parent guarantee in combination with a trust fund balance, a practice which had been prohibited until 1998. 63 FR 50465, 50473 (Sept. 22, 1998) ("In sum, the NRC has eliminated the prohibition on combining parent company or self-guarantees with external sinking funds."). This reversal of policy with respect to reactors is likely an "unintended consequence," because the impact on reactor licensees is not discussed in the Federal Register Notice, but rather when NRC describes the financial assurance mechanisms for reactors, it states: "No changes in these requirements are planned for power reactor licensees." 73 FR at 3818.

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			This proposed change places an undue burden on licensees interested in using this guarantee method. As a consequence of creating this "open-ended" liability, licensees may be put in the position by their financial auditors, of recording the whole liability and not just the guaranteed amount. This has the outcome of negatively impacting corporate credit ratings and a corporation's ability to borrow monies – which renders completion of decommissioning at additional unnecessary risk.
Parent Guarantee – Rating Issues	**A current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, A, or BBB (including adjustments of + and -) as issued by Standard and Poor's or Aaa, Aa, A, or Baa (including adjustment of 1, 2, or 3) as issued by Moody's;**	10 CFR Part 30, Appendix A, Sec. III.A.(2)(i)	NRC is properly clarifying the generally accepted proposition that an "investment grade rating" includes ratings of S&P BBB- and Moody's Baa3. However, NRC is also requiring that this rating be a rating for an "uninsured, uncollateralized, and unencumbered bond issuance." It is unclear why this is necessary, given that ratings for senior secured debt are a relevant indicator of good financial health. Moreover, NRC has not provided any evidence suggesting a need for "raising the bar."
Parent Guarantee – Rating Issues	**The parent company's independent certified public accountant must compare the data used by the parent company in the financial test, which is derived from the independently audited, year-end financial statements for the latest fiscal year, with the amounts in such financial statement. The accountant must evaluate the parent company's off-balance sheet transactions and provide an opinion on whether those transactions could materially adversely affect the parent company's ability to pay for decommissioning costs. The accountant**	10 CFR Part 30, Appendix A, Sec. III.B	The new requirement for a certification of an independent CPA appears to impose an additional unnecessary burden and cost. Company officials are required to submit information that is complete and accurate in all material respects, *e.g.*, 10 CFR 30.10, 40.10, 50.5, 70.10 & 72.12. This should provide adequate assurance that the financial test is being evaluated by qualified company personnel. If there is some need to highlight this obligation, the rule can simply require a company certification.

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	must verify that a bond rating, if used to demonstrate passage of the financial test, meets the requirements of paragraph A of this section. In connection with the auditing procedure, the licensee must inform NRC within 90 days of any matters coming to the auditor's attention which cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.		
Parent Guarantee – Rating Issues	**After the initial financial test, the parent company must annually pass the test and provide documentation of its continued eligibility to use the parent company guarantee to the Commission within 90 days after the close of each succeeding fiscal year.**	10 CFR Part 30, Appendix A, Sec. III.C.(1)	The terms of a guarantee typically provide for an annual re-evaluation of the financial test, and this provision is acceptable to the extent that it codifies existing practice for reactor licensees. However, nothing in the rule should imply that the annual evaluations be certified by an independent CPA, because this would impose an unnecessary and unjustified annual cost.
Parent Guarantee – Financial Distress	**A standby trust to protect public health and safety and the environment must be established for decommissioning costs before the parent company guarantee agreement is submitted. The trustee and trust must be acceptable to the Commission. An acceptable trustee includes an appropriate State or Federal Government agency or an entity which has the authority to act as a trustee, whose trust operations are regulated and examined by a Federal or State agency. The Commission has the right to change the trustee. An acceptable trust will meet the regulatory criteria established in these regulations that**	10 CFR Part 30, Appendix A, Sec. III.D	For non-reactor licensees, this requirement imposes an unnecessary burden and significant cost, including the cost to develop the trust arrangements and ongoing trustee fees. These costs are not insignificant in the context the amount guarantees being provided by many non-reactor licensees. Moreover, the cost is simply not justified given the already very high thresholds for qualifying to give a guarantee (*e.g.*, an investment grade credit rating). A company that drops to a slightly below investment grade rating is not necessarily in financial distress. This itself is a very early warning signal, which can be used as the trigger point for requiring the creation of the trust and setting aside of funds, long before the company's ability to fund the guarantee can seriously be

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	govern the issuance of the license for which the guarantor has accepted the obligation to pay for decommissioning costs.		questioned. Thus, we suggest that the requirement to establish a trust be imposed at the time this advance indicator of a potential financial issue arises, and payment under a guarantee is required under the new rules. For reactor licensees, the requirement for an existing standby trust is not a major issue, because existing trust arrangements should qualify to serve this purpose. If this requirement is retained, a clarifying sentence should be added: "An existing trust established for purposes of meeting the prepayment or external sinking fund methods pursuant to 10 CFR 50.75(e)(1) is acceptable to serve as the "standby trust."
Parent Guarantee – Financial Distress	**The guarantor must agree that if the guarantor admits in writing its inability to pay its debts generally, or makes a general assignment for the benefit of creditors, or any proceeding is instituted by or against the guarantor seeking to adjudicate it as bankrupt or insolvent, or seeking dissolution, liquidation, winding-up, reorganization, arrangement, adjustment, protection, relief or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, custodian, or other similar official for the guarantor or for any substantial part of its property, or the guarantor takes any action to authorize or effect any of the actions stated in this paragraph, then the Commission may:**	10 CFR Part 30, Appendix A, Sec. III.G	The new rules impose a requirement that allows for severe NRC action, including payment of the guarantee if a triggering event occurs. However, other options short of payment may be available, such as use of a third party letter of credit. The rules should be revised to provide that NRC's determination that the guarantee is no longer acceptable allow for either immediate payment or substitution of another acceptable form of financial assurance.

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	(1) Declare that the financial assurance guaranteed by the parent company guarantee agreement is immediately due and payable to the standby trust set up to protect the public health and safety and the environment, without diligence, presentment, demand, protest or any other notice of any kind, all of which are expressly waived by guarantor; and (2) Exercise any and all of its other rights under applicable law.		
Escrow Account – Elimination of Method	**Except for 10 CFR 50.75(e)(1)(ii), which appears to have been overlooked, the existing rule language would be revised to eliminate the use of an escrow account instead of a trust.**	10 CFR 30.35(f)(2); 10 CFR 40.36(d)(3); 10 CFR 50.75(e)(1)(ii); 10 CFR 70.25(e)(3); 10 CFR 72.30(c)(3)	The NRC should not eliminate an escrow account as an acceptable option for financial assurance. An escrow account is a sound financial instrument that is protected to the same extent as a trust fund during bankruptcy. NRC's basis for eliminating escrow accounts is that an escrow account would have less protection in bankruptcy than a trust fund. However, there is no clear basis for assuming that this is correct. NRC's arguments that a dedicated trust fund should be outside the reach of creditors in a bankruptcy also would apply to a dedicated escrow account. In cases where the amount of decommissioning funding assurance is relatively small, *e.g.*, $100,000, use of an escrow account may be less expensive and more appropriate, because the cost of trust arrangements and annual trustee fees may be prohibitive. Thus, this issue is more likely to impact and be of interest to small materials licensees. However, there may be circumstances (*e.g.*, small minority owners or during decommissioning) when the use of an escrow account might be an option that a reactor licensee might want available.

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License Termination – 1% Real Rate of Return (Release for Restricted Use)	**Funds placed into a trust segregated from the licensee's assets and outside the licensee's administrative control, and in which the adequacy of the trust funds is to be assessed based on an assumed annual 1 percent real rate of return on investment.**	10 CFR 20.1403(c)(1)	NRC is departing from the 2 percent real rate of return allowed for decommissioning funding assurance for reactor licensees in 10 CFR 50.75(e)(1)(i) & (ii), and it is instead imposing an even more conservative assumption of just a 1 percent real rate of return for trust funds set aside to maintain a site in connection with restricted use conditions. The 2 percent real rate of return assumption is already very conservative and is used over very long periods of time, including SAFSTOR periods for shutdown reactors. While NRC points to some distinctions regarding shutdown sites subject to restricted use conditions, NRC should not depart from a real rate of return standard that is already adequately conservative. The argument for considering the 1% RROR is not compelling. NRC refers to a 30-year assessment of the annual rate of return of 1.58% for U.S. Treasury Bills and 4.87% for government bonds. Based upon these facts, NRC concludes 1% RROR is reasonable. The federal government has a number of references for determining forward-looking estimates of the real rate of return, upon which the NRC can rely. Among them is the OMB's Circular No. A-94, "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs." This Circular is employed by OMB to determine future costs of federal programs. Trust funds established by licensees would be a mix of short term and long term vehicles, matched to the investment term

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			(the restricted release term). Some of these assets would be Treasury Bills and government bonds, others would be more risky and provide a greater return, but would still be required to meet "prudent investor" standards. Circular No. A-94 and its attachments provide data for 3 year through 30 year, risk-free real Treasury interest rates (the most conservative investments). It seems reasonable that if the federal government has developed guidelines for determining discount rates for federal programs, NRC should strongly consider OMB's discount rate guidance as a reasonable proxy for risk-free investment returns. In the period 1979 through 2008, the RROR for evaluations of programs greater than 3 years and less than 30 years fell below 2% RROR on only 3 occasions, for short-term projects. Based upon this review, NRC can use a 2% RROR in its proposed rules, and still maintain a very conservative bias.
New Requirements for Shutdown Reactors – Annual Reporting	**After submitting its site-specific decommissioning cost estimate required by paragraph (a)(4)(i) of this section, and until the licensee has completed its final radiation survey and demonstrated that residual radioactivity has been reduced to a level that permits termination of its license, the licensee must annually submit to the NRC, by March 31, a financial assurance status report. The report must include the following information, current through the end of the previous calendar year: (A) The amount spent on decommissioning, both cumulative and**	10 CFR 50.82(a)(8)(v)	NRC is imposing a new annual reporting requirement on shutdown reactors that requires a higher level of detail than the annual decommissioning funding status reports currently required under 10 CFR 50.75(f). It is not clear why the existing reports are not adequate, but at a minimum, there should not be duplicative requirements. If NRC adopts this provision, it should remove the reporting requirement under 10 CFR 50.75(f). To the extent that NRC's desire is to ensure appropriate funds will be available by reviewing the historical expenditures, power reactor licensees are able provide this information.

