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Regulatory Improvements for Power Reactors Transitioning to Decommissioning; Request for Comment on Draft Regulatory Basis

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General Comment

See attached file

Attachments

Comments on Decommissioning Rule Regulatory Basis

I believe that the NRC is not complying with the requirements of the National Environmental Policy Act (NEPA) as implemented by 10 CFR Part 51, as well as other environmental Acts. Because of the issues outlined in the following comments the NRC is vulnerable to legal challenges with respect to licensing new reactors or relicensing operating reactors, similar to the case of the Waste Confidence Decision.

Background

Under the current and proposed rules, the NRC does not perform any environmental review of the site-specific impacts of decommissioning activities prior to the commencement of those activities. This includes site-specific reviews under NEPA, the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA), and Executive Order 12898 regarding environmental justice (EJ) and the Commission's policy statement on EJ. The decommissioning generic environmental impact statement (GEIS) prepared by the NRC (NUREG-0586, Supplement 1, published in 2002) made clear that such site-specific reviews were necessary to address issues that the NRC could not address generically. The NRC relies on the decommissioning GEIS (and its conclusions regarding the need for site-specific reviews) for licensing reviews for new reactors, and for license renewal reviews for operating reactors. Therefore, the NRC is not carrying out the reviews to which it committed in the decommissioning GEIS. Consistency with the decommissioning GEIS is of crucial importance because part of the NRC's licensing basis for new reactors and license renewal incorporates the findings and statements within the decommissioning GEIS. In addition, in the GEIS and in environmental reviews that reference the GEIS the NRC has previously told the public and other Federal agencies that NRC would conduct site-specific reviews and Section 7 consultations under ESA for decommissioning. Furthermore, NRC regulations in 10 CFR 50.82(a)(6)(ii) state that licensees shall not perform any major decommissioning activities that result in significant environmental impacts not previously reviewed. However, the NRC does not have a clear, public process to evaluate whether decommissioning activities would result in significant environmental impacts.

The revisions made in the 1996 version of the rule removed the opportunity for an environmental review (and the associated opportunity for meaningful input by the public and other agencies). Under the current rule there is no NRC site-specific environmental NEPA review at the time the licensee commences decommissioning, and no consultations under laws such as ESA. The potential revisions to the rule now being contemplated (as discussed in the associated draft regulatory basis) do nothing to address these issues.

Addressing the National Environmental Policy Act

NEPA requires Federal agencies to consider the environmental impacts of their actions as part of the decision-making process. The 1996 rule change in essence took the NRC action of approving the decommissioning plan and made it a "non-action" because NRC approval was no longer required. Because of this change, there is no longer an opportunity for the NRC to

evaluate the environmental impacts of any site-specific aspects of decommissioning before the licensee carries out the associated activities.

Although licensees have considerable latitude in terms of the details of how they carry out decommissioning, the NRC continues to oversee those activities and to determine whether decommissioning funds may be spent on the licensees proposed activities. In other words, the NRC still exercises control over the decommissioning activities of the licensee.

10 CFR 50.82(a)(4)(i) requires the licensee to submit a post-shutdown decommissioning activities report (PSDAR) including, among other things, “a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements.” This portion of the regulations is problematic because it apparently presumes that the impacts of decommissioning are bounded by previous reviews (i.e., it doesn’t ask whether the impacts are bounded). It’s unclear how a licensee would proceed if the impacts of decommissioning were not bounded by previous reviews. Interestingly, the *Federal Register* notice for the 1996 rule used the term “whether” when it described this portion of the rule (61 FR 39279).

Among the environmental reviews that the NRC would expect a licensee to consider when preparing the PSDAR is the GEIS the NRC prepared for decommissioning (NUREG-0586). Supplement 1 to NUREG-0586 was published in 2002, 6 years after the rule was last revised. While the GEIS concluded that most impacts of decommissioning would be minor, it also concluded that some issues could not be addressed generically and would have to be addressed at the time of decommissioning – see Section 6.1 of the GEIS. For example it states:

Executive Order 12898 (59 FR 7629), dated February 16, 1994, directs Federal executive agencies to consider environmental justice under the National Environmental Policy Act of 1969 (NEPA). Although the NRC is an independent agency, the Commission has committed to undertake environmental justice reviews. Subsequent to the submittal of the PSDAR, the NRC staff will consider the impacts related to environmental justice from decommissioning activities.

