

## **RULEMAKING ISSUE NOTATION VOTE**

July 5, 2011

SECY-11-0088

FOR: The Commissioners

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: DENIAL OF PETITION FOR RULEMAKING REQUESTING AMENDMENTS  
TO 10 CFR PART 50 REGARDING DECOMMISSIONING AND  
DECOMMISSIONING FUNDING (PRM-50-94)

PURPOSE:

To obtain Commission approval to deny a petition for rulemaking (PRM) submitted by Mr. Sherwood Martinelli (the petitioner).

BACKGROUND:

The petitioner filed his petition on December 23, 2009 (docketed as PRM-50-94), requesting the U.S. Nuclear Regulatory Commission (NRC or the Commission) to amend the portions of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities," that pertain to decommissioning and decommissioning funding. The NRC published a notice of receipt and request for public comment in the *Federal Register* on February 26, 2010 (75 FR 8843). The comment period closed on May 12, 2010. The NRC received one comment letter from the Nuclear Energy Institute (NEI) in opposition to the PRM.

CONTACT: Aaron L. Szabo, NRR/DPR  
301-415-1985

SECY NOTE: THIS PAPER TO BE RELEASED TO THE PUBLIC 5 WORKING DAYS AFTER DISPATCH OF THE LETTER TO THE PETITIONER.

DISCUSSION:Petitioner's Requests:

The petitioner asked the NRC to amend 10 CFR Part 50 to revise the decommissioning funding reporting requirements, restrict decommissioning funding mechanisms, and require deposits to the decommissioning trust fund within 90 days of identification of a shortfall, regardless of cause. Additionally, the petitioner asked the NRC to change the SAFSTOR and ENTOMB decommissioning options by amending the definition of the SAFSTOR decommissioning option and eliminating the ENTOMB decommissioning option.

The petitioner stated that the requested changes to the regulations are necessary to provide reasonable assurance that sufficient funds for cleanup will be available at the time of decommissioning and would not leave host communities and taxpayers with "legacy sites"<sup>1</sup>. The staff notes that, although the petitioner does not state the specific regulation affected by his request, the staff interprets the request as affecting 10 CFR 50.75(f)(1) for the reporting requirements and 10 CFR 50.75(e)(1) for the funding mechanisms and financial assurance.

*Revise reporting requirements:*

The petitioner requested that the NRC revise the requirements relating to the frequency of reporting the status of decommissioning funding from once every 2 years to annually. Further, the petitioner requested that the NRC amend the reporting criteria from annual to biannual reporting if the license is within 5 years of expiration. The petitioner stated that this change is necessary to ensure the safety and adequacy of funds set aside for the decommissioning of a nuclear power plant. Although the petitioner did not provide a specific NRC requirement, the staff interprets the petitioner's request as affecting 10 CFR 50.75(f)(1), which requires each power reactor licensee to report to the NRC, on a calendar year basis, at least once every 2 years on the status of its decommissioning funding for each reactor or part of the reactors that it owns.

*Restrict funding mechanisms and increase financial assurance:*

In support of the petitioner's request to restrict funding mechanisms and increase financial assurance, the petitioner stated that the NRC should replace its decommissioning funding requirements to require that, before nuclear power plant operations commence, licensees deposit or create a financial mechanism (such as a trust fund) with the host State, to be controlled and managed by that State. The petitioner asserted that this would ensure that there will be sufficient funding for the ultimate decommissioning of the facility. The petitioner also asked the NRC to require licensees to make additional deposits into the fund within 90 days of the identification of any shortfalls in funding. The petitioner believes that these measures would provide the public with reasonable assurance that sufficient funds for cleanup will be available at the time of decommissioning. The petitioner did not provide a specific citation for the regulatory text to be revised; however, 10 CFR 50.75(e)(1) includes decommissioning trust fund options.

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<sup>1</sup> The term "legacy site" is often used to describe a nuclear facility in decommissioning status with complex issues and an owner who cannot complete the decommissioning work for technical or financial reasons

*Change the SAFSTOR and ENTOMB decommissioning options:*

The petitioner requested that the “rules” governing alternative decommissioning strategies be modified. The first decommissioning option is ENTOMB, which involves removing all fuel and radioactive fluids and wastes and possibly removing selected nuclear components and then sealing the remaining radioactive components into the containment structure. The second option is DECON, which involves the removal of radioactive components, total dismantlement of the facility, and decontamination of remaining structures to a level that permits release for unrestricted use and termination of the license. The last option is SAFSTOR, which involves initially removing all fuel and radioactive wastes and liquids, maintaining the facility in a condition that allows the decay of radioactivity to reduce radiation levels at the facility, and then decontaminating and dismantling the facility. As the alternative decommissioning options are not defined in NRC regulations but are described in a number of NRC documents, the NRC is treating this portion of the petition for rulemaking as a request to codify these decommissioning options in 10 CFR 50.75, “Reporting and Recordkeeping for Decommissioning Planning,” as modified by the petitioner.