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	over the previous calendar year, the remaining balance of any decommissioning funds, and the amount provided by other financial assurance methods being relied upon; **(B) An estimate of the costs to complete decommissioning, reflecting any difference between actual and estimated costs for work performed during the year, and the decommissioning criteria upon which the estimate is based;** **(C) Any modifications occurring to a licensee's current method of providing financial assurance since the last submitted report; and** **(D) Any material changes to trust agreements or financial assurance contracts.**		However, it is unlikely to be useful other than for interest's sake, and further use of this data to predict future decommissioning costs may be suspect. The value of the reporting requirement does not justify burden upon licensees, because only a few plants have been decommissioning to unrestricted release and that the data does not constitute a representative sample. Licensees will be unduly challenged by rate regulators, financial auditors and other stakeholders having opposing interests as they relate to funding decommissioning. The existing NRC minimum funding formulae provide stability in rate regulation prior to retirement. Estimates of only forward-looking expenses have provided the same stability for retired units. This section should be focused only on forward-looking needs to meet decommissioning liabilities.
New Requirements for Shutdown Reactors – Annual Financial Assurance Compliance	**If the sum of the balance of any remaining decommissioning funds, plus earnings on such funds calculated at not greater than a 2 percent real rate of return, together with the amount provided by other financial assurance methods being relied upon, does not cover the estimated cost to complete the decommissioning, the financial assurance status report must include additional financial assurance to cover the estimated cost of completion.**	10 CFR 50.82(a)(8)(vi)	The new rules require that additional financial assurance must be provided each year, if there is any shortfall in existing assurance levels. An annual assessment of financial assurance is already required by 10 CFR 50.75(b)(2), but the new rules would impose a firm requirement, which would be less flexible than NRC's current case-by-case evaluation of the funding plans for shutdowns reactors. In order to assure that the new rule is not interpreted as a departure from current practice, we recommend that NRC revise the language to provide that either additional assurance be provided or that the licensee submit an acceptable plan for obtaining additional assurance.

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Independent contractor to perform ISFSI decommissioning activities	**Each holder of, or applicant for, a license under this part must submit for NRC review and approval a decommissioning funding plan that must contain:** (2) A detailed cost estimate for decommissioning, in an amount reflecting: (i) The cost of an independent contractor to perform all decommissioning activities; (ii) An adequate contingency factor; and (iii) The cost of meeting the Sec. 20.1402 of this chapter criteria for unrestricted use, provided that, if the applicant or licensee can demonstrate its ability to meet the provisions of Sec. 20.1403, the cost estimate may be based on meeting the Sec. 20.1403 criteria.	10 CFR 72.30(b)(2)	Proposed rule section 10 CFR 72.13 states that only sections 72.30(e) & (f) apply to ISFSI General Licensees (holders of a Part 50 License). The basis for excluding ISFSI General Licensees from compliance with the new requirements in proposed rule sections 72.30(b), (c), and (g) appears to be that these Licensees have a Part 50 License and, therefore, have accumulated or have access to adequate funds for decommissioning. As written, the proposed rule section 10 CFR 72.30(b)(2)(i) requires holders of a Part 50 license, who are also ISFSI Site-Specific Licensees, to submit a separate decommissioning cost estimate for their ISFSI Site-Specific License. This effectively prohibits the Part 50 Licensee from continuing to include in the Part 50 decommissioning cost estimate, the ISFSI decommissioning costs and related assumptions The proposed rule should be revised to allow an ISFSI Site-Specific Licensee, who also holds a Part 50 License, to continue to include in the Part 50 decommissioning cost estimate, the ISFSI decommissioning costs and related assumptions.
Resubmittal of ISFSI decomm funding plan every three years after license renewal	**At the time of license renewal and at intervals not to exceed 3 years the decommissioning funding plan must be re-submitted with adjustments as necessary to account for changes in costs and the extent of contamination.**	10 CFR 72.30(c)	Proposed rule section 10 CFR 72.13 states that only sections 72.30(e) & (f) apply to ISFSI General Licensees (holders of a Part 50 License). The basis for excluding ISFSI General Licensees from compliance with the new requirements in proposed rule sections 72.30(b), (c), and (g) appears to be that these Licensees have a Part 50 License and, therefore, have accumulated or have access to adequate funds for decommissioning. As written, the proposed rule section 10 CFR 72.30(c) requires holders of a Part 50 license, who are also ISFSI Site-Specific Licensees, to report their adjusted

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			ISFSI decommissioning cost estimate information to the NRC at intervals not to exceed 3 years. ISFSI Site-Specific Licensees that have a Part 50 License normally have included costs for decommissioning of the ISFSI in their Part 50 decommissioning cost estimate. The proposed rule should be revised to allow an ISFSI Site-Specific Licensee that does have a Part 50 License to continue to report their ISFSI decommissioning cost estimate information to the NRC in their Part 50 decommissioning cost estimate submittal using the Part 50 reporting interval.
Inconsistencies Between the Proposed Rule and the Financial Assurance Guidance Document	**Section 10 CFR 72.3(c) states: At the time of license renewal and at intervals not to exceed 3 years the decommissioning funding plan must be re-submitted with adjustments as necessary to account for changes in costs and the extent of contamination.**	Financial Assurance Guidance Document	The draft Guidance Document does not conform to this part of the proposed rule. Guidance Document section A.3.2 states that the DFPs should be updated every 3 years but does not address submission to NRC. Section A.3.3, titled; Submitting the Required Documentation, does not include the proposed rule requirement to re-submit the DFP at intervals not to exceed 3 years. It is recommended that the Guidance Document section A.3.3 be revised to conform with the proposed rule regarding re-submittal of the updated DFP to the NRC. There other comments in this document dealing with the report frequency.
The Need For Evaluation of Subsurface Contamination	**Each licensee shall make or cause to be made, surveys of areas, including the subsurface, that....**	10 CFR 20. 1501	The proposed NRC regulations could have the unintended consequences of triggering performance of extensive characterization and remediation efforts, without regard to the degree of actual health and safety impact. The proposed regulations would require the evaluation of subsurface

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			contamination based on future decommissioning exposure scenarios, even though no foreseeable operating exposure limits would be exceeded. Furthermore, the requirements for extensive subsurface soil characterization (or remediation for that matter) during an operating facility's lifetime is largely unrealistic. It is not feasible to perform subsurface characterization without risking the breech of barriers that contain radioactivity, disrupting the operation essential equipment, or exacerbating the migration of contaminants already in the environment. Based on industry decommissioning experience, the majority of subsurface contamination (by volume and concentration) would likely be located directly under the SSCs that have leaked, where it cannot be safely or adequately accessed for characterization purposes. Even in the case of a reactor undergoing decommissioning, these areas usually cannot be accessed until late in the decommissioning process, when many of the SSCs and higher levels of contaminants sources have been removed. Due to access constraints, it is unlikely that subsurface characterization efforts at an operating reactor would provide any better DCE input data (i.e., volumes and locations of subsurface media exceeding decommissioning criteria) than that produced by experienced decommissioning experts making engineering judgments using information currently available as 10 CFR 50.75 (g) file data.

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Adequacy Of Current Rules		10 CFR 20, 30, 50, 70, and 72	• The current decommissioning and recordkeeping criteria in 10 CFR 20, 30, 50, 70 and 72 have proved to be reasonable and effective for the fuel cycle industry. • The fuel cycle industry believes the current financial assurance and recordkeeping requirements in 10 CFR 70.25 are very appropriate and should be retained. Based on the experience and record of the industry, existing regulations may already be too burdensome. • The current decommissioning funding mechanisms in 10 CFR 70.25(f) have provided very effective financial assurance for fuel cycle facility decommissioning planning and completion. • NRC's own experience (SECY-03-0069, Attachment 7) indicates that "no licensee providing a parent company or self-guarantee has entered bankruptcy or has failed to proceed with decommissioning projects in an adequate manner". The SECY paper goes on to state that (NRC) "staff has not observed an example of an NRC licensee whose decommissioning funding fell short because of inadequate disclosure of the licensee's financial position..." • The current decommissioning funding plan and financial tests in Appendix A (Parent Company Guarantees) and Appendix C (Self Guarantees) of Part 30 have proved to be an economical way for materials licensees to demonstrate financial assurance sufficient to fund decommissioning efforts. The NRC has not demonstrated a need, and in fact it is unnecessary, to impose greater

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			restrictions in those tests in order to provide reasonable assurance of decommissioning funding. Further, NEI supports the enhancement of the guarantee provisions to permit the consideration of intangible assets in the asset tests for parent and self guarantees, as set forth in the proposed rule. That change is appropriate in light of the development of objective methods to value intangible assets, as described in the analysis in the proposed rule. No further changes are necessary to ensure this approach provides reasonable assurance of adequate decommissioning funding. • The current financial assurance regulations (10CFR70.25(f) already require a trust for decommissioning costs to be established when required. There is insufficient justification to require additional standby trust agreements for financially sound companies well in advance of the need. • NRC should address their concerns on a risk informed performance basis for individual licensees rather than mandate more restrictive financial assurance requirements in rulemaking for all companies that meet stringent parent and self guarantee criteria. • The conclusion of the above arguents supports the adequacy of the current rules.

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ISFSI Funding	**The proposed rule change currently contains a new list of information that must be included in an ISFSI and MRS licensee's decommissioning funding plan. Proposed items (b)(1) and (b)(4) are quoted below and appear to be partially redundant.** ***"(1) Information on how reasonable assurance will be provided that funds will be available to decommission the ISFSI or MRS.*** ***(4) A description of the method of assuring funds for decommissioning from paragraph (e) of this section, including means for adjusting cost estimates and associated funding levels periodically over the life of the facility."***	Section 72.30(b)	It is recommended that item (b)(1) be deleted and the items be re-numbered since item (b)(4) appears to encompass more than the information required by (b)(1).
ISFSI Additional Information Requested	**The proposed rule change establishes a new requirement for Part 72 licensees to submit to NRC a decommissioning funding plan at intervals not to exceed 3 years. The proposed rule change requires this decommissioning funding plan to contain all of the information specified in section 72.30(b), which includes a detailed decommissioning cost estimate with additional information. The Draft Guidance on Financial Assurance for Decommissioning Planning Proposed Rule, Appendix A, section A.3 indicates that the decommissioning funding plan and its detailed decommissioning cost estimate**	Section 72.30(c)	This section of the proposed rule only applies to ISFSI Site-Specific Licensees. Part 50 Licensees have normally included the ISFSI decommissioning cost estimate in their Part 50 decommissioning cost estimate. To meet the requirements of this rule change, a Part 72 Site-Specific Licensee will need a considerable amount of time and resources to prepare this decommissioning funding plan and its detailed decommissioning cost estimate for submittal to the NRC. It is recommended that the NRC provide at least one (1) year following the effective date of the rule change for Part 72 Site-Specific Licensees to prepare and submit their first updated decommissioning funding plan. This submittal time should be stated in section 72.30(c) of the final rule.

