

PRM-50-94
(75FR08843)



NUCLEAR ENERGY INSTITUTE

Ellen Ginsberg
Vice President, General Counsel
and Secretary

May 12, 2010

DOCKETED
USNRC

**SUBMITTED VIA ELECTRONIC DOCKET (www.regulations.gov)
(Docket ID NRC-2010-0004)**

May 13, 2010 (11:24am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Mr. Michael T. Lesar
Chief, Rulemaking and Directives Branch
Division of Administrative Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. Lesar,

The Nuclear Energy Institute (NEI)¹ is pleased to provide the enclosed comments on the Petition for Rulemaking (PRM-50-94 or Petition) noticed in the *Federal Register* on February 26, 2010.² The Petition, submitted by Mr. Sherwood Martinelli, requests several modifications to the Commission's requirements governing decommissioning funding assurance, as well as the timing and radiological criteria for decommissioning nuclear power plants.

NEI's detailed comments on PRM-50-94 are included in the enclosure to this letter. As explained in the enclosure, NEI recommends that the NRC deny the Petition because the Petitioner has not provided an adequate justification for modifying the Commission's regulations. If you have any questions concerning these comments please feel free to contact Jerry Bonanno (jxb@nei.org, 202-739-8147).

Very truly yours,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive, flowing style.

Ellen C. Ginsberg

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, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

² 75 Fed. Reg. 8,843 (Feb. 26, 2010).

Template = SECY-067

DS10

Docket ID NRC-2010-0004
May 12, 2010
Page 2

Enclosure

cc: Edward L. Williamson, U.S. NRC
Bradley W. Jones, U.S. NRC

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

I. Discussion

A. The Proposed Amendments to the NRC's Decommissioning Funding Requirements Are Not Warranted

The first page of the Petition¹ is largely devoted to criticizing licensee compliance with, and the NRC's enforcement of, the decommissioning funding requirements contained in 10 C.F.R. Part 50. As a threshold matter, NEI notes that the appropriate process for asserting claims regarding NRC's enforcement of, and licensees' compliance with, existing regulatory requirements is provided in 10 C.F.R. § 2.206. A *Federal Register* notice published on December 29, 2009, indicates that the Petitioner has, pursuant to section 2.206, requested that the NRC take enforcement action against specific licensees for alleged non-compliance with the Commission's decommissioning funding requirements.² NEI believes that the Petitioner's claims regarding enforcement of existing regulations at specific facilities are best addressed by using the process provided in section 2.206.³ Thus, these claims are not directly addressed in NEI's comments.

Enforcement matters aside, the only direct support for modifying the Commission's decommissioning funding requirements offered in the Petition reads:

Further more, [sic] in these financially turbulent times, with the stock market fluctuating wildly from day to day and week to week, a two year reporting requirement is simply inadequate to assure the safety and adequacy of the funds meant for safe decommissioning of these sites. Furthermore, as can be witnessed by the numerous changes of ownership and corporate structure at Entergy's licensed facilities, it has become apparent that having these funds held by companies/licensees themselves is no longer acceptable.

To avoid Legacy Sites, to avoid having communities and taxpayers holding the bag, the following changes should be made to the current regulations as relate to Decommissioning funds:

1. Reporting requirements changed from every two years, to once a year.
2. Financial Assurances section shall be changed to read:

Before a nuclear power plant begins operations, the licensee must deposit and or create a financial mechanism - such as a trust fund with the host state, which is to be controlled and managed by the state - to ensure that there will be sufficient money to pay for the ultimate decommissioning of the facility. Licensees in cooperation with the state trust fund reporting authority must update the NRC on the status of these

¹ "Petition for rulemaking, 2.802," PRM-50-94, Dec. 23, 2009 (ML093620175)(Petition).

² See 74 Fed. Reg. 68,873 (Dec. 29, 2009).

³ NEI is not suggesting that the Petitioner's pending section 2.206 petition be expanded. Rather, we simply point out that requests for enforcement of existing regulations are properly handled under section 2.206, as opposed to the rulemaking process.