The petitioner believes that the SAFSTOR decommissioning option allows licensees to turn reactor sites into long-term high-level waste storage facilities. Thus, the petitioner also requested that the NRC amend its regulations to clarify that a licensee’s choice of alternative decommissioning strategy must result in the return of the site to unrestricted use within 60 years, and that the NRC eliminate the ENTOMB strategy as an option.

Petitioner’s Claims Outside of Petition for Rulemaking Process:

The petitioner also made two claims not being addressed in the process under 10 CFR 2.802, “Petition for rulemaking”: (1) Entergy Nuclear Operations, Inc. is violating NRC rules and regulations by allowing Indian Point Nuclear Generating Unit 1 (IP1) to remain in SAFSTOR, is wrongfully and illegally depending on parts of IP1 to help run Indian Point Nuclear Generating Units 2 and 3 (IP2 and IP3), and is using the reactor of IP1 as an illegal storage/dumping ground for radiological waste streams from the continued operations of IP2 and IP3; and (2) the NRC has negligently allowed certain licensees to violate the current regulations on funding and the filing of reports.

Regarding the first claim, the current NRC regulations do not disallow a unit from remaining in SAFSTOR; IP2 and IP3 are allowed to use structures, systems, and components of IP1 in accordance with their 10 CFR Part 50 licenses, and the NRC has no regulations forbidding the storage of radioactive waste at a 10 CFR Part 50 licensee’s facility. Regarding the petitioner’s second claim, this petition has been forwarded to the Office of the Inspector General for a determination of whether it qualifies as an allegation of wrong doing.

Stakeholder Comments:

The NRC received one comment letter during the public comment period. The NEI submitted comments in opposition to the PRM. The *Federal Register* notice (Enclosure 1) summarizes the comment letter and provides the NRC’s evaluation of the petition and letter.

RECOMMENDATION:

The staff recommends that PRM-50-94 be denied. This recommendation is based on the inadequate basis provided by the petitioner upon which the NRC could act to amend its regulations.

With respect to the petitioner's request for annual instead of biennial reporting of the decommissioning trust funds status and biannual instead of annual reporting for reactors within 5 years of the expected end of operations, the Commission published a final rule in September 1998, "Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (63 FR 50465), in which the NRC established the 2-year frequency for the decommissioning funding status report, after considering a range of frequencies from 1 to 5 years. With the 2-year reports, the NRC can increase the frequency of monitoring as needed to ensure that the reactor facility has adequate financial assurance, providing the flexibility to enable the NRC to obtain adequate information for cases in which the licensee has a shortfall, without imposing an unnecessary reporting burden on licensees that meet the funding assurance requirements. The 1998 rule also addressed the request to increase the frequency of reporting from 1 year to every 6 months for reactors within 5 years of the expected end of operations. The 1-year frequency for reactors nearing the end of operations was endorsed by a majority of the commenters on the 1998 rule. The NRC staff recommends denying the petition to increase the reporting frequency for all reactors in response to the fact that some reactors have reported shortfalls, because the existing regulatory framework provides the NRC with adequate flexibility to address oversight and reporting frequency for facilities with shortfalls.

The staff recommends denying the petitioner's request to restrict funding mechanisms and increase financial assurance. Regarding the request to amend its rules to require the host state of the reactor facility to control, manage, and report the status of the licensee's decommissioning trust fund, the NRC does not have the authority to require a state to become a trustee, nor does the staff consider it appropriate to impose trustee status on a non-licensee. With respect to the request that the decommissioning funds should not be held by the licensee, the NRC regulations already specify that a licensee cannot hold decommissioning trust funds. Therefore, no amendment is necessary to achieve the goal of prohibiting the licensee from holding the funds itself. The NRC staff also determined that requiring a licensee to deposit funds into the licensee's decommissioning trust fund within 90 days of reporting a shortfall as the exclusive remedy for a shortfall would be imprudent, because there are already several methods that provide an adequate level of assurance that funds for decommissioning will be available when needed. Providing several methods permits licensees to select the method best suited for their needs, while eliminating the flexibility of all of the currently existing methods of financial assurance would impose a burden on licensees without providing an increase in safety.