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	should be submitted to the NRC using the checklist and tables format provided in the guidance.		
ISFSI Financial Assurance Level Changes	**The proposed rule change currently states, in part:** ***"(c) At the time of license renewal and at intervals not to exceed 3 years the decommissioning funding plan must be re-submitted with adjustments as necessary to account for changes in costs and the extent of contamination. If the amount of financial assurance will be adjusted, this cannot be done until the updated decommissioning funding plan is approved…."***	Section 72.30(c)	In reference to the wording in the second sentence of section 72.30(c), it is not clear why a licensee cannot increase the amount of financial assurance until the updated decommissioning funding plan is approved by the NRC. Section 72.54(e) currently states that, "the amount of financial assurance must be increased, or may be decreased, as appropriate, to cover the detailed cost estimate for decommissioning…" It is recommended that the proposed wording in the last sentence of section 72.30(c) be changed as follows: *"If the amount of financial assurance will be decreased, this cannot be done until the updated decommissioning funding plan is approved."*
ISFSI Financial Certification Provision Consistency With Other Licensees	**Currently section 72.30(f)(4), as stated below, is not being changed as a part of this proposed rule change.** ***"(4) Records of the cost estimate performed for the decommissioning funding plan or of the amount certified for decommissioning, and records of the funding method used for assuring funds if either a funding plan or certification is used."***	72.30(f)(4)	Part 72 does not have provisions for an ISFSI licensee to certify to a prescribed amount of financial assurance like Part 30, 40 and 70 material licensees do, for example see 70.25(d). It is recommended that the section 72.30(f)(4) wording, related to certifying to a prescribed amount of financial assurance, be deleted and item (4) be reworded as shown below: *"(4) Records of the cost estimate performed for the decommissioning funding plan and records of the funding method used for assuring funds are available for decommissioning."*

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Monitoring, Adjusting & Reporting on Fund Balance	**The section 72.30(g) proposed rule change currently states:** ***"(g) In providing financial assurance under this section, each licensee must use the financial assurance funds only for decommissioning activities and each licensee must monitor the balance of funds held to account for market variations. The licensee must replenish the funds, and report such actions to the NRC, as follows:*** ***(1) If, at the end of a calendar quarter, the fund balance is below the amount necessary to cover the cost of decommissioning, but is not below 75 percent of the cost, the licensee must increase the balance to cover the cost, and must do so within 5 days after the end of the calendar quarter.*** ***(2) If, at any time, the fund balance falls below 75 percent of the amount necessary to cover the cost of decommissioning, the licensee must increase the balance to cover the cost, and must do so within 5 days of the occurrence.*** ***(3) Within 30 days of taking the actions required by paragraphs (g)(1) or (g)(2) of this section, the licensee must report such actions to the NRC, and state the new balance of the fund."***	72.30(g) and 30.35(h), 40.36(g), 70.25(h)	The new section 72.30(g) requirements apply only to ISFSI Site-Specific Licensees and are consistent with the new requirements being added to sections 30.35(h), 40.36(g), and 70.25(h) for other material licensees. It appears that these new requirements are focused on the portion of a licensee's decommissioning funds that have been prepaid or collected and are subject to market variations. The licensee's funds associated with the Prepayment and External Sinking Fund methods will be invested and may be subject to market variations, however, the Surety, Insurance, or Other Guarantee methods may not involve any licensee invested funds. The Prepayment method is expected to be fully funded at all times, therefore, the proposed wording would work. In the case of the External Sinking Fund method, the fund is not required to be fully funded until the final facility decommissioning is expected to begin. Per section 72.30(b) of the proposed rule, an ISFSI Site-Specific Licensee must have an NRC approved decommissioning funding plan for their External Sinking Fund and is required to make deposits into the fund at least annually. Part 30, 40, and 70 material licensees may also use an External Sinking Fund and could have an NRC approved decommissioning funding plan. As currently worded, the proposed wording in sections 30.35(h), 40.36(g), 70.25(h), and 72.30(g) does not recognize that a licensee's fund balance for their External Sinking Fund is not required to contain "the amount necessary to cover the cost of decommissioning" until the final facility decommissioning begins. As these proposed rule sections are currently worded, on the effective date of the

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			rule change, some licensees would be required to fully fund their External Sinking Fund to cover the cost of decommissioning within 5 days and make the 30 day report to the NRC. It is recommended that wording similar to the following be added to the proposed sections 72.30(g)(1) and (g)(2) and the corresponding sections in Part 30, 40, and 70: *"If ..., the fund balance is below the amount necessary to cover the cost of decommissioning, or in the case of an external sinking fund the amount required at that point in time by the approved funding plan, the licensee must increase the balance to provide the required amount of funds ...."*
Unwarranted Requirements To Restore Trust Funds Balance & Make Reports	***"(g) In providing financial assurance under this section, each licensee must use the financial assurance funds only for decommissioning activities and each licensee must monitor the balance of funds held to account for market variations. The licensee must replenish the funds, and report such actions to the NRC, as follows:*** ***(1) If, at the end of a calendar quarter, the fund balance is below the amount necessary to cover the cost of decommissioning, but is not below 75 percent of the cost, the licensee must increase the balance to cover the cost, and must do so within 5 days after the end of the calendar quarter.*** ***(2) If, at any time, the fund balance falls below 75 percent of the amount necessary to cover the cost of decommissioning, the licensee must***	72.30(g) and 30.35(h), 40.36(g), 70.25(h)	The new section 72.30(g) of the proposed rule contains excessive requirements for monitoring and correcting fund balances. Part 72 ISFSI Site-Specific Licenses are normally a 20 year license that will need to be renewed or extended until the U.S. Department of Energy takes title to the spent nuclear fuel. Based on continuing delays in the scheduled opening of the federal repository, a specific realistic ISFSI facility decommissioning date cannot be determined, however, it may not occur until approximately 2030 or 2040. Based on such a long period of ISFSI licensed operations, the requirements in section 72.30(g) to monitor decommissioning fund balances "quarterly" and "at any time" and to increase fund balances "within 5 days" are considered very excessive. It is recommended that the following changes be considered to simplify the rule and reduce an unnecessary burden on ISFSI licensees with a Site-Specific License, while still providing adequate assurance and information to the NRC.

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	increase the balance to cover the cost, and must do so within 5 days of the occurrence. ***(3) Within 30 days of taking the actions required by paragraphs (g)(1) or (g)(2) of this section, the licensee must report such actions to the NRC, and state the new balance of the fund."***		a. It is not clear why both requirements are needed in sections 72.30(g)(1) and (2) since the required action (increase fund balance within five days) and reporting requirement (30 day report to NRC) are essentially the same. One monitoring requirement that requires timely action and adequate reporting should be sufficient. Based on the long duration of ISFSI operations, an annual (versus quarterly) monitoring requirement and a 30 day (versus 5 days) requirement to increase the fund balance is considered more reasonable and adequate. The following wording for this recommendation is provided below: *"(g) In providing financial assurance under this section, each licensee must use the financial assurance funds only for decommissioning activities and each licensee must monitor the balance of funds held to account for market variations. The licensee must replenish the funds, and report such actions to the NRC, as follows:* *(1) If, at the end of a calendar year, the fund balance is below the amount necessary to cover the cost of decommissioning, the licensee must increase the balance to cover the cost, and must do so within 30 days after the end of the calendar year."* b. Since the section 72.30(g)(2) text related to "75 percent of the required amount" was deleted in the above recommendation, if the NRC desires to know when a licensee's fund balance falls below 75 percent of the required amount, this could be added to the (g)(3) renumbered as (g)(2) reporting requirement as follows:

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			"(2) Within 30 days of taking the actions required by paragraph (g)(1) of this section, the licensee must report such actions to the NRC, state the new balance of the fund, and state whether or not the fund balance had fallen below 75 percent of the required amount." It is also recommended that the proposed wording in section 72.30(g)(3) be clarified to specify the NRC position/office the report is made to and whether this is a verbal report or a written report. Since these monitoring and reporting requirements are also being added to Parts 30, 40 and 70, it is recommended that the NRC consider changing the corresponding wording in sections 30.35(h), 40.36(g), and 70.25(h).
Correct Reference Numbers in Part 72	**Due to the re-numbering in this proposed rule change, certain reference numbers need correction.**	10 CFR 72	Editorial changes to the following sections of 10 CFR 72 should be made: • Section 72.30(f)(3)(ii): the reference to 72.30(d)(1) should be changed to say 72.30(f)(1) • Sections 72.80(e) and (f): the references to 72.30(d) should be changed to say 72.30(f)
Scope of the proposed rule and guidance is far more extensive than warranted by the circumstances	***"The Liquid Releases Lessons Learned Task Force Final Report dated September 1, 2006, concluded that the levels of tritium and other radionuclides measured thus far do not present a health hazard to the public ..."***	Preamble, page 3814, first column	The NRC's expansion of 10 CFR 20.1406 to apply not only to new licenses, but to include existing licenses is a backfit that has not been adequately analyzed for its impact and is inconsistent with the NRC's own finding that none of the instances of inadvertent releases to the environment presented a threat to public health and safety.

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Scope of the proposed rule applies the same rule to all types of licensees despite the inherent differences in how each type of licensee controls radioactive material and/or the financial assurance instruments for decommissioning	***"...a small number of materials licensees (a total of about 5 NRC and Agreement State licensees)..."NRC's expectation is that no additional surveys will be required of power reactor licensees and fuel cycle facilities"***	Preamble II.B page 3815 third column II.J page 3821, second column	Throughout preamble, NRC acknowledges that only a few sites have identified contamination and been faced with hurdles to releasing the site. The NRC also states in the preamble (page 3816, second column) that "*the proposed changes to 10 CFR 20.82(a) affect the 12 power reactor licensees undergoing decommissioning*". Additional statements under the Discussion on Financial assurance (page 3815, third column) further describe the impact to decommissioning reactors. Those statements clearly acknowledge the effects even though the analysis of the backfit rule is limited at best.
Inconsistent regulation of unlicensed material	**References to "residual radioactivity" in 10 CFR 20.1406(c) and 10 CFR 20.1501(a) and (b). 10 CFR 20.1002 states "*Residual radioactivity means radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 10 CFR part 20.*"**	10 CFR 20.1406(c), 20.1501(a), 20,1502(b), 20.1002. See also preamble III discussion on section 20.1406, page 3829, third column and section 2 of draft guidance	Licensees should not be required to control unlicensed material in a manner that is substantively different than that required by a non-licensee. The definition in 10 CFR 20.1002 is inconsistent with a risk-informed approach to regulation and with the recently issued RIS 2008-03 "Return/Re-Use of Previously Discharged Radioactive Effluents." In addition, the preamble to the rule explicitly excludes off-site contamination attributable to previously released effluents (page 3815, first column), demonstrating the inconsistency of requiring the licensee to control on-site unlicensed material. The NRC should revise the definition of "residual radioactivity" in 20.1002 to be consistent as follows noting the stricken test.:

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			"*Residual radioactivity* means radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed ~~and unlicensed~~ sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of ~~routine or~~ accidental releases of radioactive material at the site and previous burials at the site, even if those burials were made in accordance with the provisions of 10 CFR part 20.
Remediation to unrestricted release criteria			Draft regulatory guidance released with the proposed rule specifies that the intent of the proposed rule is to address amounts of residual radioactivity at a site that are significant to achieve effective decommissioning planning. For operating facilities, these events are assumed in the proposed rule and draft regulatory guidance to result in residual radioactivity in a quantity that would later require remediation during decommissioning to meet the unrestricted use criteria of 10 CFR 20.1402. The established approach for determining the cost under ALARA is not factored into the proposed remediation decision. Further, as currently worded, the proposed rule and draft regulatory guidance have the apparently unintended consequence of eliminating the ability to use the restricted release criteria at license termination because a spill has to be remediated to the screening levels (DCGLs) for unrestricted release of the site. If the licensee does not remediate to the screening DCGLs, they must put money into decommissioning fund to remediate such that the license can be terminated for unrestricted use of the site.