Therefore, the NRC, in addressing the environmental impacts of decommissioning in the GEIS, concluded that it must undertake an EJ review after it receives the PSDAR. The NRC performs EJ reviews through the NEPA process, as discussed in the Commission’s policy statement on EJ (69 FR 52040). However, the current rule prevents the NRC from performing such a review because the NRC has no action at the time the PSDAR is submitted, and thus has no basis to undertake a NEPA review.

The GEIS also indicates that ESA must be addressed after the PSDAR is submitted, and that four other issues (including a consultation under NHPA might be either generic or site-specific. None of these issues is currently addressed by the NRC prior to the commencement of decommissioning activities by the licensee.

Therefore, it does not appear that the NRC is carrying out its obligations under NEPA regarding decommissioning activities. The NRC's environmental review at the time the plant is licensed or renewed does not have access to the applicant's decommissioning plan – since it does not exist at that time - on which to base its findings related to impacts from decommissioning. At any rate, depending on the choices made by the applicant, it could be perhaps as much as 100 years between the environmental review for initial licensing and the commencement of major decommissioning activities¹. To the extent the NRC relies on the decommissioning GEIS at the time of initial plant licensing and license renewal, that reliance carries with it the need, discussed in the GEIS, to address some issues on a site-specific basis at the time of decommissioning. But we now know that such a review will not take place based on the current rule.

Therefore, how is the NRC complying with NEPA for site-specific issues that could not be resolved generically in the decommissioning GEIS?

Another aspect of NEPA is the requirement to engage the public and other agencies in the process of evaluating the impacts of Federal actions. The existing rule appears to recognize this role, but only in part. 10 CFR 50.82(a)(ii) requires the NRC to take a number of steps to inform the public and other stakeholders of the plan for decommissioning and to collect public comments. However, because the NRC has no action to take and no NEPA review to perform, that process of collecting comments appears to be a hollow gesture. The public will be informed of the plans, but has no real input regarding environmental concerns because there is no environmental review. There is no indication in the regulations as to what the NRC is to do with the public comments. A hint may lie in the *Federal Register* notice for the 1996, which indicates that the public meeting is “informational.” (61 FR 39282) This may indicate that the authors did not really intend this interaction to be an opportunity for the public to comment. However, other portions of the notice, and the first sentence in 10 CFR 50.82(a)(4)(ii) refer to “comments.” A response at 61 FR 39284 to specific public comments on this aspect of the 1996 rule does little to clarify the situation. It indicates that:

the information meetings will be beneficial in keeping the public informed of the licensee's decommissioning activities. Although the primary purpose of these meetings is to inform the public of the licensee's planned activities, the NRC will consider public health and safety comments raised by the public during the 90-day period before the licensee undertakes decommissioning activities.

Current NRC practice is to “categorize” the stakeholder comments received on the PSDAR in its acknowledgement letter to the licensee. It remains unclear what might be done in response to such comments beyond that. Again, at this stage in the process the NRC has no action before

¹ Assuming a plant uses one license renewal, operations could last 60 years. If the licensee puts the plant in SAFSTOR for a period of 40 years, which is possible, then major decommissioning activities won't start for about 100 years after initial plant operation.

it under the current rule and therefore no obligation to respond to the comments received from the public related to the PSDAR.

What is the purpose of collecting comments from the public and other stakeholders? What is done with the comments?

Endangered Species Act

As discussed above, under the 1996 rule the NRC has no action at the time the PSDAR is submitted. Therefore, it is unclear whether the NRC can enter into consultation under ESA. That does not mean, however, that decommissioning activities will not impact endangered species or their habitat. In fact, the NRC's review of previous PSDARs suggest that decommissioning activities may trigger consultation based on the likelihood of Federally-listed species to occur on site and because decommissioning activities may affect Federally-listed species. However, under the 1996 rule the NRC does not have a clear opportunity to evaluate such impacts or consult with the affected Service(s).

