

February 22, 2017

MEMORANDUM TO: Chairman Svinicki  
Commissioner Baran  
Commissioner Burns

FROM: Victor M. McCree */RA/*  
Executive Director for Operations

SUBJECT: SUPPLEMENT TO SECY-16-0142, "DRAFT FINAL RULE—  
MITIGATION OF BEYOND-DESIGN-BASIS EVENTS  
(RIN 3150-AJ49)"

On December 15, 2016, the U.S. Nuclear Regulatory Commission (NRC) staff issued SECY-16-0142, "Draft Final Rule—Mitigation of Beyond-Design-Basis Events (RIN 3150-AJ49)." This memorandum describes four issues recently identified with the documents enclosed with SECY-16-0142 and provides revised text that, where designated in this memorandum's enclosures, should be used in place of the text provided in the enclosures to SECY-16-0142 as the basis for Commission deliberation on the draft final rule.

- 1. Remove the "good cause" exception from the draft final rule *Federal Register* notice as one of the bases on which the Commission relies to rescind orders and license conditions whose requirements are replaced by the requirements of this rulemaking.**

Enclosure 1 to SECY-16-0142 (the draft *Federal Register* notice) contains regulatory text that would effectuate the rescission of orders and removal of license conditions from the licenses of 10 CFR Part 50 and 52 licensees. The proposed rule (80 FR 70610; November 13, 2015), did not contain this regulatory language. The basis for this provision is that the Mitigation of Beyond-Design-Basis Events (MBDBE) rule would provide the same substantive requirements as these orders and license conditions, making them redundant and unnecessary. Rescinding the orders and removing the license conditions individually would be a ministerial act representing only administrative burden on licensees and the NRC staff.

In Enclosure 1 to SECY-16-0142, the NRC staff provides two reasons why the NRC can rescind orders and remove license conditions from operating reactor licenses without expressly including the measures in the proposed rule. The first reason is the "good cause" exception to the notice and comment requirement in the Administrative Procedure Act (5 U.S.C. 553(b)) (APA). However, the Commission has previously indicated it would not use this exception with respect to reactor licensing. The requirement in 10 CFR 2.804(d)(2) states: "The notice and

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comment provisions [of 10 CFR 2.804(a)-(c)] will not be required to be applied—(2) When the Commission for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest, and are not required by statute.” In the Statement of Considerations for the final rule that established this requirement (“Exceptions to Notice and Comment Rulemaking Procedures,” 50 FR 13006, 13008-09; April 2, 1985), the Commission clarified that it interpreted caselaw as not making the good cause exception available where notice and comment is required by statute:

However, the use of [the APA] exceptions is not available when notice and comment are required by statute. The Commission interprets the *UCS v. NRC* case as establishing such a limitation on the use of the APA exceptions only for rules which specifically amend reactor licenses. The exceptions to notice and comment will be available for use, in appropriate situations for all other rules, including those that deal with the activities of licensees.

Based on the Commission’s interpretation of the *UCS v. NRC* case, the Commission committed not to use APA exceptions for rules that specifically amend reactor licenses. Because the draft MBDBE final rule would amend reactor licenses, the Commission cannot use the “good cause” exception as a basis for not expressly providing for notice of and opportunity to comment on the removal of certain license conditions.

However, as discussed in Enclosure 1 to SECY-16-0142, the NRC staff’s recommendation to remove license conditions and rescind orders in the MBDBE final rule remains a logical outgrowth of the proposed rule. The NRC met its comment opportunity obligation for this provision when it issued the MBDBE proposed rule. In the proposed rule, the Commission explained that the NRC would make generically applicable certain requirements in Orders EA-12-049 and EA-12-051 and related license conditions. Rescinding the orders and removing the license conditions is a logical outgrowth of the proposed rule, and courts have held that a final rule that is a logical outgrowth of its proposed rule satisfies the notice and comment requirements of the APA. The decision in the MBDBE final rule to remove the related license conditions now that they are unnecessary was reasonably foreseeable, just as it was foreseeable that the Commission would rescind the orders.