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Inaccurate estimate of total number of hours required annually to complete the requirement or request	***"The total burden increase for this rulemaking is 1,210.5 hours (10 CFR 20 – 0 hours)..."***	Preamble IX, page 3834 second column	This estimate is grossly inaccurate – as an industry, nuclear power plants have spent thousands of person-hours and millions of dollars implementing the Industry Groundwater Protection Initiative. Given that the GPI is a voluntary effort and, to some degree, adopts a more graded approach to re-evaluation of the site's hydrogeology, as an example, the amount of time and resources necessary to implement the proposed rule using the draft guidance are significantly greater than zero hours.
Contrary to the Commission's direction in SECY-03-0069, MARSSIM is being established as a requirement for licensees.	**References throughout FR and draft guidance to MARSSIM for "subsurface," survey requirements, documentation and quality assurance/quality control requirements.**	Preamble, page 3813, third column Draft guidance throughout	The Commission's direction to the NRC was that the staff should craft regulations and guidance document(s) "*so that it is clear to the licensees and to the staff how much characterization information is enough. The staff should only ask for limited information. Licensees should not be required to submit the equivalent of a full scale MARSSIM [Multi-Agency Radiation Survey and Site Investigation Manual] survey every year.*" The draft guidance in section 3.3 refers licensees to RG 4.15 for quality assurance/quality control requirements but does not specify which version of RG 4.15 applies. As previously stated in industry's comments on RG 4.15, revision 2 has significantly more extensive requirements for quality assurance/quality control that will result in additional requirements at considerable costs.
Imposition of survey requirements beyond the potential to	**"Unmonitored Areas in Buildings" requires licensees to "*review the plans against the physical facility to identify any areas within each site building that may not be properly monitored.*"**	Table 1-2a Draft guidance, page 9	This requirement presumes that the building(s) in question will remain in place at the time of license termination. A licensee should not be required to perform additional surveys or monitoring within a building beyond that required by current regulations unless the intent is to terminate the license

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impact decommissioning			for unrestricted use of the site with the building still standing. These new requirements for characterization surveys will result in substantial additional effort by licensees, assuming that said surveys could be accomplished without challenging nuclear safety.
Inconsistent guidance on surveys	***"NRC's expectation is that no additional surveys will be required of power reactor licensees and fuel cycle facilities"***	Preamble II.J page 3821, second column	Contrary to the statement in the preamble to the proposed rule, Section 3.1 of the draft guidance lists five items that may change in a licensee's monitoring program.
Clarification of units	***Record Significant Contamination in Records Important to* Decommissioning: *"...Releases ≥ 100 g are defined in this category..."***	Draft Guidance Table 1-2b	Is the unit "grams" or "gallons"? This is an inappropriate application of a voluntary initiative threshold for voluntary communication of a leak or spill to stakeholders The reference to releases greater than or equal to 100 should be deleted in its entirety. The 100 gallons was selected to improve transparency in communication between licensees and their stakeholders. It does not in any way correlate to "significance" in terms of health or contamination. The NRC has stated in its rulemaking what "significant contamination" means. This definition covers events which, unless remediated, would prevent the site from being released for unrestricted use. (Additional Comments Below)
New requirements for leak detection instrumentation and containment		Draft guidance section 2.1	Statements that the design of the facility should include a variety of confinement measures and additional leak detection instrumentation, particularly for portions of systems that cannot be visually inspected reflect lessons learned from decommissioning experience that were not considered during

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			design and construction of the existing fleet of nuclear power plants. Any attempt to impose these requirements would violate the backfit rule.
Unreasonable timeframe for remediation ("Prompt")	***"Licensees should develop procedures that ...also specify criteria for conducting prompt (e.g., <4 hours) cleanup..."***	Draft guidance section 2.2	The proposed definition of "prompt" with regards to clean-up of a leak or spill is unreasonable and is not always practically achievable. Licensees should be given the flexibility to define the appropriate timeframe for clean-up of a spill or leak, taking into consideration ALARA, realistic exposure pathways, and the site-specific soil and ground water characteristics. This apparently arbitrary time frame is inconsistent with current requirements for materials and fuel cycle licensees establish 24 hours for reporting an event that exceeds five times an ALI or results in restrictions on access to the area (see 10 CFR 30.50, 40.60, and 70.50). As the NRC notes in the preamble to the proposed rule, none of the events represented a threat to public health. In addition, requiring licensees to perform clean-up to MARSSIM levels within 4 hours or, failing that, to modify their estimates of decommissioning funding has no clear basis. Further, such unfounded positions would have the apparently unintended consequence of eliminated from consideration both SAFSTOR or restricted site release as practical decommissioning options – despite explicit acceptance of such alternative in the current NRC regulations. The NRC should more fully evaluate the effect of this proposed rule on existing regulations and guidance for decommissioning facilities.

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Subsurface monitoring of soil		Draft guidance 3.3.1	Requires soil monitoring for deposition of particulate material resulting from controlled releases of airborne radioactive effluents. The level of effort needed to perform this monitoring is not warranted in a risk-informed regulatory scheme and effectively means that a licensee can never stop monitoring its controlled effluents even after they have passed the radiation monitoring instrumentation. This is inconsistent with RIS 2008-03 and unreasonable.
Extent of ground water monitoring plan and numeric modeling of site		Draft guidance 3.3.2	The objectives of the ground water monitoring plan effectively require 3-D monitoring and modeling of the groundwater even for instances in which no subsurface contamination or limited contamination has been identified. The level of effort needed to perform this monitoring and 3-D modeling is not warranted in a risk-informed regulatory scheme.
Clarification of reference	***"...A flow chart for developing a ground water monitoring system is shown in Figure 5-1 below."***	Page 21 draft guidance, second to last paragraph	Should the reference be to Figure **3-1**?
Response to a contamination event		Draft guidance section 4.3	The usefulness and accuracy of attempting to perform a net present worth for future clean-up instead of more immediate action is limited. In particular, the future availability of disposal options for low level radioactive waste is unknown.
Decommissioning funding plan adjustments		Draft guidance section 4.4	The basis for revising the decommissioning funding assumes that the goal at license termination will be for unrestricted use of the site. If adopted as proposed, the rule would have the apparently unintended consequence of eliminating SAFSTOR or restricted site release as practical decommissioning options even though current NRC regulations explicitly allow them. As a minimum, the NRC should consider establishing a

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			threshold (e.g. percentage of the decommissioning fund) that must be exceeded before the funding plan is required to be adjusted.
Screening values aka remediation thresholds for ground water		Draft guidance section 4.4, pages 33 and 34	Contrary to the Commission's direction to the staff, the draft guidance establishes the screening values in MARSSIM and NUREG-5512 for soil and surfaces as applicable for operating licenses. As stated in earlier comments, this effectively precludes license termination with restricted use of the site as allowed under the LTR. Establishing EPA's MCLs for ground water used as drinking water as screening values triggering remediation is not risk-informed and is not appropriate given that: (i) not all ground water is designated as a source (current or future) for drinking water; (ii) some of the MCLs are overly-conservative i.e. ^{3}H. In addition, the failure to consider the use of ground water in establishing the screening values is inconsistent with the LTR.
Inconsistent and unclear definition of "significant" for 10 CFR 50.75(g) Recordkeeping	– ***"A significant amount of subsurface residual radioactivity is an amount that would later require remediation during decommissioning to meet the unrestricted use criteria of 10 CFR 20.1402."*** **(1.1 Purpose page 4)** – ***"When any subsurface contamination above background is identified, the staff recommends that it be noted in decommissioning records, even if it is not otherwise reportable."*** **(1.3 page 5)** – ***"The NRC staff recommends that any identified leaks or spills within the***	Preamble XIII Backfit Analysis, page 3835, third column. "Draft Guidance to Implement Survey and Monitoring Requirements Pursuant to	There are several descriptions in the preamble to the proposed rule and in the draft guidance of when records should be retained under 10 CFR 50.75(g) as important to decommissioning. The descriptions are not consistent and, in some instances, without technical justification. In addition, none of these definitions appear to consider the existing thresholds for reporting requirements by licensees.

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	facilities or those greater than 100 gallons be entered in the decommissioning records.*" (1.3 page 5)** – ***"Each license type has requirements for maintaining records, including occurrences of spills and leaks, that are important to decommissioning the facility (e.g. §40.36(f), §50.75(g)). As discussed in this guidance, "significant contamination" is that which would require remediation to meet unrestricted release limits at license termination. Releases ≥ 100 g are defined in this category. Repeat events should also be recorded. Licensees may measure actual concentrations and account for decay, or they may do a calculation using RESRAD or other code to determine dose at the time of license termination (See ¶4 of this Guide)." – ***"To be included in records important to decommissioning, the nuclides must be in quantities sufficient that they either:*** ***a) create a potential to increase exposure of workers, or*** ***b) remain in place in concentrations above the values in Table 2 of Appendix B to10 CFR 20 or Appendix I to 10 CFR 50, or*** ***c) migrate to the site boundary in concentrations that could exceed facility-specified action levels, or regulatory limits."* (2.3 page 14)**	Proposed Rule Text in 10 CFR 20.1406(c) and 10 CFR 20.1501(a)" January 2008	