Initiating Section 7 consultation will also ensure that the NRC is consistent with the direction provided in the decommissioning GEIS. Specifically, Section 6.1 of the decommissioning GEIS states the following (emphasis added):

In accordance with the Endangered Species Act of 1973 (16 USC 1531 et seq.), the appropriate Federal agency (either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service) **must be consulted** about the presence of threatened or endangered species. Informal consultation **will be initiated** by the U.S. Nuclear Regulatory Commission (NRC) staff with the appropriate service after the licensee announces permanent cessation of operations. It is expected that any formal or informal **consultation will be completed prior to the licensee beginning major decommissioning activities**, which can occur 90 days after the submission of the post-shutdown decommissioning activities report (PSDAR). At that time, it will be determined whether such species could be affected by decommissioning activities and whether formal consultation will be required to address the impacts. Each State should also be consulted about its own procedure for considering impacts to State-listed species.

As described above, consistency with the decommissioning GEIS is of crucial importance because part of the NRC's licensing basis for new reactors and license renewal incorporates the findings and statements from the decommissioning GEIS. In addition, in the GEIS and in environmental reviews that reference the GEIS the NRC has previously told the public, the U.S. Fish and Wildlife Service, and National Marine Fisheries Service that we would initiate Section 7 consultation for decommissioning.

NRC regulations in 10 CFR 50.82(a)(6)(ii) state that licensees shall not perform any major decommissioning activities that result in significant environmental impacts not previously

reviewed. The impacts from decommissioning activities to Federally listed species have never been evaluated by the NRC given that this was one of the six areas in the decommissioning GEIS for which the NRC did not reach a generic conclusion. In addition, the list of endangered species (and the associated habitats) change over time as the U.S. Fish and Wildlife Service and the National Marine Fisheries Service update their information. So the information regarding endangered species at the time a plant is licensed, or even at the time a license is renewed, may not reflect the conditions at the time of decommissioning. More importantly, the evaluation and consultation conducted during initial licensing and license renewal does not include the full range of activities that would occur during decommissioning, such as the demolition of buildings. Therefore, the NRC has never examined whether the licensees will perform major decommissioning activities that result in significant environmental impacts to Federally listed species.

How, then, is the NRC meeting its obligations under ESA and in 10 CFR 50.82(a)(6)(ii) for the impacts of decommissioning the plant?

National Historic Preservation Act

In the decommissioning GEIS, the staff concluded that impacts to historic and cultural resources would likely be small if the decommissioning activities all occurred within the plant's operational areas (see Section 4.3.14.4). However, the staff could not reach the same conclusion if impacts outside the operational areas were anticipated. In such a case, the NRC concluded that:

The potential impacts may be SMALL, MODERATE, or LARGE and must be determined through site-specific analysis. Before the licensee conducts any decommissioning activity that might result in the disturbance of historic properties or archeological resources outside the site operational area, the NRC will, in accordance with the National Historic Preservation Act of 1966 as amended (16 USC 470 et seq.), consult with the appropriate SHPO or THPO to evaluate potential impacts.

In addition, in the GEIS the NRC identified the potential that the plant facilities themselves might be eligible for listing on the National Register of Historic Places. However, this issue was not addressed further.

In fact, this issue has already come up. During the review of the combined license application for Fermi, Unit 3, the NRC learned that the Michigan State Historic Preservation Officer (SHPO) had identified Fermi, Unit 1, as eligible for listing. The licensee had partially decommissioned this older unit, and was preparing to demolish the remaining portions of the plant to make way for the new unit. The NRC staff who were overseeing the decommissioning process could not enter into consultation under NHPA for Unit 1 because they had no action before them. However, the NRC reviewing the combined license application were able to include the impacts of the demolition of Unit 1 in the consultation for the new plant, addressing the concerns raised by the SHPO. But this was accomplished only because of the fortuitous alignment of the combined license review with the need to consult for the unit that was being decommissioned.

