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General Comment

Comments by Citizens Awareness Network and Nuclear Information and Resource Service

Attachments

2022.08.30 CAN-NIRS Comments on NRC Decommissioning Rule

COMMENTS BY CITIZENS AWARENESS NETWORK AND NUCLEAR INFORMATION AND RESOURCE SERVICE ON U.S. NUCLEAR REGULATORY COMMISSION PROPOSED RULE, *REGULATORY IMPROVEMENTS FOR PRODUCTION AND UTILIZATION FACILITIES TRANSITIONING TO DECOMMISSIONING,* 87 FED. REG. 12,254 (MARCH 3, 2022), DOCKET NO. NRC-2015-0070

Submitted August 30, 2022

INTRODUCTION AND SUMMARY

Citizens Awareness Network ("CAN") and the Nuclear Information and Resource Service ("NIRS") hereby comment on the U.S. Nuclear Regulatory Commission's ("NRC's") proposed rule, *Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning,* 87 Fed. Reg. 12,254 (March 3, 2022) (Docket No. NRC-2015-0070) ("Proposed Rule").

CAN and NIRS submit these comments as environmental organizations whose purposes are to educate the public and advocate for protection of human health and the environment against the dangers posed by nuclear reactors, nuclear factories, and nuclear waste. *See* CAN's website at www.nukebusters.org and NIRS' website at www.nirs.org. They also submit these comments as organizations who have played a key role in monitoring NRC decommissioning programs and activities and advocating for rigor and accountability in the decommissioning process.[1] They urge the NRC to reconsider the Proposed Rule, which perpetuates and exacerbates previously-established regulations that are not only unwise and unfair, but that violate governing statutes and caselaw.

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[1] Both organizations commented on the advance notice of proposed rulemaking for this Proposed Rule, *Regulatory Improvements for Decommissioning Nuclear Reactors,* 80 Fed. Reg. 72,358 (Nov. 19, 2015). *See* Letter from Deb Katz (CAN), Timothy L. Judson (NIRS), *et al.* to Secretary, U.S. Nuclear Regulatory Commission re: Comments on Nuclear Regulatory Commission Request Advanced Notice of Proposed Rulemaking Regarding Regulatory Improvements for Decommissioning Power Reactors Jointly Submitted by Citizens Awareness Network, Nuclear Information and Resource Service, *et al.* (March 18, 2016) (NRC Agencywide Document Access and Management System ("ADAMS") Number ML168081A494) ("CAN/NIRS Comments on ANPR").

Subsequently, CAN and NIRS commented on the NRC's draft regulatory basis document, published at 82 Fed. Reg. 13,778 (March 15, 2017). *See* letter from Deb Katz (CAN) and Timothy L. Judson (NIRS), *et al.* to Secretary, U.S. Nuclear Regulatory Commission re: Comments on Nuclear Regulatory Commission Draft Regulatory Basis for Decommissioning Power Reactors, Jointly Submitted by Citizens Awareness Network, Nuclear Information and Resource Service, *et al*. (June 13, 2017) (ADAMS Accession No. ML17165S393) ("CAN/NIRS Comments on Draft Regulatory Basis").

NIRS and CAN incorporate by reference into these comments the previous comments cited in this footnote – many of which remain unaddressed.

First, the Proposed Rule is unwise and unfair because it perpetuates and expands upon NRC's well-established practice of excluding the public from decommissioning decisions. While the activities of dismantlement and decommissioning were excused from licensing action or public hearings in a previous rulemaking (Final Rule, *Decommissioning of Nuclear Power Reactors,* 61 Fed. Reg. 39,278, 39,279 (July 29, 1996) ("1996 Decommissioning Rule")), the Proposed Rule expands the category of decisions from which the public is excluded to other post-operational activities such as emergency planning and security.

The NRC's effort to exclude the public from post-operational decision-making began in 1993, with the agency's use of a policy statement (SRM-SECY-92-383 (Jan. 14, 1993) (ML20127D246) ("1993 Policy")) to eviscerate its own 1988 rule establishing public hearing rights on decommissioning plans (Final Rule, *General Requirements for Decommissioning Nuclear Facilities,* 53 Fed. Reg. 24,018 (June 27, 1988) ("1988 Decommissioning Rule")). As characterized by U.S. District Court Judge Michael Ponsor, the policy statement constituted a "concerted bureaucratic effort to thwart the efforts of local citizens to be heard about an event that vitally affects them and their children," calling to mind "the activities of Charles Dickens' fictional Office of Circumlocution in Bleak House." *Citizens Awareness Network v. NRC,* 854 F.Supp. 16, 19 (D. Mass. 1994) ("*Citizens Awareness Network I"*). As Judge Ponsor observed:

> The prospect that this tactic may be used nationally, as more nuclear plants shut down, and more local citizens groups express concern about the impact of the process on their lives, is, to put it mildly, disquieting. It would seem no more than simple fairness – as a matter of policy, if not of strict law -- to give local people the opportunity to be heard when something of this magnitude occurs in their community. If they are not to be given any voice, community members at least have a right to be told why, promptly and clearly, by some disinterested adjudicatory body.