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Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
Inappropriate application of a voluntary initiative threshold for voluntary communication of a leak or spill to stakeholders	***"The NRC staff recommends that any identified leaks or spills within the facilities or those greater than 100 gallons be entered in the decommissioning records."*** **(Section 1.3 page 5)**	"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)" January 2008	The NRC staff's recommendation is a gross mis-application of the voluntary communication threshold for a spill or leak volume of 100 gallons or more under the Industry's voluntary Groundwater Protection Initiative (GPI). The Industry GPI identifies the volume as being the threshold for voluntary communication by the licensee to its stakeholders. In fact, the Industry GPI explicitly stated in the Voluntary Communication Protocol Interim Guidance document issued June 2006 that the 100 gallons used to connote "'Significant' [for on-site leaks or spills} as used in the Industry Initiative is intended to be defined in part as what is of interest to the public. It is not intended to imply or refer back to regulatory terminology nor is it intended to indicate that the leak or spill has public health and safety or environmental protection consequences." That statement was carried through to the Final Guidance Document NEI 07-07. The threshold of 100 gallons should not be used as the threshold for "significant" in 10 CFR 50.75(g).
Incomplete Requirements for the Decommissioning Funding Plan	**Section 10 CFR 72.30(b) of the proposed rule change adds the following specific requirements (b)(1) through (b)(6) that a decommissioning funding plan must contain.** ***"(b) Each holder of, or applicant for, a license under this part must submit for NRC review and approval a decommissioning funding plan that must contain:*** ***(1) Information on how reasonable assurance will be provided that funds will be available to decommission the ISFSI or MRS.***	Financial Assurance Guidance Document	Various sections of the draft Guidance Document address the contents of a decommissioning funding plan, however, they do not cover all of the information specified in the proposed rule. It is recommended that the following draft Guidance Document sections be changed to conform to the proposed rule changes in section 72.30(b)(1) through (b)(6): • Page xxv, Decommissioning Funding Plan (DFP) definition • Page 4-5, last paragraph and last bullet

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Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
	(2) A detailed cost estimate for decommissioning, in an amount reflecting: ***(i) The cost of an independent contractor to perform all decommissioning activities;*** ***(ii) An adequate contingency factor; and*** ***(iii) The cost of meeting the Sec. 20.1402 of this chapter criteria for unrestricted use, provided that, if the applicant or licensee can demonstrate its ability to meet the provisions of Sec. 20.1403, the cost estimate may be based on meeting the Sec. 20.1403 criteria.*** ***(3) Identification of and justification for using the key assumptions contained in the decommissioning cost estimate.*** ***(4) A description of the method of assuring funds for decommissioning from paragraph (e) of this section, including means for adjusting cost estimates and associated funding levels periodically over the life of the facility.*** ***(5) The volume of onsite subsurface material containing residual radioactivity that will require remediation to meet the criteria for license termination.*** ***(6) A certification that financial assurance for decommissioning has been provided in the amount of the cost estimate for decommissioning."***		• Page A-28, Checklist 3 (also add a Part 72 box) • Page A-35, Section A.3.3, first paragraph and bullets (also add reference to 72.30(b)

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
Inconsistencies Between the Proposed Rule and the Financial Assurance Guidance Document	**Section 10 CFR 72.30(b)(6) of the proposed rule change adds a new requirement for Part 72 licensees that states, in part:** ***"(6) A certification that financial assurance for decommissioning has been provided in the amount of the cost estimate for decommissioning."***	Financial Assurance Guidance Document	The definition on page xxiv of the draft Guidance Document appears to be consistent with the proposed rule section 72.30(b)(6) change. Part 30, 40, and 70 licensees typically submit a "certification to a prescribed amount of financial assurance." Various sections of the draft Guidance Document currently state that Part 30, 40, and 70 licensees are required to submit a certification and that Part 72 licensees do not need to submit a certification of financial assurance for decommissioning with their decommissioning funding plan. In accordance with the proposed rule change, Part 72 licensees will be required to submit a certification of financial assurance to the NRC at the time of license renewal and at intervals not to exceed 3 years. It is recommended that the following sections of the draft Guidance Document be changed to conform to the 72.30(b)(6) proposed rule change, including the timing to submit it: • Page 4-3, last paragraph • Page 4-4, last paragraph • Page 4-5, last paragraph • Page A-10, DFP paragraph • Page A-20, first paragraph • Page A-25, section A.2.3 • Page A-26, section A.2.4

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
Details of Trust Agreement Creating Unintended Burden	**Section 10 CFR 72.30(c) coupled with 72.30(b) of the proposed rule contains a new requirement for Part 72 licensees to submit an updated decommissioning funding plan to the NRC for approval at intervals not to exceed 3 years. Section 72.30(c) states, in part:** ***"(c) At the time of license renewal and at intervals not to exceed 3 years the decommissioning funding plan must be re-submitted with adjustments as necessary to account for changes in costs and the extent of contamination. If the amount of financial assurance will be adjusted, this cannot be done until the updated decommissioning funding plan is approved. The decommissioning funding plan must update the information submitted with the original or prior approved plan and must specifically consider***	Financial Assurance Guidance Document	When the section 72.30(c) proposed rule change is considered along with the draft Guidance Document requirements related to the content of Trust Agreements, there is a significant impact on a Part 72 ISFSI Site-Specific Licensee. The draft Guidance Document Page A-62 for section A.4.5 Model Trust Agreement Schedules and page A-181 for section A.12.5 Model Standby Trust Agreement Schedules contain requirements for Trust Agreement document Schedule A to contain the following information: • *Amount of Cost Estimate ... Demonstrated by this Agreement* • *Date that the Cost Estimate listed here was last adjusted and approved by NRC* It is not clear why the Trust Agreement Contract document between the licensee and the trustee needs to contain these two pieces of information when this information will already be retained in the NRC's records system under the licensee's docket number. In accordance with the proposed rule section 72.30(c), a Part 72 Site-Specific Licensee would obtain NRC approval of their updated decommissioning funding plan, which includes the decommissioning cost estimate, every 3 years. The updated funding plan and associated cost estimate will be adjusted for inflation and radioactive waste burial costs and may also include a change to the projected date of ISFSI decommissioning if the USDOE schedule for assuming title to the licensee's spent fuel has changed. To keep the Trust Agreement current, the licensee will need to change Schedule A every 3 years to reflect the amount of the adjusted cost estimate and the NRC approval date.

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
			It is recommended that the draft Guidance Document page A-62 and page A-181 for Model Trust Agreement Schedule A be revised to delete the requirements for Part 72 licensees to include the following information in their Trust Agreement Schedule A: • *Amount of Cost Estimate ... Demonstrated by this Agreement* • *Date that the Cost Estimate listed here was last adjusted and approved by NRC*
Inconsistencies Between the Proposed Rule and the Financial Assurance Guidance Document	**Section 10 CFR 72.30(e) of the proposed rule change adds a new requirement for Part 72 licensees that states, in part:** ***"(e) The financial instrument must include the licensee's name, license number, and docket number; and the name, address, and other contact information of the issuer, and, if a trust is used, the trustee. When any of the foregoing information changes, the licensee must, within 30 days, submit financial instruments reflecting such changes."***	Financial Assurance Guidance Document	The draft Guidance Document was not changed to conform to the section 72.30(e) proposed rule change. Many sections of the draft Guidance Document currently contain wording similar to: *"Unlike other material licensees, part 72 licensees are not required to submit originals of the financial instruments used to provide financial assurance."* It is recommended that the Guidance Document be changed to reflect that Part 72 licensees are required to submit copies of financial instruments to the NRC within 30 days, whenever changes specified in section 72.30(e) are made to these financial instruments. Changes to the following Guidance Document sections should be considered: • Page 4-1, first paragraph • Page 4-2, third paragraph Page A-25, section A.2.3
Consistent Numbering	**The NRC proposed rule change added sub-sections to 10 CFR 72 that resulted in renumbering of some sub-sections (e.g., 72.30(d) was changed to 72.30(f).**	Financial Assurance Guidance Document	The draft Guidance Document was not changed to conform with the renumbering of some sub-sections in the proposed rule change.

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
			The following sections of the Guidance Document should be changed to reflect the renumbering of 10 CFR 72 sections: • Page 3-1, Regulatory Requirements: change 72.30(d) to 72.30(f) • Page 3-2, References to Other Records: change 72.30(d) to 72.30(f) • Pages 3-3, 3-4 and 3-5, section 3.1.2, Items 2, 3, 4 and 5: change 72.30(d) to 72.30(f) • Page 3-7, section 3.3, Regulatory Requirements: change 72.30(d) to 72.30(f) • Page 4-10, last paragraph, change "all nine of" to say "all eleven of" • Page A-208, Endnote 32: change 72.30(c)(2) to 72.30(e)(2)
Consistent Numbering	**Section 10 CFR 72.30(c)(2)(ii) of the current rule and renumbered section 72.30(e)(2)(ii) in the proposed rule state: "(ii) The surety method or insurance must be payable to a trust established for decommissioning costs. The trustee and trust must be acceptable to the Commission. An acceptable trustee includes an appropriate State or Federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency."**	Financial Assurance Guidance Document	As indicated, the proposed rule change only renumbered this section. During review of the draft Guidance Document, it was noted that page A-168, second paragraph and page A-169, section A.12.1 do not contain a reference to section 72.30(e)(2)(ii) that allows a Part 72 licensee to use a standby trust. Although this change is not within the scope of the proposed rule change, it is recommended that the wording in the second paragraph on page A-168 and page A-169, section A.12.1 of the draft Guidance Document be changed to add a reference to section 72.30(e)(2)(ii).
Consistent Numbering	**Section 10 CFR 72.30(c)(4) of the current rule and renumbered section 72.30(e)(4) in the proposed rule state: "(4) In the case of Federal, State, or local government licensees, a statement of**	Financial Assurance Guidance Document	As indicated, the proposed rule change only renumbered this section. During review of the draft Guidance Document, it was noted that page A-164, second paragraph and section A.11.1, do not contain a reference to section 72.30(e)(4) that

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
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	intent containing a cost estimate for decommissioning, and indicating that funds for decommissioning will be obtained when necessary."		allows a Part 72 licensee to use a statement of intent. Although this change is not within the scope of the proposed rule change, it is recommended that the wording in the second paragraph and in section A.11.1 on page A-164 of the draft Guidance Document be changed to add a reference to section 72.30(e)(4).
Consistent Numbering	**Section 10 CFR 72.30(c)(5) of the current rule and renumbered section 72.30(e)(5) in the proposed rule state: "(5) In the case of licensees who are issued a power reactor license under Part 50 of this chapter, the methods of 10 CFR 50.75(b), (e), and (h), as applicable."**	Financial Assurance Guidance Document	As indicated, the proposed rule change only renumbered this section. During review of the draft Guidance Document, it was noted that page 4-33, section 4.3.2.7, last bullet, still contains wording that was changed in a previous rulemaking. Specifically, this Guidance Document wording states, in part: "Exception: Part 72 licensees who are electric utility licensees (as defined in 10 CFR Part 50) may use an external sinking fund without having to couple it with a surety method or insurance (i.e., they may use a gradually funded prepayment mechanism only), in which case the amount of the fund may be below the cost estimate or prescribed amount prior to decommissioning." The NRC final rule effective December 24, 2003 (Decommissioning Trust Provisions, 67 FR 78332, dated December 24, 2002) changed the words "who are electric utility licensees" to say "who are issued a power reactor license under Part 50 of this chapter." Although this change is not within the scope of the proposed rule change, it is recommended that the wording in the last bullet on page 4-33, section 4.3.2.7 of the draft Guidance Document be changed to reflect the above wording in section 72.30(e)(5).