Moreover, the staff was informed by comments from the public on this aspect of the rule. On page 99 of the Comment Response Document (Enclosure 2 to SECY-16-0142), the NRC staff summarized a comment from the Nuclear Energy Institute that noted potential unintended consequences from having duplicate requirements in orders, license conditions, and regulations.

**Enclosure 1** to this memorandum contains replacement text for the draft *Federal Register* notice that does not reference the “good cause” exception and includes an enhanced logical outgrowth discussion. No rule language would be amended.

**2. Correct a misstatement in the draft *Federal Register* notice concerning the justification for amending an existing regulation and to clarify the applicability of the amended regulation.**

Page 80 of Enclosure 1 to SECY-16-0142 (the draft *Federal Register* notice) states that requiring licensees to have extensive damage mitigation guidelines (EDMGs) during the reactor’s decommissioning phase would not “constitute backfitting for currently operating reactors because the change concerns decommissioning reactors.” **Enclosure 2** to this

memorandum provides revised text to explain that the change would not constitute backfitting for currently operating reactors because the EDMGs are already required during decommissioning by the licensees' existing license conditions. The draft final rule would replace these license conditions on the effective date of the final rule, thereby maintaining for these licensees the requirement to have EDMGs during decommissioning.

**Enclosure 2** to this memorandum also provides revised text for the same paragraph on page 80 to state more clearly which licensees would be subject to the amended regulation. The revised sentence reads that the requirement to have EDMGs during decommissioning would apply to decommissioning power reactor licensees with irradiated fuel in their spent fuel pools and to combined license (COL) holders. The revised sentence explains that the amended regulation would not constitute backfitting because these licensees, like the currently operating reactor licensees, have license conditions requiring EDMGs during decommissioning. Because the COL holders' license conditions were imposed after issuance of the Power Reactor Security Requirements rulemaking in 2009, reference to the Power Reactor Security Requirements rulemaking in this paragraph is removed. Finally, the revised paragraph notes that Millstone Power Station, Unit 1, although in decommissioning and with irradiated fuel in its spent fuel pool, is not subject to the requirements of 10 CFR 50.155, as explained on pages 65-66 of Enclosure 1 to SECY-16-0142.

**Enclosure 2** to this memorandum contains the replacement language for the *Federal Register* notice. No rule language would be amended.

**3. Remove one minor change in the draft final rule to eliminate an unnecessary backfit and to clarify that adequate protection is the basis for imposing a change identified as a backfit.**

The current 10 CFR 50.54(hh)(1) requires a nuclear power plant licensee to have potential aircraft threat procedures. 10 CFR 50.54(hh)(3) currently provides a sunset provision for the requirements in 10 CFR 50.54(hh)(1). In SECY-16-0142, the staff recommended revising this provision. Two of the changes included in Enclosure 1 to SECY-16-0142 (the draft *Federal Register* notice) would result in instances of backfitting that were not included in the MBDBE final rule's backfitting and issue finality assessment (Enclosure 4 to SECY-16-0142). Both changes were in the MBDBE proposed rule, and the NRC did not receive any comments on them.

The first change to 10 CFR 50.54(hh)(3) that would constitute backfitting is a change to when 10 CFR 50.54(hh)(1) would no longer apply to licensees (i.e., are sunset). The requirements in 10 CFR 50.54(hh)(1) are currently sunset, according to 10 CFR 50.54(hh)(3), when the licensee submits to the NRC the licensee's certification of permanent cessation of operations and, for 10 CFR Part 50 licensees, a certification of permanent removal of fuel from the reactor vessel. The rule text in Enclosure 1 to SECY-16-0142 would sunset the requirements in 10 CFR 50.54(hh)(1) at the time when the NRC dockets the licensee's certifications because, under 10 CFR 50.82(a)(2) for 10 CFR Part 50 licensees and 10 CFR 52.110(b) for 10 CFR Part 52 licensees, the NRC's docketing of the certifications is the point in time when the licensee is no longer authorized to operate.