Id. The NRC has yet to offer the public the "simple fairness" of giving them "the opportunity to be heard when something of this magnitude occurs in their community." 854 F.Supp. at 19. Instead, the Proposed Rule expands on the category of post-operational decisions from which the public is excluded. Thus, the Proposed Rule broadens and institutionalizes the NRC's previous practice of shielding both the agency and reactor licensees from scrutiny of their decisions. If the Proposed Rule is allowed to stand as written, this lack of accountability will undermine the integrity and rigor of NRC as a regulatory agency for the coming decades in which over 90 operating U.S. reactors will cease to operate.

Second, the Proposed Rule is unlawful because it violates the Atomic Energy Act, the National Environmental Policy Act ("NEPA"), and applicable caselaw. The Proposed Rule disregards crucial holdings by the U.S. Court of Appeals for the First Circuit in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995) ("*Citizen Awareness Network II*"), which rejected the NRC's 1993 policy of refusing to provide hearings on decommissioning plans. In that landmark decision, won by CAN more than two decades ago, the U.S. Court of Appeals held that (a) dismantlement and decommissioning of a nuclear reactor constitutes new activity that is "unlicensed" by a reactor's existing operating license, and (b) under Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), interested members of the public must be "afforded a meaningful opportunity to request a hearing" before the NRC authorizes such

activity. 59 F.3d at 294-95. Under *Citizens Awareness Network II,* the NRC must take licensing action to allow dismantlement, decommissioning and related activities that were not previously authorized by an operating license; and it also must comply with statutory procedural requirements for decisions, such as offering public hearings and preparing NEPA-required environmental impact studies.

The Proposed Rule also violates the Atomic Energy Act by allowing the extension of reactor operating licenses past the statutory limit of 40 years. *Compare* 42 U.S.C. § 2133(c) (requiring that NRC must issue reactor operating licenses for a "specified period," "not exceeding 40 years") with proposed 10 C.F.R. § 50.51(b) (providing that a reactor license "continues in effect beyond the expiration date"). 87 Fed. Reg. at 12,323.

After more than two decades of violating Atomic Energy Act and NEPA, the NRC must go back to the drawing board and propose a new set of regulations that complies with NRC's governing statutes and case law. This reform must cover both the Proposed Rule and the unlawful 1996 Decommissioning Rule on which it expands. And the NRC must comply with NEPA at every decision-making point in the process.

ORGANIZATION OF COMMENTS

The comments are organized into four sections. In **Section I**, CAN and NIRS address two significant issues that the Commission has included in the scope of this rulemaking:

- "the advisability of requiring a licensee's post-shutdown decommissioning activities report (PSDAR) to be approved by the NRC;" and
- "the appropriate role of State and local governments and non-governmental stakeholders in the decommissioning process."

87 Fed. Reg. at 12,254. Section I has two subparts. **Section I.A** demonstrates that NRC licensing approval of post-operational activities (including decommissioning, emergency planning, and security), accompanied by a meaningful hearing opportunity for all affected parties, is not only advisable and appropriate but is required by the Atomic Energy Act under *Citizens Awareness Network II.*

Section I.B discusses the NRC's violation of 42 U.S.C. § 2133(c), which limits the term of a reactor operating license to 40 years, unless the license is renewed. The NRC must therefore terminate reactor operating licenses after 40 years, unless they are renewed for the purpose of decommissioning.

In **Section II**, CAN and NIRS address the applicability of NEPA to NRC decisions on decommissioning plans, as well as irradiated fuel management plans ("IFMPs"). NEPA applies to these decisions, and therefore the NRC must prepare an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA"). Any rulemaking that establishes generic requirements or standards for spent fuel storage issues is also subject to NEPA.

In **Section III**, CAN and NIRS respond to questions set forth in Section V of the Proposed Rule (pages 12,302-12,304).

Finally, in **Section IV**, CAN and NIRS set forth their conclusion that a complete overhaul of the decommissioning regulations is needed to ensure compliance with the Atomic Energy Act and NEPA.

I. THE PROPOSED RULE VIOLATES THE ATOMIC ENERGY ACT AND *CITIZENS AWARENESS NETWORK II* BY FAILING TO PROVIDE FOR NRC LICENSING APPROVAL AND PUBLIC HEARING OPPORTUNITIES FOR POST-OPERATIONAL DECISIONS ON DECOMMISSIONING, EMERGENCY PLANNING, AND SECURITY.