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Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
Risk-informed approach to soil and groundwater monitoring	**"... the GEIS presented an analysis of ground-water remediation with licensees divided into three classes based on their likelihood for significant soil and ground-water contamination:"**	Regulatory Analysis Decommissioning Planning September 2007 Page 8 paragraph 2 and 3	NRC should apply a risk-informed approach to soil and groundwater monitoring requirements by addressing these matters on a case-by-case basis during the licensing process for radionuclide and radiopharmaceutical licensees. Typically, radiopharmaceutical and research radiochemical manufacturers have a very low potential for soil and ground-water contamination due to the use of short-lived radionuclide's, gamma emitters that are easy to detect and control, rapid dispersion of low potency radionuclides, e.g., ^{14}C-labeled radiochemicals, and the non-dispersible forms of certain materials. Radiopharmaceuticals and research radiochemical manufacturers must maintain extreme controls on radionuclide inventory and processes to prevent cross contamination of products. These controls are typically more stringent than those necessary to ensure adequate occupational safety, environmental protection, and regulatory compliance with a myriad of Federal and State requirements. Continuous improvements (which are ongoing) in this industry have resulted in more effective control, lower emissions and lower occupational and public exposure.
The performance history in radiopharmaceutical licensees do not justify extensive	**"When ground water is being monitored, the surveys conducted by the licensee also would include hydro-geologic evaluations that lead to a determination of effective sampling and analysis, ..."**	SECY-07-0177 RIN: 3150-AH45 Page 35.	Surveys currently carried out by radionuclide and radiopharmaceutical industry licensees reduce the likelihood of groundwater contamination. There never has been significant groundwater contamination from these sites in up to 50 years of operation.

Matrix Of Issues Regarding Decommissioning NRC Proposed Rule, 73 FR 3812 (Jan. 22, 2008)			
Issue	***Proposed Rule or Guidance Text***	***Citation***	***Comment***
groundwater monitoring			
Excessive frequency for resubmission of decommissioning funding plans.	**At the time of licensee renewal add at interval, not to exceed 3 years,**	Proposed Rule Page 3837 col 1 10 CFR 30.35 (e) (2)	The proposed rule requires resubmission of the decommissioning funding plan at least every three years and at the time of license renewal. However, the material license renewal interval is typically five years. This will cause an excessive frequency of submissions. This can be avoided by requiring submission to be at time of renewal only or when a substantive change is necessary or as otherwise specified as a license condition.
Basis for estimating decommissioning costs too conservative in regulatory analysis.	**"... materials facilities who have a license to possess relatively small amounts of radioactive material are permitted to use a Certification Amount of funding as decommissioning financial assurance."**	Regulatory Analysis Decommissioning Planning September 2007 Page 3 paragraph 2	Decommissioning cost estimates for material licensees should be based on the actual radionuclide inventory and not license limits. For example, broad scope licensees may be licensed to possess multi-Ci quantities of a broad range of radionuclides but in practice only possess mCi quantities of many of these and zero quantities of most radionuclides. The estimates should be based on the historic use and actual holdings as indicated in licensee inventory records.
Unwarranted statement concerning the impact of waste disposal costs on contamination.	**"A continued trend of high disposal costs could increase the number of environmental contamination incidents at operating facilities, resulting in substantially higher decommissioning costs."**	Proposed Rule Page 3820 col3 paragraph 2	While the reduced availability of disposal sites and increased costs are an additional burden to licensees, these challenges have resulted in licensees taking actions to more effectively manage their wastes, by reducing volumes generated and improving storage methods. Based on our experience, this statement by NRC is unfounded.

ENCLOSURE 2

NEI Comments on the NRC "Backfit Analysis" Regarding the Proposed Rule on Decommissioning Planning.[1]

The NRC Incorrectly Concludes That the Proposed Decommissioning Planning Rule Does Not Impose Backfits That Require the Preparation of a Backfit Analysis

In its "Backfit Analysis" set forth in the notice of proposed rulemaking for the decommissioning planning rule, the NRC asserts that "the new or amended regulations in this proposed rule either clarify existing requirements, or require the collection and reporting of information using existing equipment and procedures. The proposed changes to requirements are not regulatory actions to which the backfit rule applies." 73 Fed. Reg. at 3835 (emphasis added).[2]

A backfit exists where there is a:

> modification or addition to systems, structures, components, or design of a facility;... or the procedures or organization required to... operate a facility; any of which may result from a new or amended provision in the Commission's regulations or the imposition of a regulatory staff position interpreting the Commission's regulations that is either new or different from a previously applicable staff position...
>
> [10 C.F.R. §50.109(a)(1).][3]

Numerous Backfits In Proposed Rulemaking: Contrary to the NRC's assertion, the proposed changes to existing requirements and staff positions far exceed clarification or the mere "collection and reporting" of information. The proposed regulations, coupled with the new NRC staff positions in proposed guidance,[4] are replete with changes to NRC staff positions that will have substantial impacts on licensees' facilities and procedures. At the same time, and as discussed more fully below, no demonstration has been made - as required by NRC backfitting regulations - that there is a substantial increase in the protection of the public health and safety or that the new positions are justified to achieve compliance or ensure adequate protection of the public health and safety or that a redefinition of the level of protection is necessary.

The proposed new NRC positions would cause the modification of licensed facilities and their procedures and thus constitute backfits. These new positions are by no means mere "clarifications" of existing requirements, or mere reporting of information, as claimed by the NRC.

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[1] NRC Proposed Rule, "Decommissioning Planning," 73 Fed. Reg. 3812 (Jan. 22, 2008).

[2] See also "Regulatory Analysis for Proposed Rulemaking – Decommissioning Planning," Draft for Comment (December 2007), at p. 43

[3] Similar provisions are set forth in 10 C.F.R. §§ 70.76 (a)(1), 72.62 (a), and 76.76. For purposes of this discussion, those provisions set the same fundamental standards.

[4] New generic NRC positions may be imposed both by new regulations or guidance, including Regulatory Guides (Committee to Review Generic Requirements "CRGR" Charter, Rev. 7, Appendix B, Table 1).

Proposed 'Clarifications' are Actually Fundamental Changes in Staff Positions: At issue here are two fundamental regulatory changes the NRC proposes which would, in conjunction with the proposed guidance, impose new staff positions that constitute backfits.

> *10 CFR 20.1406*: First, the "Minimization of contamination" requirements in 10 CFR 20.1406 would be amended by adding a new paragraph (c) to read as follows:
>
> (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 existing radiation protection requirements in Subpart B and radiological criteria for license termination in Subpart E of this part.

The NRC claims that "[t]his is not a backfit because it clarifies licensee requirements under two existing regulations applicable to licensed operations. To comply with the current ALARA dose requirements in 10 CFR 20.1101(b) and 10 CFR 20.1402 (within existing subparts B and E, respectively), licensees must have operating procedures to minimize the introduction of residual radioactivity into their site, including the subsurface." (73 Fed. Reg. at 3835.)

The NRC goes on to conclude that "[l]icensees should already have these procedures in place as part of their radiation protection program, and the proposed 20.1406(c) clarifies this requirement."

> *10 CFR 20.1501(a):* Second, the NRC also describes the change to 10 CFR 20.1501(a) as a "clarification," providing:
>
> (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.

The basis for this assertion of 'clarification' and the claim that no backfit analysis is required is that "10 CFR 20.1501(a) is being revised by replacing its undefined phrase "radioactive material" with a defined term 'residual radioactivity.' As defined in existing 10 CFR 20.1003, residual radioactivity includes subsurface contamination within its scope, and the word 'subsurface' is being added to 10 CFR 20.1501(a). This regulation (10 CFR 20.1501(a)(2)(iii)) already requires the evaluation of potential radiological hazards. Thus, as amended, 10 CFR 20.1501(a) makes clear that subsurface residual radioactivity is a potential radiological hazard, and that the radiological surveys required by this section must address subsurface residual radioactivity. This clarification of existing requirements does not require the preparation of a backfit analysis." (Id. (emphasis added).)

In contrast to these claims, the NRC would impose through the changes in regulations and the terms of extensive new guidance numerous new positions concerning monitoring and characterization[5] during plant operation of actual or potential subsurface contamination from leaks or spills.

Failure to Make Proper Backfit Determination and Perform Required Analysis: The NRC asserts that such changes are only clarifications and thus are not backfits. By doing so, the NRC avoids the performance of actual backfit analyses, failing to justify those new measures under the backfit rules. There simply is no "systematic and documented analysis" of these new positions as required by 10 CFR 50.109(a)(2), that would address whether there is "a substantial increase in the overall protection of the public health and safety...and that the direct and indirect costs of implementation...are justified" as required by 10 CFR 50.109(a)(3).

Fundamentally, the NRC seems to ignore even its own findings that virtually all licensees more than adequately address the subsurface concerns on which the rulemaking is premised. Indeed, as the NRC indicates throughout the proposed rulemaking package, there are a few examples where the current regulations appear to have contributed to unexpected post shutdown activities and financial demands. Further, the NRC recognizes that the likelihood of additional legacy sites seems small. In no instance has the current regulatory scheme been demonstrated to have been insufficient to assure the protection of the public health and safety.

Nonetheless, the NRC seeks to codify, in the operational context, actions and practices normally reserved for post-shutdown decommissioning, and the proposed new regulations and guidance create a regulatory scheme under which the NRC now expects extensive site characterization and potentially remediation during operation. In many respects such characterization is commensurate with actions previously required to be performed at the time of decommissioning.

Further, for power reactors, the NRC intends to codify licensees' ongoing voluntary actions with respect to the Groundwater Protection Initiative (GPI). As a result, the NRC would dictate far-reaching changes to the processes and procedures established by NRC *regulations and guidance*

[5]Examples of new staff positions are described below under "Examples of New Staff Positions."

that are currently in place – and yet justify its actions by asserting those changes are not significant when compared to *voluntary* industry initiatives.[6]

Imposing such new staff positions in these contexts without performing a backfit analysis is contrary to NRC backfit protections.

Proposed Rule Conflicts with Commission Directive: The proposed rule would directly conflict with the Commission's direction to the NRC staff when this rulemaking process began not to impose requirements that would amount to requiring site surveys during operation that were equivalent to those required during decommissioning.[7]

In 2003, when this initiative commenced, the Commission provided clear direction to the staff:

> The staff will have to be very careful when crafting the guidance documents so that it is clear to the licensees and to the staff how much characterization information is enough. The staff should only ask for limited information. Licensees should not be required to submit the equivalent of a full scale MARSSIM [Multi-Agency Radiation Survey and Site Investigation Manual] Survey every year.
>
> This proposed rule fails to heed that Commission directive.

