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Regulatory Improvements for Power Reactors Transitioning to Decommissioning

Comment On: NRC-2015-0070-0178
Regulatory Improvements for Power Reactors Transitioning to Decommissioning; Request for Comment on Draft Regulatory Basis

Document: NRC-2015-0070-DRAFT-0194
Comment on FR Doc # 2017-05141

Submitter Information

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General Comment

Formal comments with cover letter being uploaded.

Attachments

Atkins Ltr to NRC - Comments on FRN re Decomm - 17 May 2017

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May 17, 2017

Louise Lund
Director, Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation
US Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: Docket ID NRC-2015-0070: Draft Regulatory Basis; Request for Comment, Regulatory Improvements for Power Reactors Transitioning to Decommissioning, 82 FR 13,778 (Mar. 17, 2017).

Dear Ms. Lund:

On March 15, 2017, the U.S. Nuclear Regulatory Commission ("NRC") issued a notice in the *Federal Register* soliciting public comments on the Draft Regulatory Basis in support of a rulemaking amending NRC's regulations for the decommissioning of nuclear power reactors. Draft Regulatory Basis; Request for Comment, Regulatory Improvements for Power Reactors Transitioning to Decommissioning (Federal Register Notice), 82 FR 13,778 (Mar. 17, 2017). The NRC requested comments by June 13, 2017. Attachment 1 to this letter provides comments from Atkins in response to Question 5 of the Federal Register Notice.

In particular, the Federal Register Notice asked for comments on whether nuclear power reactor facilities undergoing decommissioning could be exempted from 10 CFR § 50.38's ineligibility to obtain a license if the NRC has reason to believe that the licensee will be subject to foreign ownership, control, or domination (FOCD). *See* 82 FR 13,779.

Question 5 of the Federal Register Notice requested comments as follows:

> Should the NRC address the exemption to § 50.38 for licensees of facilities in decommissioning on a generic basis as part of this rulemaking? If so, why, and how should the NRC address this issue?

Regarding Question 5, Atkins believes that the FOCD prohibition should be removed for licensees in decommissioning by revising 10 CFR § 50.38 to provide that this prohibition does not apply when reactor licensees enter decommissioning including certification of permanent cessation of power production and permanently defueled reactors. In particular, § 50.38 should be revised to make clear that, consistent with its purpose of implementing the FOCD restrictions in the Atomic Energy Act of 1954, as amended ("AEA"), 10 CFR § 50.38 applies only to production and utilization facilities, as those terms are defined in the AEA, rather than to all licenses originally issued under 10 CFR Part 50. Further,

consistent with NRC precedent, the revised 10 CFR § 50.38 should clarify that permanently defueled facilities whose licenses no longer authorize operation of the reactor are not production or utilization facilities, as those terms are defined in the AEA, because they are no longer capable of producing or making use of special nuclear material as a matter of law under NRC's regulations.

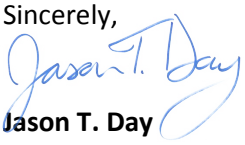
The proposed revision to 10 CFR § 50.38 to eliminate the FOCD restriction for decommissioning plants does not negate the NRC's ability to deny a license (including a 10 CFR § 50 license) to a license applicant if, based on their review and scrutiny, they conclude that issuing the license would be inimical to the common defense and security or to the health and safety of the public.

Atkins is a foreign owned nuclear services provider that would like to participate in the U.S. marketplace for decommissioning services. Atkins would like to utilize business models that have evolved for decommissioning in the United States, which include the license stewardship model, where an experienced decommissioning vendor assumes direct responsibility under an NRC reactor license for decommissioning the reactor facility.

Sound public policy dictates that the NRC should encourage broad participation in decommissioning projects by vendors that provide nuclear services in the international marketplace. If broad participation by international vendors is facilitated, the U.S. nuclear industry will benefit from increased competition and introduction of global technologies and best practices. Thus, the NRC should take a flexible approach when it interprets the FOCD restrictions imposed by statute, and NRC should narrowly apply these restrictions where necessary to protect nuclear safety and security at operating reactors.

We appreciate the opportunity to comment on the Draft Regulatory Basis and value the efforts of the NRC Staff in addressing these important issues. Atkins respectfully requests that the attached comments be incorporated in the final versions of the Draft Regulatory Basis and ultimately the final regulations.

Sincerely,



Jason T. Day
General Counsel
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Attachment

ATTACHMENT 1

Atkins Comments on Docket No. NRC-2015-0070

Question 5 posed by the U.S. Nuclear Regulatory Commission's ("NRC") in its March 15, 2017 Federal Register Notice[1] ("Federal Register Notice") requested comments on the following:

> Should the NRC address the exemption to § 50.38 for licensees of facilities in decommissioning on a generic basis as part of this rulemaking? If so, why, and how should the NRC address this issue?