Docketing licensee submissions can take a few days. Requiring licensees to comply with 10 CFR 50.54(hh)(1) until the NRC docketing of the certifications would constitute backfitting under 10 CFR 50.109 because the amendment of 10 CFR 50.54(hh)(3) would change the requirements imposed on these licensees (i.e., maintain the 10 CFR 50.54(hh)(1) procedures

past the date when the licensee submits the certifications until the date that the NRC docketed them), even if for only a few days.

The NRC staff is withdrawing this change from the final rule. Any increase in safety that would have resulted from changing the sunseting date of 10 CFR 50.54(hh)(1) would not be substantial. Once the licensee permanently removes the fuel from the reactor, the licensee will be in the same situation as the then-decommissioning reactors at the time of the issuance of Order EA-02-026, "Interim Safeguards and Security Compensatory Measures," when the NRC concluded that potential aircraft threat procedures for decommissioning reactors were not warranted. Although the certification of permanent removal of fuel will not have been docketed yet, the NRC may rely upon the licensee's act of submitting the certification under oath or affirmation as reflecting the permanent absence of fuel from the reactor vessel and thus the absence of risk from this source to public health and safety. Thus, the draft MBDBE final rule change would not be necessary and would not likely meet the criteria of the Backfit Rule.

Withdrawing the change from the final rule involves removing the last seven words from the draft final rule change to 10 CFR 50.54(hh)(3)—"once the NRC has docketed those certifications"—so the provision would read: "Paragraph 50.54(hh)(1) does not apply to a licensee that has submitted the certifications required under § 50.82(a)(1) or § 52.110(a) of this chapter." This modification eliminates the backfitting and issue finality concern arising from the docketing of the certifications. **Enclosure 3** to this memorandum includes these changes and conforming changes needed throughout the *Federal Register* notice.

The second change to the current 10 CFR 50.54(hh)(3) included in SECY-16-0142 was identified as a backfit following the issuance of SECY-16-0142. The rule text in Enclosure 1 to SECY-16-0142 would correct the reference in the current 10 CFR 50.54(hh)(3) from 10 CFR 52.110(a)(1) to 10 CFR 52.110(a) to accurately reference the regulation describing the certifications of permanent cessation of operations and permanent removal of fuel from the reactor vessel, consistent with the 10 CFR Part 50 references. For COL holders under 10 CFR Part 52, a 10 CFR 52.110(a)(1) certification informs the NRC of the date when the licensee permanently ceased or will permanently cease operations, and a 10 CFR 52.110(a)(2) certification informs the NRC of the date when the licensee permanently removed fuel from the reactor vessel.

Under the current 10 CFR 50.54(hh)(3), COL holders are required to maintain their 10 CFR 50.54(hh)(1) procedures only until the licensee submits the 10 CFR 52.110(a)(1) certification. Revising the sunseting language to change 10 CFR 52.110(a)(1) to 10 CFR 52.110(a) would require licensees to maintain these procedures until the licensee submits its 10 CFR 52.110(a)(2) certification. Submission of the 10 CFR 52.110(a)(2) certification of permanent removal of fuel could occur days, weeks, or months after submitting the 10 CFR 52.110(a)(1) certification, which may document an intent to permanently cease operations. Regardless of the amount of time between the submissions of the two certifications, this rule change would be a backfit for COL holders.

This imposition can be justified as necessary for adequate protection because Order EA-02-026, from which 10 CFR 50.54(hh) derives, was justified as an adequate protection backfit. In issuing that order, the NRC determined that the 10 CFR 50.54(hh)(1) procedures were necessary for adequate protection due to the risk presented by the presence of fuel in the reactor. Because that risk exists until the fuel is removed from the reactor, the NRC staff suggests that a licensee's maintenance of the 10 CFR 50.54(hh)(1) procedures until the

licensee submits its 10 CFR 52.110(a)(2) certification stating that fuel has been removed from the reactor, could be considered as necessary for adequate protection.