A. The Proposed Rule Violates the Atomic Energy Act and *Citizens Awareness Network II.*

1. NRC approval of post-operational activities and public hearings are required by the Atomic Energy Act and *Citizens Awareness Network II.*

As a matter of policy, the Commissioners raised questions for this rulemaking about the "advisability" of requiring NRC approval of decommissioning plans and the "appropriate role of State and local governments and non-governmental stakeholders in the decommissioning process." 87 Fed. Reg. at 12,254. In response, CAN and NIRS respectfully submit that it would be an extremely good policy for NRC to require reactor licensees to formulate dismantlement and decommissioning plans and submit them to NRC for licensing approval, with an opportunity for state and local governments and interested members of the public to request a hearing on the adequacy of the plans to satisfy NRC safety and environmental requirements. This a matter of "simple fairness" to neighbors and community members who will be affected by "something of this magnitude." *Citizens Awareness Network I,* 854 F.Supp. at 19.[2]

More importantly, these measures are *required* by the Atomic Energy Act, as established in *Citizens Awareness Network II*. In *Citizens Awareness II,* the First Circuit held that the NRC could not rely on the 1993 Policy to allow the reactor licensee to undertake the following decommissioning activities prior to the NRC's approval of the decommissioning plans that must be submitted under 10 C.F.R. § 50.82:

> Any decommissioning activity (as the term "decommission" is defined in 10 C.F.R. 50.2) that does not -- (a) foreclose the release of the site for possible unrestricted use, (b) significantly increase decommissioning costs, (c) cause any significant environmental impact not previously [**11] reviewed, or (d) violate the terms of the licensee's existing license (e.g., OL, POL, OL with confirmatory shutdown order etc.) or 10 C.F.R. 50.59 as applied to the existing license. . . .

[2] *Citizens Awareness Network II* was decided after the District Court dismissed *Citizens Awareness I* for lack of jurisdiction. *See* 59 F.3d at 290 n.4 (citing *Citizens Awareness Network I,* 854 F.Supp. at 18-19).

1993 Policy at 1; 59 F.3d at 289. The Court held that the NRC had not justified the separate treatment of these decommissioning activities from the decommissioning activities that must be approved under 10 C.F.R. § 50.82. 59 F.3d at 292.

The Court further held that the conduct of decommissioning was "unlicensed" and therefore unauthorized, because it was not contemplated by the licensee's operating license*:*

> Licenses customarily delineate the types of regulated conduct in which the licensee may engage. Regulated conduct which is neither delineated, nor reasonably encompassed within delineated categories of authorized conduct, presumptively remains unlicensed. YAEC's original license did not authorize it to implement major component dismantling of the type undertaken in the CRP [Component Removal Plan].
>
> Thus, if section 189a is to serve its intended purpose, surely it contemplates that parties in interest be afforded a meaningful opportunity to request a hearing before the Commission retroactively reinvents the terms of an extant license by voiding its implicit limitations on the licensee's conduct. *See Skidgel v. Maine Dep't of Human Servs.,* 994 F.2d 930, 937 (1st Cir. 1993) (statutory language must be interpreted in context, including its legislative purpose). The claimed right to deny such a hearing request undermines the integrity of the licensing process. At the time YAEC obtained its original license, and again when it amended the original license to a POL, parties in interest, including [Citizens Awareness Network], presumably refrained from any request for a section 189a hearing -- to which they would unquestionably have been entitled -- in reasonable reliance upon such implicit limitations in YAEC's license.

59 F.3d at 294-95. Thus, the Court remanded the Yankee Rowe decommissioning matter to the Commission for further proceedings consistent with its decision. 59 F.3d at 296. On remand the NRC offered the public a hearing on the Yankee Rowe decommissioning plan, including measures the NRC had previously excused from the scope of licensing action or public hearings. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-95-14, 42 N.R.C. 130, 132 (1995). But the NRC did not re-affirm the general validity of the 1988 Decommissioning Rule. Instead, the NRC stated that it would implement its pre-1993 policy (*i.e.,* approve decommissioning plans and offer hearings) pending completion of a rulemaking that was in process when *Citizens Awareness Network II* was decided. *Notice, Yankee Atomic Electric Co.; Yankee Nuclear Power Station; Federal Court Decision and Opportunity for Public Comments*, 60 Fed. Reg. 46,317 (Sept. 6, 1995) ("The Commission currently believes that, pending completion of its ongoing rulemaking on decommissioning, further decommissioning activities must be conducted under NRC decommissioning regulations as the Commission interpreted and applied them prior to the 1993 change in interpretation that the court rejected.").

2. Since *Citizens Awareness Network II,* the NRC has repeatedly violated the Court's decision.

a. 1996 Decommissioning Rule

At the time of the Court's decision in *Citizens Awareness Network II,* the NRC's 1988 Decommissioning Rule remained in place. The 1988 regulation, entitled "Application for termination of license," provided that "[a]ny licensee may apply to the Commission for authority to surrender a license voluntarily and to decommission the facility." Thus, NRC's licensing decision to permit surrender of a Part 50 license was conditioned on the submission of an adequate decommissioning plan. 10 C.F.R. § 50.82, 53 Fed. Reg. 24,051. Applications to surrender licenses and obtain approval of decommissioning plans were noticed in the Federal Register, with an opportunity to request a hearing. *See, e.g., Notice, Yankee Nuclear Power Station; Consideration of Issuance of an Order and Opportunity for a Hearing*, 60 Fed. Reg. 55,069 (Oct. 27, 1995).