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

mechanisms every year that the plant remains in operation, and every six months once plant is within five years of the expiration date of a current license. Further, any shortcomings regardless of the cause (such as devaluation of financial instruments held by the fund) will require additional deposits into the account within 90 days from the time the shortfalls are noticed/observed in the annual reports. This requirement provides the public reasonable assurance that funds will be available when needed to clean up a plant site and avoid costly legacy sites that must be cleaned up at taxpayer expense.⁴

1) Proposed Changes to Reporting Frequency

While not citing a specific regulatory requirement, the Petition appears to be requesting modification of the requirement for biennial decommissioning funding status reports contained in 10 C.F.R. § 50.75(f). Specifically, the Petition recommends that the NRC require annual, rather than biennial, reporting on the status of decommissioning funds. NEI disagrees with the suggested revision because more frequent reporting on the status of decommissioning funding during "financially turbulent times" will not necessarily yield useful or actionable information when dealing with long-term investments, such as nuclear power plant decommissioning trust funds. Generally, given the long-term time horizon for decommissioning, requiring more frequent reporting during "financially turbulent times" will necessarily produce information reflecting short-term market fluctuations. Precipitous modifications to long-term investment strategies based on short-term market fluctuations could invite poor fund investment behavior and create distortions in investment strategy, which, in turn, could result in significant tax consequences, as well as potential negative impacts on corporate credit ratings. Such actions harm, rather than strengthen, nuclear power plant decommissioning trust funds and unnecessarily divert capital that could otherwise be invested in the continued safe operation of existing plants.⁵

Further, for licensees that are nearing cessation of operations and license termination, the NRC's regulations already require progressive development of more detailed site-specific cost estimates. Specifically, while licensees must be funded to at least the minimum certification during operation,⁶ NRC's regulations also require:

- Submittal of a preliminary decommissioning funding cost estimate at or about 5 years prior to the projected end of plant operations;⁷

⁴ Petition, at 2.

⁵ Once deposited in a decommissioning trust, funds may be withdrawn and used only for "legitimate decommissioning activities." See 10 C.F.R. § 50.82(a)(8).

⁶ See 10 C.F.R. § 50.75(c).

⁷ 10 C.F.R. § 50.75(f).

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

- Submittal of a post-shutdown decommissioning activities report (PSDAR) prior to or within 2 years following permanent cessation of operations, which must include an estimate of expected decommissioning costs;⁸ and
- Submittal of a license termination plan at least 2 years before termination of the license, which must include an updated site-specific estimate of remaining decommissioning costs.⁹

In addition, under the existing regulations the NRC may – at any time – request information from power reactor licensees to confirm compliance with the facility's licensing basis, which includes the requirements of 10 C.F.R. Part 50.¹⁰ In fact, the Commission did just this in response to the shortfalls reported in March 2009. The NRC staff engaged in detailed analyses where necessary, with the complete cooperation of the affected licensees, utilizing the existing rules. Given the discussion provided above, the Petition has not provided an adequate basis for modifying the Commission's rules to require annual decommissioning funding reporting.

2) Additional Proposed Changes

The Petition proposes several additional changes to the Commission's decommissioning funding requirements. First, the Petition recommends that NRC require that decommissioning trust funds be managed by the states and that the states, in coordination with NRC licensees, periodically report on the status of such funds. As a threshold matter, it is unclear whether such a provision would even be constitutional.¹¹ Constitutionality aside, as demonstrated by the challenges associated with management of state pension funds, management by state governments does not immunize funds from the effects of fluctuating market conditions. The Petition offers only vague statements referencing "numerous changes in ownership and corporate structure" at a single utility as support for this proposed change. As the formation of subsidiaries and the buying and selling of property are legitimate, widespread and accepted means of doing business in the United States, it is unclear why changes in ownership or the use of otherwise legitimate corporate structures require amendment of the Commission's regulations. In addition, consideration of the status of decommissioning funding, and continued compliance with the Commission's funding requirements, is already considered in the context of Commission reviews of license amendment requests related to changes in ownership and corporate structure.

⁸ 10 C.F.R. § 50.82(a).

⁹ *Id.*

¹⁰ 10 C.F.R. 50.54(f).

¹¹ *See, e.g., New York v. United States*, 505 U.S. 144 (1992) (holding that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Constitution, in part, because it attempted to compel the States to enact and administer a Federal regulatory program).

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

With respect to the frequency of funding adjustments, NEI believes that flexibility – rather than increased rigidity – is required to prudently manage long-term investments.¹² The Petition suggests amendment of the NRC's regulations to require that *a//* funding shortfalls be corrected within 90 days of discovery. If the proposed changes were promulgated, the NRC effectively would be forcing utilities to pay an unnecessary premium for decommissioning funds that – in the vast majority of cases – will not be needed or used for decades. This premium would likely be paid at the expense of other programs that would have an immediate impact on the company's financial health and operations. Instead, the NRC should maintain the flexibility to work with licensees to address decommissioning funding shortfalls in a reasonably expeditious manner, informed by factors such as the amount of the shortfall, current market conditions, and the date the funds will likely be needed.