**Enclosure 3** to this memorandum contains replacement language for the *Federal Register* notice, including rule language. **Enclosure 4** to this memorandum contains a description of the backfit justification that could be added to the final version of the backfitting and issue finality assessment that was transmitted as Enclosure 4 to SECY-16-0142.

**4. Update the draft final *Federal Register* notice to reflect the issuance of the William States Lee III Nuclear Station COLs.**

**Enclosure 5** to this memorandum contains additional language for the *Federal Register* notice, including rule language, to reflect the recommended removal of the license conditions discussed in item 1 from the COLs for William States Lee III Nuclear Station. These COLs were issued after SECY-16-0142 was provided to the Commission.

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

Enclosures: As stated

cc: SECY  
OGC  
OCA  
OPA  
CFO

SUPPLEMENT TO SECY-16-0142, "DRAFT FINAL RULE—MITIGATION OF BEYOND-DESIGN-BASIS EVENTS (RIN 3150-AJ49)," DATED FEBRUARY 22, 2017.

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To address the issues discussed in item 1 of this memorandum, the paragraph beginning on page 107 and extending onto page 108 of the draft *Federal Register* notice (Enclosure 1 to SECY-16-0142) should be replaced with the following paragraph. Revised text is underlined; deleted text is not included.

For each of these orders being rescinded and license conditions being removed, the NRC is replacing it with equivalent requirements in the MBDBE rule. Although the NRC did not include these measures in the MBDBE proposed rule, the NRC provided sufficient notice and an opportunity to comment under the Administrative Procedure Act (5 U.S.C. 553(b)) when it issued the MBDBE proposed rule. In the proposed rule, the Commission explained that the NRC would make generically applicable certain requirements in the Mitigation Strategies and SFPI Orders and related license conditions. The Commission's decision to remove these license conditions now that they are unnecessary was reasonably foreseeable, just as it was foreseeable that the Commission would rescind the Orders. Similarly, Order EA-06-137 and its associated license condition have been unnecessary since the 2009 Power Reactor Security Requirements final rule created § 50.54(hh). Additionally, the Commission was informed by comments from the public that warned of potential unintended consequences from having duplicate requirements in orders, license conditions, and regulations. Thus, this aspect of the final rule, like the rest of the final rule, is a logical outgrowth of the proposed rule. Under the logical outgrowth line of legal decisions (e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *National Mining Ass'n v. Mine Safety and Health Administration*, 512 F.3d 696 (D.C. Cir. 2008)), the public had adequate notice and opportunity to comment on the rescission of orders and removal of license conditions.

To address the issues discussed in item 2 of this memorandum, the first full paragraph on page 80 of the draft *Federal Register* notice (Enclosure 1 to SECY-16-0142) should be replaced with the following paragraph. Revised text is underlined; deleted text is not included.

Applicability of the requirements of § 50.155(b)(3) was formerly governed by § 50.54(hh)(3), which made these requirements inapplicable following the submittal of the certifications required under § 50.82(a) or § 52.110(a)(1). As discussed in the Power Reactor Security Requirements final rule, the NRC concludes that it is inappropriate for the requirements for EDMGs to apply to a permanently shutdown, defueled reactor, where the fuel was removed from the site or moved to an ISFSI. The NRC is requiring EDMGs for a licensee with permanently shutdown defueled reactors, but with irradiated fuel still in its SFP, because the licensee must be able to implement effective mitigation measures for large fires and explosions that could impact the SFP while it contains irradiated fuel. The MBDBE rule corrects the wording of former § 50.54(hh)(3) to implement the sunseting of the associated requirement intended by the Commission in 2009. This change does not constitute backfitting for currently operating reactors, current COL holders, and currently decommissioning reactors with spent irradiated fuel in their SFP (except Millstone Power Station, Unit 1, as it is not subject to 10 CFR 50.155) because the EDMGs are also required by the licensees' license conditions. The MBDBE rule replaces the license conditions on the effective date of the MBDBE rule, thereby maintaining the EDMG requirement for these licensees.