Promulgated a year after *Citizens Awareness Network II,* the 1996 Decommissioning Rule revamped NRC's decommissioning regulations in a manner that defies the Court's decision in multiple respects:

- The title of 10 C.F.R. § 50.82 was changed to eliminate any requirement for an application to terminate an operating license. Instead, the new version of 10 C.F.R. § 50.82 was simply entitled "Termination of license." 61 Fed. Reg. at 39,30-1.
- A new 10 C.F.R. § 50.51(b) provided that an operating license for a facility that has "ceased operations" would continue "in effect beyond the expiration date to authorize ownership and possession of the production and utilization facility, until the Commission notifies the licensee in writing that the license is terminated." Under subsection (1), the licensee was authorized to conduct decommissioning activities during that period. No application or licensing action was required for those activities.
- The 1996 rule contained no requirement for submission of a decommissioning plan as a condition for surrendering an operating license. And the reference to license surrender was omitted.
- A new section, 10 C.F.R. § 50.82(a)(2) provided that the licensee's operating license "no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel" upon certification by the licensee that it has ceased operations and removed fuel from the reactor. *Id.,* 69 Fed. Reg. at 39,301. The regulation requires no NRC approval for this change to the Part 50 license.
- While a new 10 C.F.R. § 50.82(a)(4) required submission of a Post-Shutdown Decommissioning Activities Report ("PSDAR") to describe the licensee's decommissioning activities, it required no NRC approval of the PSDAR. 61 Fed. Reg. at 39,302. *See also* 61 Fed. Reg. at 39,279. A PSDAR does not constitute a decommissioning plan, as it does not require any detailed information about the activities and procedures the licensee will undertake, but simply articulates a choice of one or more of the broad decommissioning categories and other undetailed declarations.

- A new section 50.82(a)(9) required submittal of a license termination plan for NRC approval, but not until after decommissioning was completed or mostly completed. 61 Fed. Reg. at 39,302.

Thus, in violation of *Citizens Awareness Network II,* the1996 Decommissioning Rule completely eliminated any NRC licensing action on proposed decommissioning activities, and declared that Part 50 licenses could be changed to allow possession-only merely by notifying the NRC that it would no longer be possible to operate the reactor.

The NRC attempted to justify its refusal to take licensing action on decommissioning planning or offer the opportunity for public hearings, based on two rationales. But neither of these attempted distinctions from *Citizens Awareness II* has merit.

First, the NRC claimed that "initial decommissioning activities (dismantlement) are not significantly different from routine operational activities such as replacement and refurbishment." 61 Fed. Reg. at 39,284. But the Court's decision is not based on whether decommissioning activities are "similar" to operational activities. Instead, the Court reasoned that activities are unlicensed if they are "neither delineated, nor reasonably encompassed within delineated categories of authorized conduct." 59 F.3d at 294. As a matter of law, the only decommissioning-related regulation that applied to initial operating license applicants was 10 C.F.R. § 50.33's requirement for decommissioning funding. *Advance Notice of Proposed Rulemaking, Decommissioning Requirements for Nuclear Facilities,* 43 Fed. Reg. 10,370, 10,3761 (March 13, 1978). The requirement for decommissioning plans did not apply until the conclusion of an operating license term. *Id.* As a practical matter, to CAN's and NIRS' knowledge, no reactor operating license applicants in the 1970s, 1980s or 1990s described proposed dismantlement activities that would lead to decommissioning and release of the site for unrestricted use.

Thus, with the single exception of decommissioning funding plans, the regulatory scheme for operating license applications did not contemplate submission of plans for dismantlement and decommissioning of reactors at the end of their operating lives. And therefore, a reasonable member of the public would have "refrained" from requesting a hearing on decommissioning issues at that time. *Citizens Awareness Network II,* 59 F.3d at 294-95.

A reasonable member of the public would have also concluded that pursuant to the plain language of 10 C.F.R. § 50.82 as written in 1988, the NRC would require submission of a decommissioning plan upon retirement of the reactor, as a condition of surrendering the license.[3]

[3] The 1988 version of 10 C.F.R. § 50.82 provided that:

> Any licensee may apply to the Commission for authority to surrender a license voluntarily and to decommission the facility. For a facility that permanently ceases operation after July 27, 1988, this application must be made within two years following permanent cessation of operations, and in no case later than one year prior to expiration of the operating license. Each application for termination of license must be accompanied, or preceded, by a proposed decommissioning plan.

This would have been a second reason to refrain from requesting a hearing on decommissioning activities at any time prior to the proposed retirement of the reactor. By withdrawing the previously-offered right to a hearing on NRC approvals of decommissioning plans, the NRC continues to violate *Citizens Awareness II.*

Accordingly, by changing its regulations to eliminate decommissioning plans, the NRC deprived interested members of the public of their statutory right to the end-of-license hearing on which they had relied.