Inappropriate Premise for "No Backfit" Conclusion: Further, the NRC has taken a fundamentally flawed approach to determining whether a backfit exists for power reactor licensees by apparently using as the regulatory starting point for its determination of whether a backfit exists licensee activities already undertaken as a result of voluntary measures being implemented as part of the GPI. The NRC is clear that it 'credits' in its Regulatory Analysis both the existence of and the costs already expended for utilities' implementation of the voluntary GPI. This "credit" allows the NRC to easily reach the conclusion that power reactor licensees would already have implemented - prior to publication of the final rule - survey processes and reports such that licensees are unlikely to need to take additional measures or make significant additional expenditures.[8]

However, there are no current regulatory requirements dictating the specific measures undertaken in the GPI. The GPI actions are voluntary. As so framed, therefore, the NRC would

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[6]Of additional concern to NEI are the policy implications of rulemaking designed to promulgate as requirements many aspects of the voluntarily efforts undertaken as part of the industry Groundwater Protection Initiative. This issue is addressed more thoroughly in NEI's comments on the proposed rule. The implications of this approach for backfit considerations is addressed herein.

[7]SRM-SECY-03-0069, issued in response to SECY-03-0069, "Results of the License Termination Rule Analysis," May 2, 2003, cited at 73 Fed. Reg. 3813.

[8]Regulatory Analysis at 40-42. In effect, therefore the NRC is circumventing the backfit rule by taking the perspective that changes to procedures and practices are not imposed by the proposed rule but already exist through the GPI. Because the GPI is voluntary the NRC may not assume for backfitting purposes that new NRC positions that happen to coincide with voluntary efforts.

circumvent the Backfit Rule by proposing to codify a voluntary industry program and simultaneously use that very program (the GPI) in its analyses as its baseline for assessing whether a "change" in position is being imposed.

Examples of New Staff Positions: By way of example, the following proposed changes illustrate the new staff positions created by the proposed rule:

- Licensees would be required to install new confinement measures and new leak detection equipment, including where portions of systems cannot be visually inspected. While perhaps intended to address limited decommissioning experiences at selected facilities, accomplishing these actions were not incorporated into the design of current facilities and would need to be added.[9]
- Requiring licensees to "develop procedures that ...also specify criteria for prompt (e.g., <4 hours) cleanup..." clearly requires the modification of or addition to procedures required to operate the facility in a manner not heretofore a requirement.[10]
- The expectation that licensees apply radiological screening values appropriate for decommissioning facilities requires a whole new activity for current licensees, at a minimum affecting plant procedures as licensees move to apply decommissioning-like surveys during operation.
- The application of the proposed radiological screening values would dictate immediate cleanup to meet decommissioning site release levels at the present time, and thus would preclude as a practical matter the SAFSTOR decommissioning option, or restricted release option, following plant shutdown, both of which may be the most cost-effective and beneficial to safety (both worker and the public) actions following plant shutdown,[11] as available decommissioning options.[12]
- Contrary to the NRC's claim that there are no changes required in licensees' monitoring programs (73 Fed. Reg. at 3821), Section 3.1 of the draft monitoring guidance lists five items that are likely to cause changes in a licensee's monitoring program.
- The Draft Survey and Monitoring Guidance, Section 3.3, refers licensees to Regulatory Guide 4.15 for quality assurance/quality control acceptance criteria. As previously stated in industry comments[13] on Regulatory Guide 4.15, Revision 2, has significantly more extensive expectations for quality assurance/quality control than previously employed that will result in additional requirements at considerable costs.

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[9] *See* Draft Survey and Monitoring Guidance at Section 2.1.
[10] Id. at Section 2.2.
[11] The expectation that licensees also perform present worth calculations to dictate decisionmaking with regard to cleanup would create a whole **new** set of financial analyses expected of licensees. *See Id.* at Section 4.3.
[12] *Id.* at Section 4.4.
[13] See NEI Letter, "Draft Regulatory Guide DG-4010, "Quality Assurance for Radiological Monitoring Programs (Inception through Normal Operations to License Termination) – Effluent Streams and the Environment,"" December 18, 2006.

- The objectives of the ground water monitoring plan effectively require 3-D monitoring and modeling of the groundwater even for instances in which no subsurface contamination or limited contamination has been identified. The level of effort needed to perform this monitoring and 3-D modeling is beyond current expectations and not demonstrated to be warranted. (Draft Survey and Monitoring Guidance, Section 3.3.2)

The NRC Has Not Addressed Whether the Proposed Changes Would Satisfy the Regulatory Exceptions to the Requirement to Perform a Backfit Analysis

As discussed below, by virtue of its "no backfit"/"clarification" characterization of these new requirements, the NRC avoids having to address the question of whether the new requirements in fact would satisfy the second element of a backfit analysis, i.e., whether the new positions may be imposed without a detailed justification because they satisfy one of the backfit exceptions. As demonstrated below, were the NRC to undertake such an analysis, it would be apparent, even based on the NRC's own characterization of the need for these changes, that none of the backfit exceptions are satisfied.

Even where a backfit exists, the NRC need not prepare a backfit analysis if:

> The Commission or staff finds and declares, with an appropriately documented evaluation for its finding, either: (i) That a modification is necessary to bring a facility into compliance with a license or the rules, (ii) That regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety of the public, (iii) That the regulatory action involves defining or redefining what level of protection to the public health and safety or common defense and security should be regarded as adequate. [10 C.F.R. §50.109(a)(4)][14]

No Documented Evaluation Regarding Backfit Exceptions: Having already concluded that a backfit does not exist, the NRC simply ignores in this notice of proposed rulemaking any consideration of the backfit exception provisions. Instead, as already noted, the NRC asserts more generally that the proposed changes merely "clarify" existing regulations and no backfit analysis is required.

As discussed above, there are three sources of new staff positions in this proposed rulemaking: the expansion of Section 20.1406 to existing licensees; the creation of new monitoring requirements under Section 20.1501(b); and new NRC positions in the proposed guidance materials. These provisions reflect major changes in NRC positions. However, none are

[14] Similar provisions appear in 10 C.F.R. §§70.76(a)(4), 72.62(b), and 76.76. Though not identical terminology, for purposes of this analysis they provide the same fundamental basis for backfit analysis exceptions.

supported by the Section 50.109(a)(4) required finding and declaration, let alone a "documented evaluation," that such new positions are required to bring facilities into compliance with current regulations, are necessary to protect the public health and safety or to define or redefine the level of protection of the public health and safety.

NRC's Current Discussion Would Not Support Application of Backfit Exception(s) [15]: The NRC's current discussion of the effects of the proposed rule belies the asserted need for "clarification" and instead suggests that neither compliance nor adequate protection of the public health and safety serve as the premise for these new positions. In fact, the NRC claims that these changes would significantly impact only a few current licensees (a circumstance we believe would certainly be more effectively dealt with on a case-by-case basis). That being the case, and as discussed further below, the NRC certainly cannot claim as the premise for these new regulations that these changes are clearly "necessary" to assure compliance or the adequate protection of the public health and safety, or to redefine the level of protection. (Of course, claiming as the NRC does that these are not backfits serves to avoid the exception determination in the first instance.) In short the NRC has not demonstrated that an exception to the requirement to perform a backfit analysis exists.

Absence of Need: As noted by NEI in its comments to the Office of Management and Budget related to the proposed rule's information collection requirements,[16] the NRC itself acknowledges 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).[17] Similar conclusions are reached with respect to other categories of licensees, either finding that the licensees would not be affected or that any effects would occur only if "significant residual radioactivity" above current levels (not currently anticipated) is later discovered.[18] The NRC further acknowledges that licensee practices in recent years have resulted in a significant drop in radiological releases.[19] In light of these NRC conclusions, it is apparent that it would be difficult to justify these proposed changes as exceptions to the backfitting rule.

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[15]While we address here generally the applicability of the backfit exceptions to the proposed decommissioning planning rule, these comments are not a substitute for direct comments on the NRC's own analysis that must be performed with respect to the numerous backfits in this proposed rule.

[16]*See* R. Anderson (NEI) Letter to N. Frey (OMB), "RIN 3150-AH45: OMB Review of NRC Information Collection Requirements and Solicitation of Public Comments on NRC Proposed Rule on Decommissioning Planning," dated February 21, 2008.

[17]*See* the NRC's "Regulatory Analysis for Proposed Rulemaking – Decommissioning Planning," Draft for Comment (December 2007) ("Regulatory Analysis"), at 11. (Of course, as noted previously, this conclusion appears to be based on the existence of the voluntary GPI.)

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

[19]*See Id.* at 9 – 10, and Figure 2-1.

No Justification for "Clarification" Assertion: In addition, in the draft OMB supporting statement, the NRC acknowledges that *current* regulations already address the fundamental NRC concerns, but again claim that they require "clarification" with respect to their scope concerning subsurface contamination.[20] Nonetheless, the NRC does not explain why a wholly new set of regulations and guidance are essential to achieving this specific goal of "clarification" if current regulations address the fundamental concerns.

In fact, it appears that such "clarification" is more 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. Such an assessment is certainly justified in light of the extensive effort the NRC has already expended in this area. [21] Justification for creating such broad ongoing programs across the nuclear industry, where only a limited subset of licensees may actually warrant additional regulatory attention, has not been justified nor is it justifiable.

In short, the NRC seeks to impose new regulations and create additional guidance with new staff positions, when in fact it has already concluded that the current regulations address the considerations of concern. Frankly, it is a misuse of the term "clarification" to create sweeping new staff positions by these regulatory changes. Further, asserting that few licensees should be impacted in the first instance is simply inconsistent with justifying such a broad brush approach to new regulations. If indeed this is meant to be clarification it should be achieved in a less burdensome manner than a generic imposition of new requirements and staff positions.

A Backfit Analysis Would Demonstrate that Imposition of the Proposed Backfits Are Not Justified

Were the NRC to perform the analysis required prior to imposition of a backfit, it would be clear that the regulatory tests for imposing a backfit are not met.[22] Specifically, NRC regulations dictate that:

> The Commission shall require the backfitting of a facility only when it determines, based on the analysis provided in paragraph (c) of this section, that there is a substantial increase in the overall protection of the public

[20]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).

[21]The NRC stretches generally accepted concepts of "clarification" where the proposed rule and associated documentation 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 regarding additional decommissioning financial assurance.

[22]Although NEI provides comments herein regarding the application of these backfit restrictions, these comments are not a substitute for direct comments that will be filed on the backfit analysis the NRC must perform.

health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.
[10 CFR §50.109(a)(3).][23]

No Backfit Analysis Pursuant to 10 CFR §50.109(a)(3): The NRC has not performed, because it has asserted that a backfit is not involved in the first instance, any of the assessment set forth in 10 CFR §50.109(c)[24] for justifying the imposition of a backfit. As discussed below, were the NRC to perform such an analysis, it would find that a backfit is not justified.

