

December 1, 2014

CD14-0264

Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Subject: Accelerating Decommissioning Activities at Operating Reactors

Dear Ms. Vietti-Cook:

EnergySolutions urges the Commission to issue a statement that it favors accelerating the conduct of decommissioning activities at operating reactor sites. In order to encourage this activity, the Commission should direct the NRC staff to review favorably and, where appropriate, to grant exemption requests from licensees seeking to use existing nuclear decommissioning trust funds (NDTs) during the operating life of reactor sites.

NRC's regulations in 10 CFR 50.2 define the removal of major radioactive components (MRCs), including reactor pressure vessel heads and steam generators as "major decommissioning activities." Then in 10 CFR 50.82(a)(5), NRC's regulations prohibit major decommissioning activities from being conducted until after permanent cessation of operations, and 10 CFR 50.82(a)(8) restricts the use of NDTs set aside for radiological decommissioning. Thus, although removal and disposal of a steam generator at an operating site is the same activity during operations as during decommissioning, the NRC does not consider this activity to be "decommissioning" unless it occurs after permanent shutdown. This regulatory scheme restricts the ability of licensees to use funds available from their NDTs for steam generator disposal, even though 1) the funds have been collected from ratepayers explicitly for that purpose; 2) funds remaining after the disposal of the steam generator would meet or exceed the funding requirements of 10 CFR 50.75(c); and 3) the Treasury Department considers this same activity to be decommissioning for purposes of making withdrawals from a tax-qualified NDT.¹

EnergySolutions has for several years pursued with the Commission the option of reactor licensees being able to use NDTs to undertake decommissioning activities at operating nuclear power plants. This effort included a rulemaking petition submitted on May 20, 2007, a petition that was later denied.² We have pursued this effort as we believe licensees should be encouraged to accelerate decommissioning activities at operating plants, rather than deferring disposal of MRCs until after plant shutdown. For many licensees, this can only be

¹ See, e.g., Treasury Regulation §1.468A-1(6) ("The term *nuclear decommissioning costs* or *decommissioning costs* includes all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant, **whether that nuclear power plant will continue to produce electric energy or has permanently ceased to produce electric energy.**") (Emphasis added.)

² Denial of Petition for Rulemaking to Amend 10 CFR 50.82, Docket PRM-50-88, Thomas E. Magette on behalf of EnergySolutions, 73 FR 62220, October 20, 2008.

accomplished if they are permitted to use funds existing in their NDTs to pay for such disposal. Otherwise, many licensees have an incentive to simply defer disposal of MRCs until after plant shutdown when funds from the NDTs can be used to pay for the disposal.

This issue was raised by comments in response to the 1994 draft policy statement regarding the use of trust funds, and these comments were captured in the decommissioning rulemaking that was concluded in 1998 as an alternative to a policy statement. At that time, the NRC staff concluded that “allowing decommissioning trust fund withdrawals for disposals that continue to operate is not warranted.”³ Instead, the staff asserted that the cost of such disposals constitute an operating expense. However, the Treasury Department later reached the opposite conclusion,⁴ as reflected in the current Treasury regulations.

Obviously, a licensee could seek approval of an exemption from NRC’s regulations in order to permit the use of existing funds from an NDT to pay for MRC disposal. However, the NRC staff has been unreceptive to such requests when they have received such applications. Where requests for exemption have been made, the applicants have been asked to withdraw their requests rather than face a denial. Consequently, licensees are reluctant to pursue this option that would benefit the public and industry by disposing of contaminated equipment and freeing up limited site space.