The staff recommends denying the petitioner's request that the NRC change the SAFSTOR and ENTOMB decommissioning options by amending the definition of the SAFSTOR decommissioning option and eliminating the ENTOMB decommissioning option. Regarding changes to SAFSTOR, the NRC staff recommends denying the petitioner's requests that the NRC require complete decommissioning within 60 years, require that the license may only be terminated based on meeting unrestricted use criteria, and prohibit use of a SAFSTOR facility for any activities related to other reactors on site or other licensees.

The 60-year decommissioning period was never intended to be an absolute limit, and the rule language developed in 1988 (53 FR 24018) never stated it as an absolute limit. Based on the Statement of Considerations in the *Federal Register* associated with the 1988 rule, the NRC disagrees that a formal commitment was made in which a reactor facility would be required to complete decommissioning within 60 years.

The NRC amended the unrestricted use criterion for termination of a license in July 1997 when it amended the definition of decommissioning to allow license termination under restricted conditions (62 FR 39058, 39090-91). Because the petitioner did not raise any new issues to cause the NRC staff to reconsider the conclusions reached in the 1997 rulemaking process, the NRC staff suggests denying the request to re-impose a requirement for a reactor licensee to decontaminate its facility to meet unrestricted use criteria in all cases.

The petitioner's request to forbid a licensee from using a facility in SAFSTOR for any activities related to other reactors on site, or from placing additional waste streams that belong to other licensees at a SAFSTOR facility, are resolved under current NRC regulations. To prevent the occurrence of legacy sites at reactor facilities, 10 CFR 50.75(f)(3) requires the licensee to submit a preliminary decommissioning cost estimate, which includes an up-to-date assessment of the major factors that could affect the cost of decommissioning, and 10 CFR 50.54(bb) requires the licensee to provide a plan for the management of spent fuel. As these requirements ensure that a licensee will have enough funds to decommission the facility and, thus, prevent the facility from becoming a legacy site, even if a facility in SAFSTOR continues to share equipment with an operating unit on site or in the event that some waste from another reactor on the site is placed in the SAFSTOR facility, the NRC staff recommends denying the requests.

The petitioner's request to eliminate the ENTOMB decommissioning option does not raise any new or significant points that would cause the NRC staff to reconsider the conclusions reached in the 1988 rulemaking which stated that ENTOMB should not be specifically precluded as there may be instances in which it would be an allowable alternative in protecting public health and safety and common defense and security. Therefore, the NRC staff recommends denying the request to eliminate the ENTOMB decommissioning option.

The staff requests Commission approval to publish a *Federal Register* notice (Enclosure 1), denying PRM-50-94. A letter is enclosed for signature by the Secretary of the Commission (Enclosure 2), informing the petitioner of the Commission's decision to deny PRM-50-94. The staff will inform the appropriate Congressional committees.

#### RESOURCES:

Denial of this petition will not affect budgeted resource needs.

#### COORDINATION:

The Office of the General Counsel has reviewed this package and has no legal objection.

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The staff recommends denial of PRM-50-94 on the basis that the petitioner has not provided an adequate basis upon which the NRC could act to amend its regulations.

***/RA by Martin J. Virgilio for/***

R. W. Borchardt  
Executive Director  
for Operations

Enclosures:

1. *Federal Register* Notice
2. Letter to Sherwood Martinelli

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EDATS: NRR-2011-0034

ADAMS Accession No: ML111250392 Package

\* Via E-Mail

\*\* Via Memo

OFFICE	NRR/DPR/PFIB:PM	QTE*	NRR/DPR/PRIB:BC	NRR/DPR/PFIB	NRR/DPR	NRR/DPR:D
NAME	ASzabo	KAzariah-Kribbs	SHelton	CRegan	TFredrichs	TMcGinty
DATE	05/6/2011	05/9/2011	5 / 24 /2011	5/26 /2011	5/ 26 /2011	5/31/2011
OFFICE	ADM/DAS/RAD*	OGC/GCLR/RFC	NRR:D	EDO		
NAME	CBladey	BJones	ELeeds (BBoger for)	RBorchardt (MVirgilio for)		
DATE	6 /8 /2011	6 /16 /11	6/28 /11	7/5/11		

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