To address the issues discussed in item 3 of this memorandum, several changes to the draft *Federal Register* notice (Enclosure 1 to SECY-16-0142) are needed. Revised text is underlined; deleted text is not included.

The paragraph beginning on page 61 and extending onto page 62 should be replaced with the following (with Note 3 as a footnote on page 62):

Once a licensee's § 50.82(a)(1) or § 52.110(a) certifications of permanent cessation of operations and permanent removal of fuel from the reactor vessel have been submitted, that licensee need only comply with the requirements of § 50.155(b) through (e), and (g) associated with maintaining or restoring SFP cooling. As discussed previously, these proposed requirements are based on the Mitigation Strategies Order. The licensees for the Kewaunee Power Station, Crystal River Unit 3 Nuclear Generating Plant, San Onofre Nuclear Generating Station, Units 2 and 3, and Vermont Yankee Nuclear Power Station submitted § 50.82(a)(1) certifications after issuance of the Mitigation Strategies Order. The NRC has rescinded the Mitigation Strategies Order for this group of NPP licensees (Shutdown NPP Group).<sup>3</sup> These rescissions were based on the NRC's conclusion that the lack of fuel in the licensee's reactor core and the absence of challenges to the containment rendered unnecessary the development of guidance and strategies to maintain or restore core cooling and containment capabilities. Consistent with these rescissions, the MBDBE rule relieves licensees in decommissioning from the requirement to comply with the § 50.155(b) requirements to have mitigation strategies and guidelines to maintain or restore core cooling and containment capabilities. Moreover, these licensees do not need to comply with any of the other requirements in this final rule that support compliance with the § 50.155(b) requirements to have mitigation strategies and guidelines for maintaining or restoring core cooling and containment capabilities.

Note 3: The Mitigation Strategies Order for Fort Calhoun Station, Unit 1, which has permanently ceased operations and defueled, has not yet been rescinded, but the deadline for full compliance has been relaxed to August 31, 2017.

**The last paragraph on page 62 of should be replaced with the following:**

This MBDBE rule treats the EDMG requirements in a manner similar to the requirements for FSGs. For a licensee that has submitted the § 50.82(a)(1) or § 52.110(a) certifications, the lack of fuel in its reactor core and the absence of challenges to the containment would render unnecessary EDMGs for core cooling and containment capabilities. This licensee would not need to comply with the requirements in the MBDBE rule associated with core cooling or containment capabilities; rather, the licensee would be required to comply with the requirement to have EDMGs based on the presence of fuel in the SFP.

**The first paragraph on page 63 should be replaced with the following:**

Once a licensee's § 50.82(a)(1) or § 52.110(a) certifications have been submitted, that licensee does not need to comply with the MBDBE requirement in § 50.155(f) that the licensee provide reliable means to remotely monitor wide-range SFP levels to support effective prioritization of event mitigation and recovery actions. The requirement in § 50.155(f) makes generically applicable the requirements in the SFPI Order. This order requires a reliable means of remotely monitoring wide-range SFP levels to support effective prioritization of event mitigation and recovery actions in the event of a beyond-design-basis external event with the potential to challenge both the reactor and SFP.