While recognizing the challenges posed by the recent economic downturn, NRC Chairman Gregory B. Jaczko recently expressed continued confidence in the NRC's decommissioning funding assurance framework, stating:

During the economic downturn, we have seen that licensees have experienced some challenges in maintaining sufficient decommissioning funds. Overall though, I believe that the experience of the last two years has shown that our regulatory approach is generally sound. Most of our licensees maintained adequate funds, and most of those who experienced shortfalls already have addressed them.¹³

Specifically, despite the worst financial crisis since the Great Depression, the decommissioning funds for over 70 percent of the operating nuclear reactors remained at or above the NRC required minimum levels at the end of 2008, as reflected in the March 2009 decommissioning fund status reports. Further, less than a year after filing the March 2009 reports, 21 of 27 estimated shortfalls had been resolved and plans to resolve the 6 remaining shortfalls were under review by the NRC.¹⁴ The conservatism applied to the NRC's existing decommissioning funding assurance program is clearly effective and the Petition has provided no basis for amending the Commission's existing decommissioning funding requirements.

B. The Proposed Changes to the SAFSTOR and ENTOMB Options Are Not Warranted.

The Petition also seeks changes to the way the SAFSTOR option is used in decommissioning and recommends elimination of the ENTOMB decommissioning approach. Before addressing the substance of the Petitioner's request, it should be noted that the information quoted on page 2 of the Petition and attributed to the NRC's "current rule," appears to have originated in

¹² See NEI Comment Letter entitled "Revision to Comments on Draft Regulatory Guide DG-1229, Assuring the Availability of Funds for Decommissioning Nuclear Reactors," (Sept. 10, 2009)(ML092590128).

¹³ NRC News Release No. 10-034, "Remarks of NRC Chairman Gregory B. Jaczko at Commission Briefing on Decommissioning Funding" (February 23, 2010).

¹⁴ NRC Staff Presentation at Feb. 23, 2009 Commission Briefing, "Decommissioning Funding Assurance" (ML100550292).

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

an NRC Fact Sheet entitled "Decommissioning Nuclear Power Plants" dated January 2008 (SAFSTOR Fact Sheet). While similar information on the DECON, SAFSTOR, and ENTOMB decommissioning options can be found in several NRC guidance documents,¹⁵ this information is not currently codified in the NRC's regulations. Thus, the Petitioner's recommendations with regard to the SAFSTOR and ENTOMB options appear to be requests to modify the SAFSTOR Fact Sheet and possibly the associated Commission guidance, rather than the regulations.

Uncertainty regarding the nature of the request aside, the Petition states that the SAFSTOR decommissioning option is undermined by two serious flaws. Although it is difficult to pinpoint the two specific flaws referred to in the Petition, one seems to focus on the enforcement of the existing decommissioning rules at specific nuclear power plants (Indian Point Units 1, 2, and 3), while the other seems to focus on the wording of the SAFSTOR guidance. As explained above in Section I.A., requests for enforcement action at specific nuclear power plants are appropriately resolved through the process spelled out in 10 C.F.R. § 2.206, not the rulemaking process. Thus, the Petitioner's assertions regarding compliance at Indian Point will not be addressed further in NEI's comments.

With respect to the language in the SAFSTOR Fact Sheet, which the Petitioner attributes to NRC's regulations, the Petition states:

Lastly, and most disturbing, is the Safstor option as currently written into the rules wrongfully allows licensees to turn reactor sites into LONG TERM ONSITE HIGH LEVEL WASTE STORAGE DISPOSAL DUMPS that do not afford stakeholder citizens the protections they should be afforded when a facility is acting as a long term storage facility.¹⁶

The Petition goes on to assert that, at the beginning of the licensing process for operating nuclear power plants, host communities were promised that sites would be decommissioned and returned to unrestricted use within a period of 60 years. According to the Petition, these promises were "finite and enforceable" and are jeopardized by the Commission's current rules, which, according to the Petitioner, are "vague and ambiguous" with respect to SAFSTOR. Thus, the Petitioner recommends that the language quoted from the SAFSTOR Fact Sheet be revised to require licensees choosing the DECON option to decommission sites for unrestricted use; to require licensees choosing the SAFTOR option to decommission sites for unrestricted use and terminate the license within a 60-year timeframe; and that the ENTOMB option be removed.