Second, the NRC asserted that *Citizens Awareness Network II* was based on "what the Court perceived to be NRC approvals of licensee decommissioning activities." 61 Fed. Reg. at 39,285 (citing 59 F.2d at 291-92, 294-95). This characterization is correct as far as it goes: the Court did observe that the NRC's declaration "that some forms of 'major component disassembly' henceforth were to be outside the license-amendment process, whereas more 'serious' types of component removal were to remain subject to the amendment process" confirmed that the Commission had "always considered component disassembly, similar to that involved in [the licensee's Component Removal Plan], as action beyond the ambit of the presumptive authority granted under the licenses it issued." 59 F.3d at 295. But the Court was merely observing that the NRC's own conduct demonstrated that it understood what the Atomic Energy Act requires. The Court did not leave the NRC free to disagree on that topic.

b. Proposed Rule

The Proposed Rule perpetuates and expands upon the Atomic Energy Act violations of the 1996 Decommissioning rule. Like the 1996 rule, the Proposed Rule continues to allow reactor licensees to decommission their reactors based on PSDARs that are submitted to the NRC for information and monitoring, without licensing action or public hearings. In addition, for the first time, the Proposed Rule allows licensees to relax their existing emergency plans and security measures based on "reports" to be submitted to the NRC for information and monitoring, without licensing action or public hearings.

The Proposed Rule does not even mention *Citizens Awareness Network II,* but it makes a similar argument that post-operational activities may be conducted under Part 50 licenses because they pose risks that are less than operating the reactor under the existing license. 87 Fed. Reg. at 12,265. This reasoning fails to overcome *Citizens Awareness Network II* for the same reasons as the 1996 Decommissioning Rule failed. The mere fact that activities during decommissioning are similar to operational activities, or their risks are bounded by operating reactor risks, does not support the conclusion that those activities were contemplated by the original licensing action or any other licensing decision for that reactor.[4]

Pursuant to *Citizens Awareness Network II,* because decommissioning "presumptively" does not constitute conduct delineated by a reactor's operation, and because the NRC has failed to

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53 Fed. Reg. at 24,051.

[4] Notably, NRC does not argue, either in the 1996 rule or the Proposed Rule, that reactor operating licenses contemplated decommissioning activities.

overcome that presumption, the NRC must take licensing action with respect to decommissioning activities, and it must offer the public a meaningful opportunity for a hearing. *Citizens Awareness Network II,* 59 F.3d at 294-95. Accordingly, the NRC has not made any meaningful response to *Citizens Awareness Network II* that would excuse it from complying with the Court's holdings.

In the Proposed Rule, the NRC also attempts to further cement the concept of the 1996 Decommissioning Rule that the Commission may order the transition of a nuclear reactor license from a production and utilization facility to possession without any licensing action. Thus, proposed Section 50.82(a)(2) declares that once the licensee has ceased operation, taken fuel out of the reactor, and disassembled the reactor, it no longer qualifies as a "production and utilization" facility. 87 Fed. Reg. at 12,326. But the NRC begs the question of what the reactor is during the period of decommissioning. NIRS and CAN respectfully submit that the reactor is still a production and utilization facility that is "possess[ed]" by the licensee pursuant to 42 U.S.C. § 2133(a). As discussed above, however, the NRC must approve decommissioning measures before they are carried out, because the original operating license did not contemplate those decommissioning activities. Upon completion of the approved decommissioning measures, the NRC may determine that the conditions of a decommissioning license amendment have been fulfilled and the reactor license can be terminated.[5]

At the point when decommissioning is completed, it logically follows that there is no license that could be held for the facility itself. The only license that would be held by the licensee would be a Part 72 license for continued storage of spent fuel.

[5] The NRC's citation to *Cincinnati Gas & Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-22, 20 N.R.C. 765 (1984) for the proposition that the equipment in a reactor that makes it a production and utilization facility can be decommissioned without licensing action is inapposite. As acknowledged in the Proposed Rule, the Cincinnati Gas & Electric Co. had almost finished building the Zimmer reactor when it decided to terminate the project. The reactor was never irradiated. The Licensing Board allowed the construction permit holder to withdraw its application for an operating license, on condition that it close off enough pipes to prevent the reactor from being utilized and thereby qualifying as a utilization facility. The question of what kind of licensing action is needed to withdraw an operating license application for a reactor that has never been irradiated is fundamentally distinct from the question of what kind of licensing action is needed to decommission an irradiated reactor for which decommissioning was never contemplated at the time of licensing, because in the second situation the licensee must take measures to protect the public from radiation risks posed by the decommissioning activity.

B. The Atomic Energy Act Precludes the NRC From Extending Part 50 Operating Licenses for Purposes of Decommissioning or Spent Fuel Storage.

1. The Proposed Rule is not consistent with the Atomic Energy Act's 40-year limit for operating licenses.

Under the Administrative Procedure Act, it is well-established that the NRC must comply with Congress' statutory directives. *See, e.g., Nat'l. Ass'n of Regulatory Util. Comm'rs,* 736 F.3d. 517, 520 (D.C. Cir. 2013). The Proposed Rule must be withdrawn because it violates the 40-year limit on operating license terms in 42 U.S.C. § 2133(c) ("Each reactor license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operations, and may be renewed upon the expiration of such period.") Contrary to this 40-year limitation, proposed 10 C.F.R. § 50.51(b) would provide that a reactor license: "continues in effect beyond the expiration date."[6] 87 Fed. Reg. at 12,323. While both the Atomic Energy Act and NRC regulations lawfully allow the renewal of operating licenses, they do not permit the extension of those licenses for any other purpose.