**The paragraph beginning on page 110 and extending onto page 111 should be replaced with the following:**

This rulemaking designates § 50.54(hh)(3) as § 50.54(hh)(2) to reflect the movement of the requirements formerly in § 50.54(hh)(2) to § 50.155(b)(3). Section 50.54(hh)(2) is revised to reflect that § 50.54(hh)(1)'s applicability is to the licensee rather than the facility, to clarify that § 50.54(hh)(2) applies to only § 50.54(hh)(1), and to correct the section numbers for the required certifications. To avoid an unnecessary backfit in § 50.54(hh)(2), in the final rule the NRC removes the words "once the NRC has docketed those certifications" from the proposed § 50.54(hh)(2).

**The last full paragraph on page 111 should be replaced with the following:**

Paragraph 50.155(a) describes which entities are subject to the MBDBE rule. Paragraph 50.155(a)(1) provides that each holder of an operating license for a nuclear power reactor under 10 CFR part 50, as well as each holder of a COL under 10 CFR part 52 for which the Commission has made the finding under § 52.103(g) that the acceptance criteria have been met, is required to comply with the requirements of this rule until the time when the licensee submits the certifications described in § 50.82(a)(1) or § 52.110(a). These certifications inform the NRC that the licensee has permanently ceased to operate the reactor and permanently removed all fuel from the reactor vessel. The permanent removal of fuel from the reactor vessel removes the possibility of core damage and containment failure, making it appropriate to terminate the requirements for strategies and guidelines to maintain or restore core cooling and containment capabilities. At the time the licensee submits these certifications, control of the applicability of the requirements of § 50.155 for licensees transitions to § 50.155(a)(2).

**The last full paragraph on page 112 should be replaced with the following:**

Paragraph 50.155(a)(2) addresses power reactor licensees that permanently stop operating and defuel their reactors and begin decommissioning the reactors.

Paragraph 50.155(a)(2)(i) provides that when an entity subject to the requirements of § 50.155 submits to the NRC the certifications described in §§ 50.82(a)(1) or 52.110(a), then that licensee is required to comply only with the requirements of § 50.155(b) through (e), and (g) associated with maintaining or restoring SFP cooling capabilities for the reactor described in the § 50.82(a)(1) or § 52.110(a) certifications. In other words, the licensee may discontinue compliance with the requirements in § 50.155 associated with maintaining or restoring core cooling or the primary reactor containment functional capability for the reactor described in the § 50.82(a)(1) or § 52.110(a) certifications. Compliance with the requirements of § 50.155(b) through (e), and (g) associated with maintaining or restoring SFP cooling capabilities continues as long as spent fuel remains in the SFPs associated with the reactor described in the § 50.82(a)(1) or § 52.110(a) certifications, or until the criterion of § 50.155(a)(2)(ii) can be satisfied. Once those conditions are satisfied, control of the applicability of the requirements of § 50.155 for licensees transitions to paragraphs 50.155(a)(2)(iv) or 50.155(a)(2)(ii), respectively.

**The last full paragraph on page 113 should be replaced with the following:**

Paragraph 50.155(a)(2)(iv) allows holders of operating licenses or COLs for which the certifications described in § 50.82(a)(1) or § 52.110(a) have been submitted to cease compliance with all requirements in § 50.155, once a power reactor licensee has permanently stopped operating, defueled its reactor, and removed all irradiated fuel from the SFP(s) associated with the reactor described in the § 50.82(a)(1) or § 52.110(a) certifications.

**The first full paragraph on page 140 should be replaced with the following:**

As required by §§ 50.109 and 52.98, the Commission has completed a backfitting and issue finality assessment for this rule. The Commission finds that the change to the types of certifications that COL holders must submit before the requirements of § 50.54(hh)(1) no longer apply constitutes a violation of issue finality. This change is justified as necessary for adequate protection of the public health and safety or common defense and security. In addition, even if the staffing and communications requirements are considered to be backfitting, they are necessary for licensees to comply with the MBDBE rule and, as such, are necessary for adequate protection of the public health and safety or common defense and security. Thus, the requirements would satisfy the criteria for an exception from the requirement to conduct a backfitting analysis under § 50.109(a)(4)(ii). Availability of the backfit and issue finality assessment is indicated in section XIX of this notice.

