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Subject: [External_Sender] NRC Rulemaking Docket NRC-2015-0070 - Submission of Comments by NYSDPS
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Good afternoon Secretary Vietti-Cook and NRC Staff:

Attached for docketing please find comments submitted by the New York State Department of Public Service concerning the proposed decommissioning rulemaking in docket NRC-2015-0070.

Please contact me if you have difficulty in opening the attachment.

Respectfully submitted,

J. Sipos

John Sipos
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**Department of
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August 31, 2022

VIA ELECTRONIC SUBMISSION

U.S. Nuclear Regulatory Commission
Office of the Secretary
ATTN: Rulemakings and Adjudications Staff
Washington, DC 20555

Re: NRC Rulemaking for Production and Utilization Facilities
Transitioning to Decommissioning NRC-2015-0070

Dear Secretary Vietti-Cook:

Enclosed please find the comments of the New York State Department of Public Service concerning the proposed rulemaking.

Respectfully submitted,

s/ John J. Sipos

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Regulatory Improvements for Production and
Utilization Facilities Transitioning to
Decommissioning

10 CFR Parts 20, 26, 50, 51, 52, 72, 73, 140

Docket No.:
NRC-2015-0070

RIN: 3150-AJ59

**COMMENTS SUBMITTED BY
THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE**

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Submitted: August 31, 2022

TABLE OF CONTENTS

	<u>Page No.</u>
Interest of the Department of Public Service	1
NRC's Current Approach to Decommissioning	2
The Department of Public Service's Experience.....	3
1. NRC should require approval of the PSDAR, a site-specific environmental review, and a hearing opportunity before a licensee undertakes any decommissioning activity.....	4
2. The Proposed Rule should require prompt decontamination of reactor sites ..	5
3. NRC should not relax its emergency planning requirements or cyber-security protocols before all spent fuel at a site is removed from the spent fuel pool and placed in dry cask storage	7
4. NRC should require the existing level of financial insurance to be maintained until all spent fuel is in dry cask storage.....	8
5. NRC should update the generic decommissioning financial funding formula to make it more reflective of current cost considerations and to cover all estimated radiological decommissioning costs, rather than merely "the bulk" of the costs	9
6. NRC should require a site-specific cost estimate during operations and a full site investigation and characterization before or at the time the reactor ceases to operate	10
7. NRC must not allow decommissioning trust fund assets to be used for federal spent fuel management obligations	11
8. NRC should not relax the frequency of decommissioning funding assurance reporting to three years	12
9. NRC should revisit its regulations with respect to the granting of exemptions.....	12
10. Sites that are currently undergoing decommissioning should not be automatically exempt from any new or amended requirement included in the final rule	12
11. NRC should expressly recognize state authority over the non-radiological activities and residual radiation associated with the decommissioning process	13

NOTE REGARDING CITATIONS AND REFERENCED DOCUMENTS

All citations and references mentioned in this document are hereby incorporated by reference. Should NRC Staff be unable to obtain any such citations or references, they are requested to contact the New York State Department of Public Service for assistance.

On March 3, 2022, the United States Nuclear Regulatory Commission (NRC) invited public comments on a proposed rule entitled “Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning” (the Proposed Rule). 87 Fed. Reg. 12254 (Mar. 3, 2022). While the New York State Department of Public Service (the Department) agrees that NRC’s current decommissioning regulations should be revised, the Department nevertheless further contends that the Proposed Rule, in its current form, substantially misses the mark. Accordingly, the Department offers the following comments concerning the Proposed Rule.¹

Interest of the Department of Public Service

The Department is the staff arm of the New York State Public Service Commission (or NYSPSC), which regulates New York’s electric, gas, steam, telecommunications, and water utilities, as well as its energy production. The NYSPSC has a broad public interest mandate to both ensure New Yorkers’ access to safe and reliable utility service at just and reasonable rates and to protect New York’s environment. N.Y. Pub. Serv. Law § 5. Through a series of rate orders beginning in the early 1990s, the NYSPSC authorized utilities to collect funds for the eventual decommissioning and restoration of nuclear electric generation sites for reuse. The Nuclear Decommissioning Trust (or NDTs) for each of New York’s reactor sites were capitalized with New York ratepayer or customer funds via NYSPSC-approved expense allowances.² The NYSPSC retains its regulatory interest in those trust funds as a result of those orders as well as subsequent orders authorizing the transfer of reactor sites and assets. It also possesses general supervisory powers over all electric plants in the State of New York, which include, among other things, “retired nuclear power reactors and their associated systems, structures, fuel and waste storage facilities, real estate, fixtures and personal property.” N.Y. Pub. Serv. Law §§2(12), (13); 5; 66(1).