In response to Question 5, Atkins believes that 10 CFR § 50.38 should be revised to clearly state that the Foreign Ownership, Control, or Domination ("FOCD") requirements do not apply to any nuclear power reactor facility that is undergoing decommissioning where the licensee has certified permanent cessation of operations and permanent removal of fuel from the reactor core. Once these certifications are made, 10 CFR § 50.82(a)(2) provides that the "license no longer authorizes operation of the reactor or emplacement or retention of the fuel into the reactor vessel." Thus, as a matter of law, neither the utilization nor the production of special nuclear material ("SNM") is authorized. In order to assure that it is physically not possible to conduct reactor operations, the modification to § 50.38 could also provide that the licensee must also alter the reactor such that the plant cannot resume activities that would result in production or utilization of SNM without noticeable plant modification activities. For example, removal of the fuel loading system and equipment.

Atkins provides two specific recommendations in response to Question 5 below.

1. The Decommissioning Rulemaking Should Be Revised to Provide That 10 CFR § 50.38 Applies Only to Production and Utilization Facilities, As Defined in the AEA

As part of its making improvements to the decommissioning regulatory regime, the NRC should revise 10 CFR § 50.38 to make clear that the FOCD provisions apply only to production and utilization facilities, as those terms are defined in the Atomic Energy Act of 1954, as amended ("AEA"). In particular, 10 CFR § 50.38 should be revised to clearly indicate that it does not apply to facilities undergoing decommissioning. As explained below, this is consistent with the underlying purpose 10 CFR § 50.38, which is to implement the FOCD restrictions in the AEA.

The AEA authorizes the NRC to issue licenses for production and utilization facilities, as those terms are defined in the statute.[2] The NRC implements this licensing authority via its regulations at 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities." The Commission's licensing authority, however, is subject to certain statutory limitations, including those in AEA sections 103d and 104d:

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[1] Draft Regulatory Basis; Request for Comment, Regulatory Improvements for Power Reactors Transitioning to Decommissioning, 82 FR 13,778, 13,779 (Mar. 17, 2017).

[2] AEA §§ 103a (42 U.S.C. § 2133(a)), 104b (42 U.S.C. § 2134(b)), 104c (42 U.S.C. § 2134(c)).

ATTACHMENT 1

Atkins Comments on Docket No. NRC-2015-0070

> No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.[1]

This prohibition is implemented through Commission regulations at 10 CFR § 50.38, which currently reads:

> Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.[2]

Unfortunately, the words "a license" could be perceived as rendering the FOCD restriction broadly applicable to *all* licenses originally issued under Part 50. Such an interpretation, however, would be at odds with the Commission's intent. As the NRC has explained, "the underlying purpose of 10 CFR 50.38 is to implement the FOCD restrictions of sections 103d. and 104d. of the AEA and to prevent foreign control, domination or ownership over *production and utilization facilities as defined by the AEA*."[3] The regulation was never intended to apply to facilities that fall outside of those statutory definitions.

In fact, in 2013, the NRC recognized the fact that application of 10 CFR § 50.38 to Part 50 licenses for facilities other than production and utilization facilities was inconsistent with the Commission's purpose in promulgating the regulation.[4] Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company held Part 50 operating licenses for their respective nuclear power reactors. However, after ceasing power operations and permanently defueling the facilities, the "possession only" Part 50 licenses no longer authorized operation of the reactors.[5] The NRC agreed that these facilities were neither production nor utilization facilities, and that imposing 10 CFR § 50.38 on such facilities was inconsistent with the underlying purpose of the rule.[6]

However, licensees should not need to request "exemptions," in individual licensing proceedings, from a regulation that was never intended to apply to such facilities in the first instance. Accordingly, the NRC

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1 AEA § 103d (42 U.S.C. § 2133(d)). The analogous provision in AEA § 104d does not include the phrase "an alien or," but is otherwise identical. *See* AEA § 104d (42 U.S.C. § 2134(d)).

2 10 CFR § 50.38.

3 *See* Letter from M. Lombard to W. Norton, Request for Exemption from Title 10 of the Code of Federal Regulations 50.38 Requirements for Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company – (TAC Nos. L24538, L24565, and L24566), Encl. at 5 (July 15, 2013) [hereinafter Yankee Exemption] (ML13086A010); (The exemption was also published in the Federal Register. *See* Exemption, "Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and The Yankee Atomic Electric Company," 78 FR 58,571, 58,572 (Sept. 24, 2013)).