**Numbered paragraph 4 on page 159 should be replaced with the following:**

4. In § 50.54 remove paragraph (hh)(2), redesignate paragraph (hh)(3) as (hh)(2) and revise it to read as follows:

**§ 50.54 Conditions of licenses.**

\* \* \* \* \*

(hh) \* \* \*

(2) Paragraph 50.54(hh)(1) does not apply to a licensee that has submitted the certifications required under § 50.82(a)(1) or § 52.110(a) of this chapter.

\* \* \* \* \*

**Within numbered paragraph 5 on pages 159-160, the rule text for the new 10 CFR 50.155(a) should be replaced with the following:**

(a) *Applicability.*

(1) Each holder of an operating license for a nuclear power reactor under this part and each holder of a combined license under part 52 of this chapter for which the Commission has made the finding under § 52.103(g) shall comply with the requirements of this section until submittal of the license holder's certifications described in §§ 50.82(a)(1) or 52.110(a) of this chapter.

(2)(i) Once the certifications described in § 50.82(a)(1) or § 52.110(a) of this chapter have been submitted by a licensee subject to the requirements of this section, that licensee need only comply with the requirements of § 50.155(b) through (e), and (g) of this section associated with spent fuel pool cooling capabilities.

(ii) Holders of operating licenses or combined licenses for which the certifications described in § 50.82(a)(1) or § 52.110(a) of this chapter have been submitted need not meet the requirements of this section except for the requirements of paragraph (b)(3) of this section associated with spent fuel pool cooling capabilities once the decay heat of the fuel in the spent fuel pool can be removed solely by heating and boiling of water within the spent fuel pool and the boil-off period provides sufficient time for the licensee to obtain off-site resources to sustain the spent fuel pool cooling function indefinitely, as demonstrated by an analysis performed and retained by the licensee.

(iii) Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 1) is not subject to the requirements of this section.

(iv) Holders of operating licenses or combined licenses for which the certifications described in § 50.82(a)(1) or § 52.110(a) of this chapter have been submitted need not meet the requirements of this section once all irradiated fuel has been permanently removed from the spent fuel pool(s).

To address the issues discussed in item 3 of this memorandum, a new section should be added to Enclosure 4 to SECY-16-0142, starting on page 7, as follows:

#### ***4.0 Evaluation of MBDBE Rule Provisions that Constitute Backfits***

The NRC realized during its preparation of the final rule that one change set forth in the final rule would constitute a backfit. In its revisions to the former 10 CFR 50.54(hh)(3), the final rule revises the reference to 10 CFR 52.110(a)(1) to be 10 CFR 52.110(a) to accurately reference the regulation describing the certifications of permanent cessation of operations and permanent removal of fuel from the reactor vessel. For COL holders, a 10 CFR 52.110(a)(1) certification informs the NRC of the date when the licensee permanently ceased or will permanently cease operations, and a 10 CFR 52.110(a)(2) certification informs the NRC of the date when the licensee permanently removed fuel from the reactor vessel. This change was in the MBDBE proposed rule, and the NRC did not receive any comments on it.

Under the former 10 CFR 50.54(hh)(3), COL holders were required to maintain their 10 CFR 50.54(hh)(1) procedures only until the licensee submits the 10 CFR 52.110(a)(1) certification. Revising the sunset language to change 10 CFR 52.110(a)(1) to 10 CFR 52.110(a) requires licensees to maintain these procedures until the licensee submits its 10 CFR 52.110(a)(2) certification. Submission of the 10 CFR 52.110(a)(2) certification could occur days, weeks, or months after submitting the 10 CFR 52.110(a)(1) certification. Notwithstanding the amount of time between the submissions of the two certifications, this rule change is a backfit for COL holders.