The Atomic Energy Act contains no prohibition against renewal of operating licenses for purposes of decommissioning reactors. Therefore, the NRC should amend 10 C.F.R. Part 54 to make provision for timely renewal of reactor licenses for purposes of decommissioning. The time period should provide an adequate opportunity to resolve all licensing issues related to decommissioning, including the completion of adjudicatory hearings, before the termination date of the Part 50 license. NIRS and CAN recommend that after the last date for submitting an application for renewal of an operating license for purposes of continued operation has passed, the NRC should automatically impose a reasonable renewal term for the purposes of decommissioning the reactor. The reasonableness of the term should be established through notice-and-comment rulemaking accompanied by a NEPA analysis (including an analysis of whether there is any environmental or health and safety value in retaining the SAFSTOR and ENTOMB options). The application should require submission of a decommissioning plan at least three years before the license expiration date, in order to allow sufficient time for completion of the NRC's safety and environmental reviews and adjudicatory hearings.

[6] Note that in the 1988 Decommissioning Rule, 10 C.F.R. § 50.51 contained the unequivocal limitation that "Each license will be issued for a fixed period of time to be specified in the license but in no case to exceed 40 years." 53 Fed. Reg. at 24,049. In the 1996 Decommissioning Rule, the NRC kept this language but added a new and contradictory subsection (b) providing that "Each license for a facility that has permanently ceased operations continues in effect beyond the expiration date to authorize ownership and possession of the production or utilization facility." 61 Fed. Reg. at 39,300.

2. The NRC must develop a new set of standards to govern the licensing and conduct of post-operational activities.

Because the activities associated with decommissioning – including dismantlement, decontamination, emergency planning, insurance coverage, and security – are quite different for a decommissioning reactor than for an operating reactor, the NRC must establish appropriate standards. The NRC correctly acknowledges that continuing to review and rule on exemption applications for current Part 50 standards is not an appropriate use of the exemption process. In light of the fact that many more reactors can be expected to close in the coming decades, to take the route of issuing exemptions would be costly and invite unfair inconsistencies. Yet, the NRC has avoided setting standards for decommissioning by declaring itself a monitor rather than a regulator. As discussed above, this approach is not lawful under the Atomic Energy Act. Therefore, the NRC must take the rule back to the drawing board.

II. THE PROPOSED RULE VIOLATES NEPA.

According to the Proposed Rule, NEPA does not apply to this rulemaking, the PSDARs or any other aspects of post-operational activities because they do not involve any "actions" by the NRC. 87 Fed. Reg. 12,291. As discussed in Section I.A above, however, the Proposed Rule violates the Atomic Energy Act by refusing to provide for licensing decisions about post-licensing activities. If these decisions are restored, as required by the Act, NEPA does indeed apply to the decommissioning of nuclear reactors. Thus, a revised Proposed Rule must make provision for preparation of EISs, or at the very least EAs, to address the environmental impacts of post-operational activities. All of these activities – especially emergency planning and spent fuel storage – have potentially significant and site-specific safety significance, and therefore they also have potentially significant environmental impacts. Thus, they may not be exempted from NEPA consideration or relegated to a generic EA.

The NRC must also reconsider the environmental impacts of significantly delaying decommissioning under the SAFSTOR and ENTOMB options. Experience has shown that dragging out decommissioning activities for multiple decades under the SAFSTOR and ENTOMB options is unnecessary to protect public health and the environment, ties up sites that could be used for other purposes, is inappropriate in circumstances where ownership of reactors is transferred to other companies for the sole purpose of decommissioning, and is routinely used to game the system for estimating needed decommissioning funds, thereby creating shortfalls. *See* CAN/NIRS Comments on ANPR at global page 7. A NEPA analysis would also have to address new and significant information about the acceptability of SAFSTOR and ENTOMB.[7]

[7] CAN and NIRS anticipated that the Proposed Rule would address new and significant information raised by them and other commenters about the SAFSTOR and ENTOMB options, especially in light of the Commission's instruction that the Proposed Rule should address "the appropriateness of maintaining the three existing options for decommissioning and the timeframes associated with" the options of DECON, SAFSTOR, AND ENTOMB. 87 Fed. Reg. at 12,254. But there is no mention of those options in the Proposed Rule.

CAN and NIRS respectfully submit that a thorough NEPA analysis of the timing options for decommissioning, in light of what is currently known about the challenges of decommissioning would generally result in requirements for much more expeditious decommissioning. And a NEPA analysis would distinguish between the environmental impacts of extending the time for reactor decommissioning and the environmental impacts of extended onsite storage of spent fuel, which are completely different.