¹ The Department incorporates and reasserts here New York State’s previous comments on this matter. They were submitted in response to NRC’s November 19, 2015 advance notice of proposed rulemaking and its March 15, 2017 draft regulatory basis. *See Comments of Vermont, Massachusetts, Connecticut, and New York* (March 18, 2016) (ADAMS Accession No. ML16085A310); *New York State Comments*, (March 18, 2016) (ADAMS Accession No. ML16081A495); *Comments of New York State Energy Research and Development Authority and New York State Department of Public Service* (June 13, 2017) (ADAMS Accession No. ML17165A386). The comments provided here do not necessarily reflect the views of any particular New York Commissioner.

² *See, e.g.*, NYSPSC Case 91-E-0462, *Opinion and Order Adopting Settlement* (April 14, 1992); NYSPSC Case 94-E-0334, *Opinion and Order Approving Settlement* (April 6, 1995); NYSPSC Case 96-E-0897, *Order Adopting Terms of Settlement Subject to Conditions and Understandings* (September 23, 1997). NRC acknowledges that funding for the decommissioning of power reactors is also subject to regulation by State Public Utility Commissions or other agencies. 10 C.F.R. § 50.75.

NRC's Current Approach to Decommissioning

In 1988, through an Administrative Procedure Act (APA) notice and comment rulemaking, the NRC Commissioners first promulgated a limited set of decommissioning regulations by amending 10 C.F.R. Parts 30, 40, 50, 51, 70, and 72 to require facilities to begin to provide some assurances that licensees might be able to fund the future decommissioning of their facilities. See Final Rule, General, Requirements for Decommissioning Nuclear Facilities, 52 Fed. Reg. 24018 (June 27, 1988).³ The 1988 rule was premised on the regulated utility model. It required reactor owners to make regular payments to the nuclear decommissioning trusts and was complemented by economic oversight from State utility commissions, which decided how much would be collected from ratepayers for a facility's decommissioning trust each year. The NRC's 1988 rule defined decommissioning as the removal of residual radioactivity in order to release the site for other uses. 10 C.F.R. § 50.2 (1986) (decommissioning defined); 52 Fed. Reg. at 24049. In the accompanying Statement of Considerations, the Commission confirmed that "decommissioning" did not include management of spent fuel:

Decommissioning as defined in the rule means to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license. . . . Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond that necessary to terminate the NRC license.

52 Fed. Reg. at 24019. In a subsequent 1996 APA rulemaking, the NRC Commissioners reiterated that decommissioning funding did not include spent fuel management. 61 Fed. Reg. 39278, 39285 (July 29, 1996) (Statement of Considerations). That rulemaking is promulgated at 10 C.F.R. § 50.82(a)(8)(i)(A), which has remained unchanged. 10 C.F.R. § 50.75(h)(1)(iv) also prevents the use of monies in decommissioning trusts for spent fuel management expenses.

Under this longstanding approach, the decommissioning phase is a *laissez faire*, industry-driven affair. A retired reactor proceeds through a series of guidance documents, exemptions, removal of technical specifications, and recissions at a pace

³ As acknowledged by the Atomic Safety and Licensing Board, NRC has not promulgated comprehensive regulations concerning the decommissioning of reactor sites. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LA-2, LBP-15-18 at 3, 81 N.R.C. 793 (May 18, 2015); accord, NRC Office of Inspector General, *Decommissioning the Yankee Rowe Nuclear Power Plant: NRC Policy at a Crossroads*, OIG/94A-07 at 9 (June 27, 1994) (NRC Office of General Counsel confirming that NRC regulations do not address the decommissioning of reactors that cease operation before the completion of their license terms) (ADAMS Accession No. ML20071H031).

selected by the owner. NRC does require that the plant owner submit a relatively brief description of its approach to decommissioning, the Post-Shutdown Decommissioning Activities Report (PSDAR). Notably, NRC Staff exercises no regulatory authority over the document other than acknowledging its receipt. NRC neither approves nor disapproves any of the industry's decisions or plans for decommissioning the reactor sites, and it has no authority to require more of anything, less of anything, or something altogether different than what is contained in the PSDAR. Important decommissioning tasks such as segmentation of the containment vessel, removal of the contaminated piping, moving the spent fuel from the pools, deconstruction of containment domes, and the associated timelines for those activities, are left solely in the hands of the licensee.