This imposition is justified as necessary for adequate protection because Order EA-02-026, from which 10 CFR 50.54(hh) derives, was justified as an adequate protection backfit. In issuing that order, the NRC determined that the 10 CFR 50.54(hh)(1) procedures were necessary for adequate protection due to the risk presented by the presence of fuel in the reactor. Because that risk exists until the fuel is removed from the reactor, a licensee's maintenance of the 10 CFR 50.54(hh)(1) procedures until the licensee submits its 10 CFR 52.110(a)(2) certification stating that fuel has been removed from the reactor, is necessary for adequate protection.

To address the issues discussed in item 4 of this memorandum, several changes to the draft *Federal Register* notice (Enclosure 1 to SECY-16-0142) are needed. Revised text is underlined; deleted text is not included.

The two paragraphs beginning on page 106 and extending onto page 107 should be replaced with the following:

The NRC is also removing certain license conditions contained within the COLs held by Detroit Edison Company (for Enrico Fermi Nuclear Plant, Unit 3), South Carolina Electric & Gas Company (for Virgil C. Summer Nuclear Station, Units 2 and 3), Nuclear Innovation North America LLC, et al. (for South Texas Project, Units 3 and 4), Duke Energy Florida, Inc. (for Levy Nuclear Plant, Units 1 and 2), and Duke Energy Carolinas, LLC (for William States Lee III, Units 1 and 2). These licensees did not receive the Mitigation Strategies and SFPI Orders because the NRC had not issued COLs to these licensees at the time the NRC issued the Orders. When the NRC issued those COLs, it included license conditions that are equivalent to the orders' requirements. Because the license conditions contain the same requirements as the orders, and the provisions of § 50.155 replace the requirements imposed by the orders, the license conditions contain requirements equivalent to § 50.155 and will not be necessary once the MBDBE rule goes into effect. Therefore, the mitigation strategies for beyond-design-basis external events license conditions will be deemed removed from the Enrico Fermi Nuclear Plant, Unit 3, Virgil C. Summer Nuclear Station, Units 2 and 3, South Texas Project, Units 3 and 4, Levy Nuclear Plant, Units 1 and 2, and William States Lee III, Units 1 and 2 COLs on **[INSERT THE EFFECTIVE DATE OF THE FINAL RULE]**.

In addition to license conditions corresponding to the Mitigation Strategies Orders, the COLs for Enrico Fermi Nuclear Plant, Unit 3, South Texas Project, Units 3 and 4, Levy Nuclear Plant, Units 1 and 2, and William States Lee III, Units 1 and 2 included license conditions for the performance of staffing and communications assessments that correspond to the requests for information on those subjects in the NRC letter issued under § 50.54(f) on March 12, 2012.



**A new paragraph should be added at the end of the text on page 136 as follows:**

Under § 50.155(i)(9), the mitigation strategies for beyond-design-basis external events, reliable SFP instrumentation, and emergency planning license conditions will be deemed removed with the exception of license condition 2.D(12)(j)1 from the William States Lee III, Units 1 and 2 licenses on [INSERT DATE 2 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

**A new paragraph 50.155(i)(9) should be added immediately following paragraph 50.155(i)(8) on page 167 as follows:**

(9) On [INSERT DATE 2 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL RULE], William States Lee III Nuclear Station, Unit 1, License No. NPF-101, license conditions 2.D(12)(d)11 regarding reliable spent fuel pool instrumentation, 2.D(12)(g), “Emergency Planning Actions,” and 2.D(12)(j), “Mitigation Strategies for Beyond-Design-Basis External Events,” except for 2.D(12)(j)1, and William States Lee III Nuclear Station, Unit 2, License No. NPF-102, license conditions 2.D(12)(d)11 regarding reliable spent fuel pool instrumentation, 2.D(12)(g), “Emergency Planning Actions,” and 2.D(12)(j), “Mitigation Strategies for Beyond-Design-Basis External Events,” except for 2.D(12)(j)1, are deemed removed from those licenses.