Furthermore, the impacts of post-operational impacts may not be discounted because they are less than the extraordinarily severe impacts that could be caused by the nuclear reactor's operation. *See* 87 Fed. Reg. at 12291-92. The EIS's for operating reactors do not necessarily "bound" the impacts of post-operational activities, because they are entirely different. *See Citizens Awareness Network II,* 59 F.3d at 294-95. Thus, the NRC must prepare an entirely new environmental analysis for post-operational activities.

III. RESPONSE TO QUESTIONS IN SECTION V OF THE PROPOSED RULE.

In Section V of the Proposed Rule, the NRC poses 48 questions. This is a little less than half of the 86 questions posed in the 2015 ANPR. It is disturbing that the NRC still has so many questions after conducting an ANPR; and it is also disturbing that some of the questions are repetitive, or seek information that the Commission instructed the Staff to collect, digest in the Proposed Rule. Taken together with the Proposed Rule's evasions of the Atomic Energy Act and NEPA, answering the questions has the feel of a make-work activity, perhaps designed to create the illusion of including the public in some non-existent process of deliberation.

More importantly, had the NRC acknowledged that NEPA is applicable to decommissioning decisions, the NRC Staff itself would have asked and answered many of the questions in a NEPA analysis; and would have offered its analysis for public comment. Questions 5 and 8 below provide examples of issues that should have been addressed in a NEPA analysis.

The posing of so many questions without suggesting the NRC's own answers, at such a late point in this years-long rulemaking process, also betrays the NRC's view of itself as a bystander rather than a regulator in the decommissioning decision-making process. The NRC has delegated all decision-making to licensee while it stands on the sidelines, wondering and speculating about the outcome. Drawing the public into the process of wondering and speculating does not substitute for statutory compliance, including the rigors of APA-compliant rulemakings and adjudications.

If and when the NRC corrects its course and engages in a rulemaking to establish standards and procedures for approving decommissioning plans and terminating Part 50 licenses, it will become necessary for the NRC to resolve its questions and propose the answers in rulemaking and NEPA decision-making documents. In the meantime, CAN and NIRS respond to some of the most prominent questions. They also refer the NRC to the ANPR Comments, which answer some of the same questions.

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

Yes. *See* Sections I and II above.

1. *Other than NRC review and approval of the PSDAR, are there other activities that could help to increase transparency and public trust in the NRC regulatory framework for decommissioning?*

Yes. All post-operational activities should be approved in licensing proceedings, with an opportunity for public comment. These proceedings should comply with the Atomic Energy Act and NEPA. *See* Sections I and II.

2. *Should the rule provide a role for the states or local governments in the process? What should that role be?*

Yes. State and local governments should have all rights to which the Atomic Energy Act entitles them, and those rights should not be denied or abridged by the decommissioning rule. *See* Section I.

3. *What are the advantages or disadvantages of various roles?*

The Proposed Rule's use of the phrase "various roles" signals that the NRC views public participation in its decisions as more of a parlor game than a legal requirement. The health, safety and environmental risks posed by decommissioning are significant. Recognizing the full rights of States, local governments and Native American governments to participate in formal proceedings, with rights of appeal to federal court, is mandatory.

4. *What are the advantages and disadvantages of requiring prompt decontamination rather than allowing up to 60 years to decommission a site? As part of its review of a PSDAR, what are the advantages and disadvantages of NRC evaluating and making a decision about the timeframe for decommissioning on a site-specific basis?*

NIRS and CAN are stunned by this question, given that the Commissioners instructed the Staff to address these very issues in the Proposed Rule. *See* note 8. CAN and NIRS previously commented on this issue in responding to the ANPR, and they stand by those comments. It is past time for the NRC to provide its own analysis of current information. As discussed in Section II, that analysis should comply with NEPA.

5. *The NRC has determined that 10 hours would be a sufficient amount of time for an emergency response to a spent fuel pool accident based on an all-hazard plan. Is there additional information the NRC should consider in evaluating this issue?*

6. *What are the advantages and disadvantages of extending cyber security requirements to shutdown nuclear power plants until all spent fuel is transferred to dry cask storage?*

The NRC should address post-operational emergency planning and security issues separately from the regulations that currently govern operating reactors. *See* Section I.B.2. New emergency

planning and security regulations should establish clear safety standards, based on both safety and environmental analyses under the Atomic Energy Act and NEPA. If site-specific factors are involved, they should be addressed in individual licensing proceedings. To CAN's and NIRS' knowledge, there is no existing EIS that would fulfill this requirement.

7. *What are the advantages and disadvantages of updating the formula [for decommissioning funding] to reflect recent data and to cover all estimated radiological decommissioning costs rather than the bulk of the costs?*

As the NRC concedes, the "current table of minimum amounts (also referred to as the minimum decommissioning formula) has not been updated for over 30 years." Updating a 30-year old measure for mitigating the environmental impacts of decommissioning reactors is easily identifiable as a NEPA requirement for this rulemaking. The NRC would not be asking the question if it were in compliance with NEPA. Instead, it would be updating the data and evaluating its effectiveness. Such an analysis should also include the effects on decommissioning funds of diverting them to other purposes related to spent fuel storage, as has been permitted unlawfully by the NRC in many exemption proceedings.