NRC may receive public comment on the PSDAR, but it does not approve the PSDAR and the submission of the PSDAR and its review by the NRC Staff does not require the licensee to request a license amendment or any other NRC approval. This deference obviates an NRC licensing action, National Environmental Policy Act review, and any opportunity for a hearing until the owner submits a License Termination Plan at the very end of the decommissioning process—potentially decades later—after all of the key decisions have already been made, the vast majority of the decommissioning work has been completed, and the money in the decommissioning trust may have been expended.

The Department of Public Service's Experience

As a result, states like New York have been forced to undertake extensive efforts to ensure that reactor sites within their borders have financial capital, are promptly and thoroughly decommissioned and restored, and that the public remains adequately informed of the licensees' plans and progress. For example, New York recently entered into an agreement with the company that is decommissioning the Indian Point site under which the company committed to perform a full site investigation and characterization at the facility, maintain certain minimum balances in the reactors' NDTs, provide additional financial assurance for site restoration, and return 50% of its U.S. Department of Energy spent fuel reimbursements to the NDTs. *See* NYSPSC Case 19-E-0730, *Order Asserting Jurisdiction and Approving and Adopting Joint Proposal*, 2021 WL 2073754 (N.Y. Pub. Serv. Comm'n, May 19, 2021). Similarly, in a separate settlement covering the transfer of four reactors in western New York, the reactor owner agreed to maintain certain minimum NDT balances during decommissioning and to provide additional financial assurance for site restoration. The owner also agreed to provide specific and detailed decommissioning funding information to the Department annually while the reactors continue to operate. *See* NYSPSC Case 21-E-0130, *Order Asserting Jurisdiction, Approving Joint Proposal, and Continuing Lightened Regulation*, 2021 WL 6000020 (N.Y. Pub. Serv. Comm'n, Dec. 16, 2021).

Incorporation of the following comments into any final decommissioning rule would help to alleviate the undue burden that states like New York have assumed by establishing predictable and thorough national decommissioning standards and by granting non-industry stakeholders a meaningful role in the decommissioning process.

1. NRC should require approval of the PSDAR, a site-specific environmental review, and a hearing opportunity before a licensee undertakes any decommissioning activity.

NRC's current policy of receiving—but not approving—a licensee's PSDAR deprives stakeholders of a meaningful opportunity to comment on the licensee's decommissioning plans, thereby foregoing an opportunity to improve a licensee's decommissioning plans and eroding public trust in the decommissioning process. The Proposed Rule should therefore be amended to require that any PSDAR be affirmatively approved by the NRC's *Commissioners* following a site-specific environmental review and an opportunity for an adjudicatory hearing.

NRC's current PSDAR framework are notably out-of-step with international guidance. Indeed, the International Atomic Energy Agency (IAEA) recommends that “[p]rior to the conduct of decommissioning actions, a final decommissioning plan shall be prepared and shall be submitted to the regulatory body *for approval.*” Requirement 11 of GSR Part 6 [1]: Final decommissioning plan (emphasis added). NRC's current approach, by contrast, neither approves the document nor disapproves it, thereby “leaving [the] NRC with no real decision-making role with respect to decommissioning activities on the site[.]” Comments of Commissioner Jeffery M. Baran on SECY-18-0055. The Proposed Rule fails to remedy this deficiency, but it should. NRC should not be content to remain at the far margins of the international community's nuclear safety consensus.

In addition to finally giving NRC meaningful authority over a licensee's decommissioning activities, requiring NRC approval of PSDARs would offer host states, municipalities, and other stakeholders an opportunity to discuss their concerns with NRC and the licensee at an adjudicatory hearing.

The Department's recent experience has demonstrated the immense value of stakeholder participation in decommissioning planning. Over the last several years, ownership of each of New York's four reactor sites has been transferred to new entities. Under the New York Public Service Law, the NYSPSC must review and approve any such transfer. N.Y. Pub. Serv. Law § 70. Through that approval process, the NYSPSC was able to convene a broad array of stakeholders, discuss their concerns, and ultimately address those concerns by securing significant financial assurance, site restoration, and emergency planning commitments from the licensees. These comprehensive settlements would not have been possible

without robust public participation and without the NYSPSC's ultimate authority to approve or disapprove these proposed transactions. Not all states, however, have public utility commissions with this authority, and not all reactor sites will change hands before being decommissioned. Only the NRC can impose uniform national protections for stakeholders that will apply to all future decommissioning sites.