Although certain licensees may have entered into agreements with host states creating obligations to decommission sites to levels meeting the unrestricted use criteria, Subpart E of 10 C.F.R. Part 20 allows license termination under restricted conditions and pursuant to alternate criteria, in addition to release for unrestricted use.¹⁷ The radiological criteria

¹⁵ See Regulatory Guide 1.159, Rev. 1, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," (Oct. 2003); Regulatory Guide 1.184, "Decommissioning of Nuclear Power Reactors," (July 2000).

¹⁶ Petition, at 2 (emphasis in original).

¹⁷ See 10 C.F.R. §§ 20.1402, 20.1403, 20.1404.

ENCLOSURE
Nuclear Energy Institute Comments
Docket ID NRC-2010-0004

contained in Subpart E, which apply to all power reactor licensees, were developed through a deliberative notice and comment rulemaking that spanned nearly three years and included multiple workshops designed to collect additional comments after closure of the official public comment period.¹⁸ While individual licensees would surely be obliged to abide by legal agreements entered into with host states, the Petition provides no basis – health and safety or otherwise – for limiting license termination options *for all nuclear power reactors*.

In addition, while the Petition focuses on the NRC's SAFSTOR guidance, it does not directly address 10 C.F.R. § 50.82(a)(3), which reads:

Decommissioning will be completed within 60 years of permanent cessation of operations. Completion of decommissioning beyond 60 years will be approved by the Commission *only when necessary to protect public health and safety*. Factors that will be considered by the Commission in evaluating an alternative that provides for completion of decommissioning beyond 60 years of permanent cessation of operations include *unavailability of waste disposal capacity* and other site-specific factors affecting the licensee's capability to carry out decommissioning, including presence of other nuclear facilities at the site.

(emphasis added). The Petitioner argues that allowing consideration of waste disposal capacity in deciding whether to approve a decommissioning period exceeding 60 years creates a "loophole" that jeopardizes public health and safety.¹⁹ To the contrary, this provision protects public health and safety by providing for continued NRC regulatory control over a nuclear power plant site in the event that a disposal option for used fuel and other high-level radioactive waste does not become available within the 60-year timeframe. This provision is especially important, given the fact that under federal law the Department of Energy – not the NRC or its licensees – has responsibility for creating a disposal option for used nuclear fuel and other high-level radioactive wastes. Contrary to the recommendations made in the Petition, the NRC simply does not have the authority to require "legacy wastes [to] be stored at current DOD/DOE sites until such time as the Federal Government DOES ITS JOB."²⁰ In addition, the Petition provides no basis for eliminating the ENTOMB decommissioning option. In sum, the Petition has not provided a basis for amending the NRC's guidance or regulations relating to the timing or radiological criteria for decommissioning nuclear power plants.

II. Conclusion

As illustrated in the discussion provided above, the Petition does not provide an adequate justification for revising the Commission's rules governing the decommissioning of nuclear power plants. Thus, NEI recommends that the NRC deny the Petition.

¹⁸ "Radiological Criteria for License Termination: Final Rule," 62 Fed. Reg. 39,058 (July 21, 1997).

¹⁹ Petition, at 3.

²⁰ Petition, at 3 (emphasis in original).

Rulemaking Comments

From: Gallagher, Carol
Sent: Thursday, May 13, 2010 10:46 AM
To: Rulemaking Comments
Subject: Comment on PRM-50-94
Attachments: NRC-2010-0004-DRAFT-0002.1[1].pdf

Van,

Attached for docketing is a comment from Ellen Ginsberg on PRM-50-94 that I received via the regulations.gov website on 5/12/10.

Thanks,
Carol

Received: from HQCLSTR01.nrc.gov ([148.184.44.79]) by OWMS01.nrc.gov
([148.184.100.43]) with mapi; Thu, 13 May 2010 10:46:25 -0400
Content-Type: application/ms-tnef; name="winmail.dat"
Content-Transfer-Encoding: binary
From: "Gallagher, Carol" <Carol.Gallagher@nrc.gov>
To: Rulemaking Comments <Rulemaking.Comments@nrc.gov>
Date: Thu, 13 May 2010 10:46:23 -0400
Subject: Comment on PRM-50-94
Thread-Topic: Comment on PRM-50-94
Thread-Index: Acryp8qOqk323KWjR8yJSn3IXF86gw==
Message-ID:
<6F9E3C9DCAB9E448AAA49B8772A448C50D0F590A86@HQCLSTR01.nrc.gov>
Accept-Language: en-US
Content-Language: en-US
X-MS-Has-Attach: yes
X-MS-Exchange-Organization-SCL: 1
X-MS-TNEF-Correlator:
<6F9E3C9DCAB9E448AAA49B8772A448C50D0F590A86@HQCLSTR01.nrc.gov>
MIME-Version: 1.0