Staff has justified its reluctance to consider exemptions, as well as for rejecting the *EnergySolutions* petition for rulemaking, in part by stating that such an exemption is in conflict with stated policy. We believe that Commission policy should encourage accelerated decommissioning activities at operating reactor sites and allow the use of NDT funds where appropriate. Even if Commission policy favors preservation of NDTs for the purposes covered by 10 CFR 50.75, this should not preclude the review of a request for an exemption, where funds exceed the amounts necessary to meet the requirements of 10 CFR 50.75. Moreover, departure from a policy preference should not be the basis for denying an exemption. After all, the exemption sought is from the Commission’s regulations, which carry far more weight than a policy articulated in the statement of consideration for a rulemaking. If such inconsistency provided sufficient merit for the rejection of a request for exemption there could never be a basis for an exemption. The fact that Commission rules⁵ allow for and provide standards for exemptions from its regulations is sufficient to dismiss this argument.

While we believe that there is a strong case why the use of funds from NDTs to pay for MRC disposal should be explicitly authorized by NRC regulations for all licensees, we believe that at a minimum, the Commission should encourage the staff to look favorably upon requests for exemptions from the restrictions on use of funds from NDTs when so doing would accelerate decommissioning activities at operating reactor sites. For the reasons provided below, we think the policy that the staff has been relying on should be reevaluated, because accelerated decommissioning activities at operating reactor sites should be favored.

We are writing to request that the Commission 1) direct the staff to explain why decommissioning funds cannot be used for decommissioning activities prior to ceasing

³ 61 FR 39278, 39293, July 29, 1996.

⁴ See, e.g., Memorandum No. 200931007, Office of the Chief Counsel, Internal Revenue Service, March 11, 2009.

⁵ 10 CFR 50.12.

operations provided that there are sufficient decommissioning funds remaining to meet the decommissioning funding rules; and 2) conduct a review on the merits of any such application for an exemption that they may receive, rather than indicating to licensees that such requests will be denied if the NRC staff proceeds with a detailed review, as has been their practice to date.

The Commission has regulatory standards that establish minimum funding assurance requirements for decommissioning trust funds. We are not suggesting that an exemption from these standards be granted. Rather, we believe that one of the conditions an applicant should meet in order to receive an exemption is the ability to continue to satisfy the minimum funding requirements of 10 CFR 50.75(c). The standard set in this regulation was only last year reaffirmed by staff as adequate to accomplish the objective of providing assurance that adequate funding would be available. The staff reached this conclusion after a multi-year study of funding adequacy conducted at the direction of the Commission, concluding:

At this time, NRC staff does not recommend revising the Table of Minimum Amounts, as found in 10 CFR 50.75(c)(1), or the adjustment factors at 10 CFR 50.75(c)(2). The formula in 10 CFR 50.75(c) successfully establishes a common minimum standard measurement, or reference level, to which each licensee must accumulate committed financial resources during the life of the operating license as it was intended and described above.⁶

Discussing the minimum funding requirements and the other components of the regulations that apply to decommissioning funding, staff concluded:

Historically this process has been successful as sufficient funding was available to complete decommissioning of nuclear power plants to NRC regulations, as necessary.

Staff also has argued that the disposal of MRCs was an operating expense that should not be funded by decommissioning funding. As staff stated in the denial of the *EnergySolutions* petition for rulemaking:

In fact, the NRC considered this possibility [the use of decommissioning trust funds for MRC disposal], and stated that these disposals are considered operating activities and should be financed as such.⁷

We believe this conclusion to be in error for two reasons. First, NRC regulations describe the disposal of MRCs as a decommissioning activity. Disposing of an MRC at a decommissioned site clearly would be funded with decommissioning trust funds. Second, licensees have collected funds from their ratepayers that are paid into their decommissioning trust funds explicitly for the purpose of disposing of retired MRCs. Suggesting that reactor operators should finance these disposals out of operating funds is proposing that their customers pay twice for the same thing. This would be unreasonable under any circumstances; but when nuclear power plants are shutting down strictly because they are unable to remain financially competitive with other sources of electric power, it is indefensible.

⁶ SECY-13-0066, *Staff Findings on the Table of Minimum Amounts Required to Demonstrate Decommissioning Funding Assurance*, June 20, 2013.

⁷ Denial of Petition for Rulemaking to Amend 10 CFR 50.82, Docket PRM-50-88, Thomas E. Magette on behalf of *EnergySolutions*, 73 FR 62221, October 20, 2008.