Finally, the Department offers the following comments regarding the nature of stakeholder—and especially host state—participation in the decommissioning planning process. Specifically, before approving a PSDAR, NRC should invite the host State to file an opinion of support, opposition, or conditional support that includes specific recommendations for changes to the PSDAR. NRC should further, as Commissioner Baran has argued, be obligated to meaningfully respond to the State's comments. Host states should then be granted automatic party status as intervenors on any issues they wish to raise through an adjudicatory hearing.⁴ Non-compliance with a licensee's decommissioning plans should carry financial penalties, and in cases of financial bankruptcy or habitual non-compliance, NRC should be empowered to take over the decommissioning process.

2. The Proposed Rule should require prompt decontamination of reactor sites.

Barring extraordinary circumstances, licensees should be required to decommission reactor sites as soon as is technically feasible (Prompt DECON). Allowing licensees to defer for decades decommissioning work that the industry has repeatedly shown can generally be accomplished much faster increases costs, exacerbates inflationary risks, impedes reuse and redevelopment, and harms host communities. The Proposed Rule should be revised accordingly.

ENTOMB should be eliminated entirely from the Proposed Rule. The IAEA rejects the notion that, barring a severe accident or other extraordinary circumstance, ENTOMB is a legitimate decommissioning strategy. GSR Part 6 1.10. It reasons that ENTOMB “impose[s] a burden on future generations owing to the need for long term monitoring of the site and owing to possible future actions necessary to prevent and reduce leakages of radioactive material from the facility.” SSG-47 at 32-33. The Department agrees.

Furthermore, developments within the decommissioning industry indicate that the rationale for accepting extended SAFSTOR is much weaker today than it once was. Indeed, in New York's experience, no well-capitalized licensee is interested in marking time and voluntarily taking 60 years to decommission. Indian Point's licensee, for example, is on track to fully decommission that site

⁴ In recent years, Massachusetts and New York submitted petitions for intervention and requested adjudicatory hearings concerning facility transfers and decommissioning, but those petitions were rejected.

(excepting the Independent Spent Fuel Storage Installation (ISFSI)) within just 12-15 years of closure. And the current licensee for New York’s four operating reactors recently committed to decommissioning those sites in less than 20 years of their eventual closure.

In fact, completing radiological decommissioning within just 10 years of shutdown is not only feasible—it has already occurred at several reactor sites. The following United States reactor sites have all been promptly decommissioned in roughly 10 years or less:

PLANT	STATE	YEARS BETWEEN SHUTDOWN AND LICENSE TERMINATION (APPROX.)
Big Rock Point	Michigan	9
Fort Saint Vrain	Colorado	8
Connecticut Yankee/Haddam Neck	Connecticut	11
Maine Yankee	Maine	9
Shoreham	New York	6

NUREG 1350, Information Digest 2021-2022, Volume 33, App. C. Indeed, active decommissioning work for a nuclear power plant takes about 10 years on average. *Id.* at 68.

In typical cases, therefore, there is simply no technical justification for giving licensees 60 years to return these sites to their communities. In fact, licensees appear to select extended SAFSTOR only when they lack sufficient financial resources to accomplish Prompt DECON. This suggests that revisions to NRC’s financial assurance regulations such as those recommended in Point V below are important not only to ensure that funds are available to complete the work, but also to shorten overall decommissioning timelines.

The Department understands based on its direct recent experience engaging with stakeholders on decommissioning issues that host communities tend to strongly prefer prompt decommissioning. This approach mitigates short-term job losses, helps retain key site personnel for the decommissioning phase, and clears the way for sites to be expeditiously returned to productive reuse. NRC should therefore take this opportunity to require that licensees decommission their reactors sites as soon as technically feasible.

3. NRC should not relax its emergency planning requirements or cyber-security protocols before all spent fuel at a site is removed from the spent fuel pool and placed in dry cask storage.

The safety of New Yorkers and their environment is of paramount concern to the Department. While the cessation of reactor operations reduces the overall risk to a host community, as long as spent fuel remains in a spent fuel pool, the risk of a zirconium fire is not eliminated to zero. Accordingly, the Department strongly urges NRC to abandon any effort to relax its emergency planning requirements or cyber security protocols before all spent fuel at a reactor site has been removed from spent fuel pools and placed in dry cask storage.