How, then, is the NRC meeting its obligations under NHPA for the impacts of decommissioning the plant?

Other Site-Specific Issues

The decommissioning GEIS also identified that there were three other issues that might warrant a site-specific review, depending on the circumstances. These were land use, aquatic ecology, and terrestrial ecology. But based on the current rule (and the draft regulatory basis) the NRC cannot review the impacts to these resources prior to the commencement of decommissioning because it has no action at that time, and thus doesn't perform any NEPA review.

How, then, is the NRC meeting its obligations under NEPA for the impacts of decommissioning the plant to these resources?

Role of the NRC versus Role of the Licensee

The current rule (and the draft regulatory basis) put a heavy emphasis on what the licensee will do at the beginning of the decommissioning process, while providing little indication of the role of the NRC. For example, while the licensee must submit a PSDAR, there is no regulatory requirement for the NRC to review it. The NRC has made a habit of reviewing the PSDAR, despite the lack of a regulatory requirement. But lacking a specific requirement puts the NRC in a weak position in terms of dealing with any concerns related to the PSDAR.

In addition, the laws mentioned in these comments – NEPA, ESA, and NHPA – were written to ensure that Federal agencies took appropriate steps to protect environmental values in taking actions. But because of the 1996 rule change, the NRC no longer has an action related to decommissioning until the licensee submits its license termination plan (LTP). Approval of the LTP, via license amendment, is the only decommissioning action expressly approved by the NRC during the up to sixty year decommissioning process and thus, the only point that the NRC conducts a NEPA analysis. The *Federal Register* notice for the 1996 rulemaking stated that the major considerations of licensee decommissioning activities that could significantly affect the environment are at the license termination stage, when the licensee submits the LTP for approval. However, the LTP may not be submitted for decades after the start of decommissioning and typically will not be submitted until most of the major impacts of decommissioning have occurred. Further, NRC's approval of the LTP is limited to the NRC's determination of whether the licensee meets the radiological criteria of 10 CFR 20.1402. The NEPA analysis for the LTP is thus limited to remaining activities, as described in the LTP, and therefore does not address the issues being raised by these comments.

The NRC cannot abdicate its responsibilities under NEPA, ESA and NHPA and its obligation to comply with the Commission's Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions (69 FR 52040). But the 1996 rule appears to have done just that and the draft regulatory basis does nothing to address this concern.

How does the current rule (and the draft regulatory basis) comport with the NRC's obligations under NEPA, ESA and NHPA?

Proposed Resolution

In order for the NRC to meet its obligations under NEPA, ESA, NHPA, etc., it must perform a site specific review prior to the licensee carrying out decommissioning activities. It cannot do so as the rules (as they are interpreted by the NRC) stand. There are at least two options to address this problem.

1. The NRC could reinterpret the existing rule and indicate that the review of the PSDAR, while not a license amendment, does constitute an NRC action that would allow the staff to meet its obligations under NEPA, ESA, NHPA, etc. This approach is the simplest. But the new interpretation would need to be documented in a durable document that would make clear that all future decommissioning reviews would include these site-specific environmental reviews. That document would then be referenced in staff guidance documents.
2. The rule could be modified to make it clear that the NRC will review and approve the PSDAR, which would constitute an NRC action that would allow the NRC to meet its obligations under NEPA, ESA, NHPA, etc. Similar to approval of partial site releases (10 CFR 50.83), this approval would not involve a license amendment or an opportunity for hearing. This approach is most direct and most durable. It would require more effort than a re-interpretation by the NRC. But it would also be less easily undone in the future if the NRC were to lose sight of the reason it must perform such reviews.

Under both of these options, the environmental review would provide the opportunity to address the public comments related to environmental impacts. The environmental review under both options would allow the NRC to carry out the site-specific reviews necessary based on the decommissioning GEIS and remove the vulnerability for licensing and relicensing of reactors.