8. *Considering that 10 C.F.R. part 72 specific license ISFSIs have no financial protection requirements, should the NRC address the disparity between specific license and general license ISFSIs as a part of this rulemaking?*

This rulemaking has confusing aspects that seem to blend issues related to decontamination and decommissioning and spent fuel storage. Because the activities are conducted under separate provisions of the Atomic Energy Act and NRC regulations, the NRC should maintain a better distinction. For instance, the rules should clearly provide that decommissioning funds may not be plundered for purposes related to spent fuel storage. It should also be clear from the regulations that Price Anderson insurance coverage stops at the time a Part 50 license is terminated. That termination of coverage is extremely important, because a specific spent fuel storage license must commence at the same time the Part 50 license ends. Whether this rulemaking is used to address that topic or the NRC conducts a separate rulemaking, there should be no regulatory gap or confusion.

IV. CONCLUSION AND RECOMMENDATIONS FOR NEXT STEPS

As guaranteed by the Atomic Energy Act and NEPA, the affected public counts on the NRC to regulate the nuclear industry with rigor, applying a standard of reasonable protection of public health and safety and providing a meaningful opportunity to participate in decisions that affect their welfare. As required by NEPA, the affected public also reasonably counts on the NRC to evaluate the environmental impacts of its decisions and weigh the costs and benefits of reasonable alternatives. In short, the public is entitled to rely on NRC as a regulator, not a bystander. The NRC should take its authority back from the industry it regulates and propose a new set of regulations for reactor decommissioning and post-operational spent fuel storage.

To restore accountability for its post-operational decisions, and to come into compliance with the Atomic Energy Act and NEPA, the NRC must go back to the drawing board and devise a set of

standards that apply specifically to post-operational activities at nuclear reactors. These standards should:

- Provide for licensing decisions and a meaningful opportunity for a hearing on all post-operational activities, including dismantlement and decommissioning and related measures for emergency planning, security, and insurance coverage;
- Have their own justification related to the risks of the post-operational activity (rather than declaring they can be watered down because the risk is less than for an operating reactor);
- Make clear distinctions between dismantling/decommissioning activities and post-operational spent fuel storage (including ensuring that decommissioning funds are not robbed for purposes of spent fuel storage), which should be regulated and licensed under 10 C.F.R. Part 72;
- Set clear, specific and comprehensive standards for post-operational activities that will ensure that decommissioning and spent fuel storage are carried out in a manner that protects public health and safety;[8]

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[8] The NRC should take the 1988 Decommissioning Rule and supporting Generic Environmental Impact Statement ("GEIS") as a starting point. The rule:

> contains requirements that a decommissioning plan contain a description of the following: The choice of the alternative for decommissioning and the activities involved; the controls and limits on procedures and equipment to protect occupational and public health and safety; a description of the planned final radiation survey; quality assurance and safeguards provisions, if appropriate; and a plan for assuring the availability of funds for decommissioning. Based on this requirement the licensee submits the necessary information to the NRC in the decommissioning plan.

53 Fed. Reg. at 24,024-25. Guidance can also be found in the 1988 GEIS:

> It is the responsibility of the NRC, in protecting public health and safety, to ensure that after a nuclear facility ceases operation its license is terminated in a timely manner. License termination requires decommissioning. Analysis of the technical data base establishes that decommissioning can be accomplished and the facility released for unrestricted use shortly after cessation of operations or, in certain situations for certain facilities, delayed and completed after a period of storage. *These situations would include considerations where the potential exists for occupational exposure and waste volume reduction, resulting from radioactive decay, or the inability to dispose of waste due to lack of disposal capacity, or other site-specific factors which may affect safety.* Completing decommissioning and releasing the site for unrestricted use eliminates the potential problems that may result from an increasing number of sites contaminated with radioactive material, as well as eliminating potential health, safety, regulatory, and economic problems associated with maintaining the nuclear facility.

1988 GEIS at viii (emphasis added). Also from 1998 GEIS:

- Ensure NEPA compliance with generic standards and site-specific decisions.
- Provide for renewal of operating licenses for decommissioning purposes and establish renewed license termination dates that are reasonable and that take into account (a) all relevant safety and environmental implications and (b) the need to timely complete safety and environmental reviews and adjudicatory hearings.

These reforms will involve a complete overhaul of the Proposed Rule. After so many years of evading the clear requirements of the Atomic Energy Act, NEPA, and the Administrative Procedure Act, that process is likely to be time-consuming. But it is necessary for compliance with the NRC's governing statutes.

Respectfully submitted

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A final detailed decommissioning plan is required for review and approval by the NRC prior to cessation of facility operation or shortly thereafter. *Besides the description of the decommissioning alternative which will be used, the final plan should include a description of the plans to ensure occupational and public safety and to protect the environment during decommissioning; a description of the final radiation survey to ensure that remaining residual radioactivity is within levels permitted for releasing the property for unrestricted use; an updated cost estimate; and for certain facilities as appropriate a description of quality assurance and safeguards provisions. The plan should include an estimate of the cost required to accomplish the decommissioning.*

Id. at 9.