Over time, NRC has authorized the storage of increased quantities of spent fuel assemblies in spent fuel pools in an effort to minimize financial costs given the absence of a federal repository for spent fuel. Such dense storage necessarily increases the potential source term in the event of a severe accident involving a spent fuel pool. Past federal studies have demonstrated that, so long as spent fuel remains in a pool, a zirconium fire remains possible. The consequences of such a fire could be significant. See NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* (Jan. 2001) (ADAMS Accession No. ML010430066); SECY-01-0100, *Policy Issues Related to Safeguards, Insurance, and Emergency Preparedness Regulations at Decommissioning Nuclear Power Plants Storing Fuel in Spent Fuel Pools* (August 2001) (ADAMS Accession No. ML011450420); see also Travis et al., *A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants*, NUREG/CR-6451, 4-3 (1997) (ADAMS Accession No. ML082260098); *Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor*, 162, 232 (Oct. 2013) (ADAMS Accession No. ML13256A342). And a report by the National Academy of Sciences and recent scholarly articles further confirm the potential risks. See, e.g., *Reducing the Danger from Fires in Spent Fuel Pools*, *Science & Global Security*, Vol. 24, No. 3, 141-173 (2016).

The Proposed Rule, however, would significantly reduce licensees' emergency preparedness obligations and cyber security protocols before all spent fuel has been safely placed in dry cask storage. Specifically, the Proposed Rule eliminates requirements that an emergency planning zone, dedicated radiological offsite planning, and public alert and notification systems remain in place before all fuel has been safely moved to the ISFSI. See 87 Fed. Reg. at 12273–78. Although the Department acknowledges that the overall set of safety risks generally diminish following reactor shutdown, the consequences of even a low-probability event like a zirconium fire could be significant.

The magnitude of those consequences warrants an approach that continues to elevate public safety above licensee convenience or cost considerations. This is

especially so given that recent industry advances, which have increased the speed with which spent fuel can be transferred to dry cask storage, suggest that the Proposed Rule would only minimally advance licensee convenience. It is also worth noting that, by declining to relax its emergency planning requirements, NRC would be encouraging prompt decommissioning because licensees who wish to be relieved of these obligations would have an incentive to expeditiously transfer spent fuel out of pools and into dry cask storage.

Finally, although not discussed in the Proposed Rule, the Department takes this opportunity to urge NRC to keep its resident inspectors on site until the licensee obtains partial site release. Currently, these NRC inspectors depart the site following a reactor shutdown, and a licensee's decommissioning activities are then subject to only periodic in-person inspections. As the then-chief of NRC's Reactor Decommissioning Branch acknowledged at this year's Regulatory Information Conference, however, public interest in site activities often increases dramatically following shutdown. Community members are often both puzzled and concerned when they learn that no federal inspector will be on site during decommissioning, thereby undermining public confidence in NRC and in the decommissioning work itself. New York addressed these concerns by hiring a full-time state inspector to monitor work at the Indian Point site. But it is inappropriate for NRC to shift this added burden to the states, not all of whom are in a position to bear it.

NRC should instead retain at least one resident inspector, or alternatively assign new decommissioning inspectors, to provide ongoing oversight of a licensee's decommissioning activities. Such an inspector may be trained differently than those at operating sites, in recognition of the different regulatory requirements with which licensees must comply. This inspector could also serve as NRC's principal liaison to the community—a critical role given the often-intense public interest in decommissioning.

4. NRC should require the existing level of financial insurance to be maintained until all spent fuel is in dry cask storage.

Because of the risks discussed in Point III above, the Department further submits that licensee insurance requirements should be fully maintained until the possibility of a zirconium fire in a spent fuel pool is zero (*i.e.*, until all spent fuel has been removed from a site's pools). This course would maintain an appropriate emphasis on public safety and would only minimally burden licensees because, as Commissioner Baran has observed, “[e]ven without a change in the amount of insurance required while spent fuel remains in the pool, premiums paid by licensees would decrease to reflect the declining risks of liability over time.” Comments of Commissioner Jeffery M. Baran on SECY-18-0055 (Aug. 9, 2021) (ADAMS Accession No. ML21305B106).