Staff claims to have imposed no restrictions on the disposal of MRCs, but their insistence that disposal of these components should be financed with operating funds does that very thing. In partial justification for this assertion, staff points to the acceptability of creating a sub-account for the segregation of funds explicitly for this purpose.

Thus, licensees have had full notice that sub-accounts for the disposal of MRCs during operations could be established as long as decommissioning funding assurance requirements are met.³

This provides support for the proposition that funds from NDTs should be available to fund MRC disposal during the operating life of a plant, because it is an acknowledgement that funds in the NDTs may not be limited to the planned post-shutdown radiological decommissioning covered by 10 CFR 50.75. Licensees have long maintained commingled funds in their NDTs to pay for expenses beyond the scope of 10 CFR 50.75, such as non-radiological decommissioning and spent fuel management. In fact, site specific cost studies that are the basis for ratepayer collection have long included such costs. However, few licensees have provided for separate accounting treatment. Provided that the funds remaining in the NDT after MRC disposal meet or exceed the 10 CFR 50.75(c) requirements, it is a superficial distinction to limit use to sub-accounts. Licensees recognize that they would face regulatory action if NDT fund levels fall below the requirements of 50.75(c). Where NDTs have funds that exceed the 10 CFR 50.75 requirements, the NRC staff should approve exemptions to use such funds for purposes that go beyond the post-shutdown decommissioning contemplated by 10 CFR 50.75.

Another effect of the staff view is to extend the storage of waste that instead could be disposed. This is counter to the Commission's established preference for disposal over storage of radioactive waste. As staff has noted:

While there are no specific policy statements addressing extended LLRW storage, the Commission and staff have consistently recognized permanent disposal of LLRW as the preferred management strategy over extended storage.⁸

The continued storage of these components is further complicated by post-Fukushima requirements. In response to the Fukushima accident the NRC has asked licensees to evaluate their ability to withstand major incidents, accidents, and disasters.⁹ Consequently, some utilities have performed 10 CFR 50.59 assessments and determined that their mausoleum or other storage facilities for MRCs could not withstand major incidents. Continued storage also conflicts with NRC's recently promulgated regulations in 10 CFR 37 *et al.* for the physical protection of byproduct material.¹⁰ While neither of these issues should mandate that licensees be required to remove MRCs from storage to disposal, they do provide further justification for the Commission not to discourage their disposal.

⁸ RIS-2011-09, *Available Resources Associated with Extended Storage of Low-Level Radioactive Waste*, NRC Regulatory Issue Summary, August 16, 2011.

⁹ Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident, March 12, 2012.

¹⁰ Final Rule, 10 CFR Part 37 *et al.*, *Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material*, 78 FR 16921, March 19, 2013.

In summary, we believe the Commission should encourage accelerated decommissioning activities at operating reactor sites, and there is a compelling case to justify the use of decommissioning trust funds for the disposal of major radioactive components at operating reactors. These benefits include:

- Disposing of LLRW, which is widely accepted as being preferable to storage
- Using NDTs for their intended purpose, while reducing the amount of contaminated material at a licensed site

We ask that the Commission direct the staff to consider the merits of any request that it may receive for an exemption to its regulations limiting the use of decommissioning trust funds to plants that have permanently ceased operation. We further propose that standards to be met in order to receive such an exemption are:

- Continuing to meet the funding assurance requirements of 10 CFR 50.75(c)
- Using the funds for a major decommissioning activity as defined in 10 CFR 50.2
- Using funds that were collected for the purpose of a major decommissioning activity

We appreciate the Commission's willingness to entertain public comment. Questions regarding these comments may be directed to me at dshrum@energysolutions.com or (801) 649-2109.

Sincerely,



Daniel B. Shrum
Senior Vice President
Regulatory Affairs

Cc: Chairman Allison M. Macfarlane
Commissioner Kristine L. Svinicki
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