4 *See id*. at 1; *see* also 78 FR at 58,752.

5 Yankee Exemption, Encl. at 1; 78 FR at 58,752.

6 Yankee Exemption, Encl. at 4-5; 78 FR at 58752.

should revise the regulatory basis document and 10 CFR § 50.38 to include the following clarification (addition in red text and underlined):

- The term "a license" in 10 CFR § 50.38 refers exclusively to licenses for production and utilization facilities, as those terms are defined in the Atomic Energy Act of 1954, as amended; it does not include any other licenses issued under 10 CFR Part 50. Accordingly, 10 CFR § 50.38 is amended to read as follows:

> Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a production or utilization facility license.

2. The 10 CFR § 50.38 Should Clarify That Permanently Defueled Facilities Are Not Production or Utilization Facilities, As Defined in the AEA

By operation of law, after certifying cessation of power operations and permanent defueling, facilities licensed under 10 CR Part 50 are no longer authorized to produce or utilize of SNM. This is mandated as a matter of law by operation of 10 CFR § 50.82(a)(2). Consistent with NRC precedent, the regulatory basis and revised 10 CFR § 50.38 should ensure that such permanently defueled facilities are not considered production or utilization facilities, as those terms are defined in the AEA.

The AEA defines production and utilization facilities as those that are capable of "the production of" (production facility) or "making use of" (utilization facility) SNM in certain quantities and manners.[7] Nuclear power reactors are constructed and then operating with such capabilities. However, when those facilities shutdown, their licenses no longer authorize operation of the reactor. The NRC should codify in 10 CFR § 50.38 that its interpretations of the AEA's definitions of "production facility" and "utilization facility" recognize the bright line between facilities being constructed to become operating reactor facilities and operating reactor facilities, which satisfy the AEA criteria for production and utilization facilities, versus permanently shut down and defueled facilities, which are not intended to return to operation.

NRC regulations require Part 50 licensees to submit written certifications "[w]hen a licensee has determined to permanently cease operations," and again, "[o]nce fuel has been permanently removed from the reactor vessel."[8] As explained in 10 CFR § 50.82(a)(2):

> Upon docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel . . . the 10 CFR part 50 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

Thus, by operation of law, a permanently defueled facility is no longer capable of producing or making use of SNM. Although the Yankee facilities (discussed above) had been dismantled, the basis for their exemption request was that the "*conditions of the licenses* do not allow their use as a production or

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[7] AEA §§ 11v (production facility); 11cc (utilization facility).

[8] 10 CFR § 50.82(a)(1).

utilization facility, and they are therefore not subject to Sections 103d. or 104d. of the AEA."[9] The NRC agreed that such facilities were neither production nor utilization facilities.[10]

The appropriate inquiry is whether the facility legally is capable of producing or making use of SNM; it is not relevant whether, theoretically, a licensed facility could be operated unlawfully. It is contrary to NRC policy to assume that a licensee will intentionally violate its legal obligations.[11] Accordingly, the Regulatory Basis should include the following clarification:

- Facilities licensed under 10 CFR Part 50 that have docketed a certification of permanent removal of fuel from the reactor vessel, pursuant to 10 CFR § 50.82(a)(1), are considered incapable of producing or making use of special nuclear material, and thus, are not production or utilization facilities as those terms are defined in the Atomic Energy Act of 1954, as amended.

In addition, 10 CFR § 50.38 should be amended as follows (additions in red and underlined):

- Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a production or utilization facility license. This section does not apply to any facility license where the certifications for permanent cessation of operations and for permanent removal of fuel from the reactor vessel has been docketed pursuant to 10 CFR § 50.82(a), and the licensee is no longer authorized to operate; provided, however, that the licensee has made alterations to the plant equipment that results in preventing the resumption of activities to produce or utilize SNM without significant plant alterations.

Once the licensee has made certifications that it has permanently ceased operations and permanently removed fuel from the reactor vessel, the licensee is no longer authorized to operate, and as such, as a matter of law the license no longer authorizes the utilization or production of SNM. The proposed change also provides that the licensee must alter the plant in such a way that the plant cannot resume SNM production or utilization activities. With substantive alteration to the physical plant (e.g., removal of the fuel up-ender), the licensee is also physically unable to reload the reactor, so that the facility is incapable of utilizing or producing SNM without physically altering the plant to re-establish the incapacitated plant equipment changes. Efforts to re-establish the plant equipment would be visible from the exterior of the reactors and noticeable during NRC periodic inspections during decommissioning.

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9 Yankee Exemption, Encl. at 2; (emphasis added); *see also* 78 FR at 58,752 (citing same).

10 *Id*., Encl. at 4.

11 *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003).