5. NRC should update the generic decommissioning financial funding formula to make it more reflective of current cost considerations and to cover all estimated radiological decommissioning costs, rather than merely “the bulk” of the costs.

Ideally, the Department would prefer that NRC eliminate the generic decommissioning funding formula and instead require licensees to perform a site-specific cost estimate during a reactor’s operating phase as it generates electricity and revenues. *See* Point VI, *infra*. If NRC preserves the generic funding formula, however, the Department notes that the current decommissioning funding formula is woefully outdated and should be revised.

This is not just the Department’s opinion—the current formula’s adequacy has been heavily criticized by, among others, the Government Accountability Office, *see* Government Accountability Office, *NRC’s Oversight of Nuclear Power Reactors’ Decommissioning Funds Could Be Further Strengthened* (2012) (<https://www.gao.gov/products/GAO-12-258>), and NRC’s own Inspector General, *see* NRC Inspector General, *Audit of NRC’s Decommissioning Funds Program* (2016) (ADAMS Accession No. ML16160A208).⁵

This criticism is understandable given that the current formula is over 30 years old and based on limited financial data from the late 1970s. Accordingly, even if the nuclear industry had remained static during the intervening years, there would still be ample reason to update the formula. The industry, however, has not remained static—it has evolved significantly since that time, and that evolution has only deepened the need for a decommissioning funding formula that adequately covers *all* estimated radiological decommissioning costs.

Decades ago, many reactor sites were owned by vertically integrated utilities that possessed many assets and revenue streams. This arrangement lessened the pressure on a site’s NDTs, as other resources were available to cover a site’s decommissioning costs if the NDTs fell short. Today, by contrast, inactive reactor sites are now transferred to subsidiary entities of companies that specialize in decommissioning. New York’s Indian Point is just one example of this new and popular industry practice. These special-purpose subsidiaries may lack access to any assets other than the site itself and its associated NDTs. Such subsidiaries

⁵ *See also* Pacific Northwest National Laboratory, *Assessment of the Adequacy of the 10 C.F.R. § 50.75(c) Minimum Decommissioning Formula*, 3-15 to 3-17 (Nov. 2011) (site-specific license termination cost estimates frequently exceed the § 50.75 amount); Palisades and Big Rock Point License Transfer Proceeding, *Pet’n of the Michigan Att’y General for Leave to Intervene*, 19 n.55 (Feb. 24, 2021) (ADAMS Accession No. ML21055A888) (formula estimates of cost to decommission Main Yankee, Haddam Neck, and Yankee Rowe were 16%, 38%, and 42% below actual cost, respectively); SECY-18-0078, Table 1 (ADAMS Accession No. ML18096B543) (showing site-specific decommissioning cost estimate for Beaver Valley Unit 1 of \$711M versus formula cost estimate for Beaver Valley Unit 2 of \$482M).

would lack any other assets or revenues with which to supplement the NDTs if the NDTs prove insufficient to fully fund the decommissioning.

This lack of faith in the NRC's decommissioning funding formula drove New York to secure additional financial assurances from its nuclear operators in connection with their recent ownership transfer proceedings. Indian Point's licensee, for example, committed to maintaining certain minimum balances in the reactors' NDTs, provided additional financial assurance for site restoration, and agreed to return 50% of its U.S. Department of Energy spent fuel reimbursements to the NDTs. New York's other licensee similarly agreed to maintain certain minimum NDT balances during its four reactors' eventual decommissioning and to provide additional financial assurance for site restoration. These protections will help to mitigate the NRC formula's shortcomings with respect to New York's reactor sites, but not every state will have the opportunity or resources to obtain similar commitments.

The Department also agrees with Chair Hanson's observation that the formula's inadequacy "erodes public confidence in the NRC and in its approach to decommissioning funding assurance." Comments of Chair Christopher T. Hanson on SECY-18-0055 (Aug. 10, 2021) (ADAMS Accession No. ML21230A315). This lack of public confidence is indeed a systemic issue with NRC's approach to decommissioning. *See also* Points 1 and 3 (above) and 7 (below). NRC could begin to restore some of that confidence by adopting a new decommissioning funding formula that ensures sufficient funds are accumulated during a reactor's operating phase to allow for its prompt and thorough decommissioning.

6. NRC should require a site-specific cost estimate during operations and a full site investigation and characterization before or at the time the reactor ceases to operate.