Historical Performance Not an Indication of Future Performance: The NRC primarily sets forth as justification for the proposed rule the existence of historical difficulties with decommissioning funding adequacy for a few licensees as a result of additional contamination discovered at these few sites following plant shutdown, resulting in decommissioning costs exceeding what had been provided for by the licensees.

NEI fully 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 very limited 'examples' cited by the NRC of licensees for which some concern has exists[25] does not support the broad brush approach proposed by the NRC.

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[23]Regulatory Analysis, at Section 4.4.

[24]In reaching the determination required by paragraph (a)(3) of this section, the Commission will consider how the backfit should be scheduled in light of other ongoing regulatory activities at the facility and, in addition, will consider information available concerning any of the following factors as may be appropriate and any other information relevant and material to the proposed backfit:

1) Statement of the specific objectives that the proposed backfit is designed to achieve;
2) General description of the activity that would be required by the licensee or applicant in order to complete the backfit;
3) Potential change in the risk to the public from the accidental off-site release of radioactive material;
4) Potential impact on radiological exposure of facility employees;
5) Installation and continuing costs associated with the backfit, including the cost of the facility downtime or the cost of construction delay;
6) (The potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirement;
7) The estimated resource burden on the NRC associated with the proposed backfit and the availability of such resources;
8) The potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit;
9) Whether the proposed backfit is interim or final and, if interim, the justification for imposing the proposed backfit on an interim basis.

[25]Regulatory Analysis, at pp. 10-18, discussing the limited need for any new regulations for different classes of NRC licensees.

In the first instance, the cited examples generally relate to licensees which had been operating for significant periods of time before the current regulations, comprehensive guidance and discipline in reviewing applications, licensee practices and awareness, and decommissioning funding requirements were in place. (This is further contrasted with the NRC's own findings with respect to current licensees.[26]) 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,[27] but later withdrawn in 1980 because of health and safety concerns and the absence of prior agency review).[28] This is one example of significant changes to the historical regulatory scheme with respect to onsite radiological waste disposal. Such practices were likely factors in many of the specific examples of legacy sites of concern to the NRC.

As noted, 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.

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.

Although the NRC cites very few examples in its regulatory analysis, while asserting that 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.

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[26]Regulatory Analysis, at p. i, Executive Summary states:

> NRC staff estimate that a small number of material licensees are at risk to have significant residual radioactivity in their subsurface environment and would need to perform additional site surveys to identify the residual radioactivity, as required in proposed changes to 10 CFR 20.1406 and 20.1501. Staff has no basis that other licensees would need to perform additional surveys, including power reactors, fuel cycle facilities, and the large majority of source and byproduct material facilities.

[27]22 Fed. Reg. 548 (January 29, 1957).

[28]45 Fed. Reg. 71761 (October 30, 1980).

New Regulations Unnecessary for Consistency: The NRC claims further justification for these new provisions by asserting that "licensee's practices vary widely" and therefore (apparently) require further direction for consistency.[29] 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.[30]

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.

Actual Direct and Indirect Costs Unrecognized: The NRC asserts that few licensees would be required to perform additional surveys. Specifically, the NRC states that there are only a handful of licensees which will need to take actions as a result of this rule.[31] In the backfitting context, such a characterization indicates that the NRC believes that current practices are capable of protecting the public health and safety, with limited exceptions. If the NRC were to perform the analysis required by 10 CFR §50.109(a)(3), it would not be able to demonstrate a substantial increase in the overall protection of the public health would be derived from these backfits. A new generic rulemaking is simply not required to address questions applicable to only a few licensees.

Further, contrary to NRC claims, and also contrary to the backfitting cost/benefit determination required under 10 CFR §50.109(a)(3), there is a substantial increase in licensees' direct and indirect costs for implementing these requirements. That increase is simply unjustified in light of the de minimus (i.e., expected effect on few licensees) added protection of the public health and safety.

As already noted, the NRC claims that this rule would not require much additional work by licensees. In fact, the NRC asserts that the "total burden for this rulemaking is 1,210.5 hours (10 CFR 20 - 0 hours)."[32] This estimate (total 1,210.5 hours) is grossly inaccurate. To illustrate, nuclear power plants have spent thousands of person-hours and millions of dollars implementing the GPI. These costs must be incorporated into the NRC's analysis in that the GPI is a voluntary effort, not an existing requirement, but yet the NRC would seek to include these voluntary efforts

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[29]Regulatory Analysis at p.9 ("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.")

[30]See id.

[31]See e.g., id at p.i.

[32]73 Fed. Reg. at 3834.

in its analyses as if they were already requirements and, thus, the regulatory burden and costs above current requirement are not directly considered.[33]

Conclusion

For the reasons described above, NEI submits that the NRC has failed to follow applicable backfit regulations and internal processes, which would dictate first that these proposed regulatory changes are indeed backfits. As such, a full backfit analysis needs to be performed by the NRC. As discussed herein, NEI believes that when subjected to the required analyses, the proposed changes will not survive backfitting scrutiny.

NEI submits that the NRC must re-evaluate the backfitting implications of the proposed rule on two principal grounds.

First, in light of the fundamentally flawed analyses and conclusions reached with respect to the application of the backfitting requirements, NEI submits that the NRC has arbitrarily applied its own backfitting regulations in this instance and as such would not withstand further legal scrutiny without substantial revision.

Second, NRC internal guidance concerning the control and development of generic requirements[34] establishes processes designed to assure consideration is given to "the backfit implications of any proposed regulatory action."[35] The imposition of new generic staff positions subject to backfit consideration can be imposed through rulemaking or generic guidance (including regulatory guides) and are subject to established review processes, including CRGR review.[36] These processes address mechanisms for the staff to internally address whether a

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[33]See NRC Cost Estimate of GPI implementation, Regulatory Analysis, Appendix D. However, the NRC acknowledges that its Regulatory Analysis "assumes that the costs incurred by power reactor licensees to implement the GPI are equivalent to the estimate provided in Appendix D and that no additional costs will be incurred beyond those already expended under the GPI to implement the proposed rule requirements." (Regulatory Analysis at p. 42 (emphasis added).)

[34]*See* "Procedures for Controlling the Development of New and Revised Generic Requirements for Power Reactor Licensees," LIC-400 (February 12, 2004).

[35]*See id.*, at p. 3, Section 4.

[36]*See e.g.*, Committee to Review Generic Requirements "CRGR" Charter, Rev. 7, Appendix B, Table 1.

backfit exists, and if so determined to conduct meetings and to provide for CRGR review.[37] Yet when as here the action is not deemed a backfit in the first instance no opportunity for additional external scrutiny of staff actions is afforded prior to issuance of, in this case, the proposed rule itself.[38]

Accordingly, NEI submits that the staff has failed to adhere to its own requirements and processes regarding consideration of generic backfits. One remedy may be to reinitiate a full backfitting review and analysis, and provide for additional input from stakeholders and the CRGR. If those processes are not adhered to completely (such as may be the case if the staff continues to assert these changes are not backfits), NEI requests that the NRC consider this submittal as an appeal of the NRC's backfit determination as well as its backfitting analysis. Indeed, for plant-specific backfits, NRC procedures allow for licensee action to challenge a staff finding that a backfit does not exist, and to appeal the staff's determination and regulatory analysis.[39] As representative of the nuclear energy industry, including all NRC licensees that would be impacted by these new requirements, consideration of this request as a consolidated backfit appeal. is appropriate. Such an approach would achieve administrative efficiency and would support the achievement of the underlying intent inherent in NRC's recognition that backfitting requirements apply to generic rulemakings and new regulatory guidance as well as individual plant applications.

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[37]NEI submits that even considering the discretion afforded to the Staff by the Commission Memorandum addressing CRGR review at the proposed rule stage (Memorandum, "Staff Requirements - COMNJD-06-0004/COMEXM-06-0006 – Streamlining the NRR Rulemaking Process," May 31, 2006), the significance of this rulemaking and the "no backfit" conclusion by the Staff should have indicated that CRGR consultation was appropriate. As indicated in that Memorandum, such consultation is appropriate where it "will result in a more efficient and effective process for [this] particular rulemaking." That being said, CRGR will now not be engaged until late in the process.

[38]*See id.*, at p. 4, Section 4.B.3.

[39]"Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests," LIC-202 (February 10, 2004), at Sections II.c.(2) and IV. See also, "Management of Facility-Specific Backfitting and Information Collection," Management Directive 8.4 and Handbook, (October 28, 2004), at Part II (B)(8).

From: Kevin O'Sullivan
Sent: Tuesday, May 13, 2008 1:54 PM
To: Evangeline Ngbea
Subject: FW: RIN 3150-AH45: Comments for Decommissioning Planning Rulemaking and Guidance Documents
Attachments: 05-08-08_NRC_Comments for Decommissioning Planning Rulemaking and Guidance Documents.pdf; 05-08-08_NRC_Comments for Decommissioning Planning Rulemaking and Guidance Documents - Matrix of Issues_Enclosure 1.pdf; 05-08-08_NRC_Comments for Decommissioning Planning Rulemaking and Guidance Documents - Backfit_Enclosure 2.pdf

From: BELL, Denise [mailto:dxb@nei.org] **On Behalf Of** FERTEL, Marvin
Sent: Thursday, May 08, 2008 5:39 PM
Subject: RIN 3150-AH45: Comments for Decommissioning Planning Rulemaking and Guidance Documents

May 8, 2008

Ms. Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 200555-0001

Attention: Rulemaking and Adjudications Staff

Subject: RIN 3150-AH45: Comments for Decommissioning Planning Rulemaking and Guidance Documents.

Project Number: 689

Dear Madam Secretary:

The Nuclear Energy Institute (NEI) is submitting these comments on the Nuclear Regulatory Commission's (NRC) Decommissioning Planning rulemaking on behalf of the nuclear energy industry.

NEI assembled a team of industry experts to assist in developing these comments. This team consisted of staff with expertise in decommissioning, health physics, groundwater, environmental protection, legal affairs, finance, and licensing.

The nuclear industry is firmly committed to planning, funding, and conducting decommissioning of licensee facilities safely, efficiently, and protective of public health and the environment. The nuclear industry believes that NRC decommissioning regulations should, and currently do, contain appropriate requirements to provide reasonable assurance that legacy sites will be prevented. In fact, NRC licensees have extensive programs in place that comply with the NRC's current decommissioning regulations to provide such assurance. These programs address all aspects of decommissioning planning, including conduct of operations to minimize contamination, monitoring and surveillance, recordkeeping, and financing. These programs are subject to NRC inspection and oversight. Indeed, there have been few issues identified with respect to conformance with the requirements of NRC's decommissioning regulatory system among current licensees.

Marvin S. Fertel

Enclosures

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