For many of the reasons discussed in Point 5 (above), NRC should base its financial assurance requirements on site-specific cost estimates performed during operations. Although an updated generic formula is clearly superior to the current antiquated one, a site-specific estimate would most accurately project actual costs and would therefore best ensure that host states and communities will not be left with the financial challenge posed by radiologically contaminated, partially decommissioned sites in their midst.

Additionally, NRC should further require licensees to perform and include a thorough site investigation characterization with each PSDAR submittal. As NRC surely knows, many reactor sites contain significant and potentially unrecognized radiological and non-radiological contamination. *See, e.g.*, Declaration of Timothy B. Rice (Feb. 12, 2020) (ADAMS Accession No. ML20043E126); *NYS OAG Comments on Decommissioning Planning Rulemaking*, in NRC Docket RIN 3150-

AH45, point III, p.13-15, n. 3-7 (May 8, 2008) (ADAMS Accession No. ML081340325). Absent an early-stage, comprehensive investigation and characterization, a licensee's cost estimates may ultimately prove unreliable, thus increasing the risk of a funding shortfall.

7. NRC must not allow decommissioning trust fund assets to be used for federal spent fuel management obligations.

The Department submits that it is inappropriate for staff one federal agency (NRC) to propose regulations to accommodate the ongoing contractual breach of another federal agency (the U.S. Department of Energy, which has yet to remove spent fuel from reactor sites). These funds were collected to benefit host states by limiting the risk that they would be left with radiologically contaminated, partially decommissioned sites within their borders. The funds were then capitalized with ratepayer funds under the various state public utility commissions' ratemaking authority. It is incumbent upon NRC Commissioners to protect those funds at least until such time as decommissioning is complete and the reactor license is terminated.

Moreover, exemptions should not be permitted to allow licensees to divert money from State- authorized decommissioning trusts to cover spent fuel management costs—costs necessitated by the federal government's breach of its statutory and contractual obligations to pick up and remove spent nuclear fuel from reactor sites and host communities.⁶ This NRC Staff practice of issuing such exemptions and allowing licensees to pocket the damages subsequently recovered by licensees in the Court of Federal Claims is an affront to the ratepayers who paid money into the decommissioning trusts.⁷ It is not NRC Staff's money to do with as it wishes. The 1988 and 1996 APA notice and comment rulemakings are clear: “decommissioning” does not include “spent fuel management.” At a minimum, a substantial and major question exists over NRC Staff's authority to provide for the

⁶ The Commission's 2021 notation votes on the proposed rulemaking reflect that a majority of commissioners at the time agreed that the rule should not be amended to allow the removal of funds from the decommissioning trusts to cover federal contract obligations. *See* SECY 18-0055, Notation Vote, Response Sheet, Chair Hanson, PDF frame 2 (dated August 10, 2021) (ADAMS Accession No. ML21230A315) (“I disapprove the staff's recommendation to generically allow licensees to use decommissioning trust funds for spent fuel management and for expenses associated with the decommissioning of the Independent Spent Fuel Storage Installation”); Notation Vote, Response Sheet, Commissioner Baran, PDF frames 12, 15 (p. 11, 14) (dated August 9, 2021) (ADAMS Accession No. ML21305B106) (noting “NRC's regulations state that decommissioning trust fund assets can only be used for radiological decommissioning...” and “NRC should avoid a rule that allows trust fund assets to be used for something other than radiological decommissioning and not return to the fund when licensees are later reimbursed for these activities.”).

⁷ *See* New York State Department of Public Service Letter to NRC Commissioners concerning proposed exemption of decommissioning financial regulation (Nov. 23, 2020) (ADAMS Accession No. ML20328A251) (incorporated by reference).

conversion of these funds. The Department has identified no basis for NRC Staff to authorize a licensee to deplete money from a trust established for site decommissioning and convert those funds to an account to cover a separate federal agency's obligations for contract breaches. In its future action on this proposed rulemaking, the Commission should unambiguously reject this prior practice and direct NRC Staff to cease countenancing such financial conversions going forward.

8. NRC should not relax the frequency of decommissioning funding assurance reporting to three years.

The Department opposes NRC's proposal to decrease the frequency of a licensee's funding assurance reporting. These reports provide states and the public with a window into the adequacy of a reactor site's current decommissioning funding. Rather than weaken reporting requirements, the Department suggests that NRC revisit and strengthen its overall funding assurance regime as discussed elsewhere in this comment and require annual public financial reports concerning the trust balances during reactor operations.

9. NRC should revisit its regulations with respect to the granting of exemptions.

The Department supports Commissioner Baran's proposal regarding NRC's procedures for considering a licensee's request for a regulatory exemption. In order to "prevent exemptions from swallowing a rule promulgated under the Administrative Procedure Act," any final rule should "require the NRC Staff to (1) seek public comment on any requests for an exemption from the provisions of the decommissioning regulations[;] and (2) respond to any comments received in a written, publicly-available decision document. In addition, the rule should require any requests for an exemption from the decommissioning regulations to be granted or denied by the Commission rather than the NRC Staff." Comments of Commissioner Jeffery M. Baran on SECY-18-0055 (Aug. 9, 2021) (ADAMS Accession No. ML21305B106). Additionally, the Department submits that such exemptions should be limited to exceptional, unforeseen situations; considered based on objective criteria; and offer interested parties an opportunity for an adjudicatory hearing.

10. Sites that are currently undergoing decommissioning should not be automatically exempt from any new or amended requirement included in the final rule.

The Department submits that reactor sites that are already in decommissioning should not be automatically exempt from any new or amended requirements imposed under the final rule. Nevertheless, the Department also urges NRC to respect existing state decommissioning agreements negotiated under

the current regulatory framework and recognize that changes to the underlying federal regulations may disrupt the careful balances struck by those agreements.

For these reasons, the Department supports Commissioner's Baran's proposal, which would require licensees for plants at which decommissioning is ongoing to submit a report assessing how any new or amended requirements would or would not apply to that specific site, with several critical adjustments. Specifically, the report should account for any related commitments that the licensee has made to affected state and local governments and explain whether the new or amended requirements are rendered unnecessary by those commitments or would otherwise impair them. Affected state and local governments should then be afforded an opportunity to comment on this report. Ultimately, NRC should not disturb a licensee's existing commitments to state and local government and any applicable state public utility commission orders.

11.NRC should expressly recognize state authority over the non-radiological activities and residual radiation associated with the decommissioning process.

Although NRC has authority over certain radiological aspects of decommissioning, it is the host states that regulate both non-radiological activities and waste at nuclear power plants, as well as radiation that falls below levels of regulatory concern to NRC. *See* 42 U.S.C. § 2023. That is clear under both federal and state law. Unfortunately, some states' experiences under the current decommissioning regime indicate that licensees believe state authority is more limited than it is.

In enacting the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (AEA), Congress provided NRC with regulatory authority over nuclear safety. However, the inherent authority of state and local governments to regulate nuclear activities for purposes other than protection against radiation hazards has been expressly reserved by the AEA's savings clause in 42 U.S.C. § 2021(k). The plain language of § 2021(k) is that states retain the authority to regulate non-radiological aspects of nuclear licensees' activities so long as they do not oust NRC of its authority. Thus, for instance, NRC has long recognized that States have full authority over the ultimate site restoration standards. It is thus critical for NRC to recognize host states' important roles over the non-radiological activities and residual radiation below levels of NRC regulatory concern at closed reactor sites.

A host state's environmental and natural resources agency protects human health and the environment in many ways, including: by regulating activities that affect the quality of the State's air and water; by ensuring that solid and hazardous wastes are managed and disposed of in a safe and environmentally protective way; by requiring that contaminated sites be thoroughly investigated and remediated so

as to reduce or eliminate risks to human health and the environment posed by non-radiological hazardous contamination; and by regulating certain radiological impacts that fall below levels of regulatory concern to NRC.⁸ The Department requests that NRC expressly acknowledge the authority of host states over these activities of nuclear licensees.

In closing, the Department expresses its appreciation to NRC for the opportunity to comment on these important issues.

Respectfully submitted,

s/ John J. Sipos

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⁸ The New York State Department of Environmental Conservation has, for example, published guidance stating that radioactivity should be remediated until a 10 millirem per year total effective dose equivalent (TEDE) is achieved. *See* N.Y. State Dep't of Env't Conserv., DER-38, *Cleanup Guidelines for Soils Contaminated with Radioactive Materials* (2013). Other states have adopted similar standards. *See, e.g.*, 105 Mass. Code Regs. 120.245 (10 millirem per year); N.J. Admin. Code § 7:28-12.8 (15 millirem per year); Conn. Dep't of Env't Prot., Div. of Radiation, Bureau of Air Mgmt. et al., *Remediation Standards for Radionuclide Contamination in Connecticut* (19 millirem per year).