NEW YORK STATE OF OPPORTUNITY. Department of Public Service

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

SUNSI Review Complete
Template=ADM-013
E-RIDS=ADM-03
ADD: Shawn Harwell, Mary Neely

Comment (8)
Publication Date: 6/21/2023
Citation: 88 FR 40337

September 13, 2023

VIA ELECTRONIC SUBMISSION
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop TWFN-7-A60M
Washington, DC 20555-0001

ATTN: Program Management, Announcements & Editing Staff

Re: NRC Staff Draft Interim Guidance
Early Use of the Decommissioning Trust Fund During Reactor Operations for Major Radioactive Component Disposal,
88 Fed. Reg. 40337-02 (June 21, 2023); NRC-2023-0111

Dear NRC Office of Administration:

Enclosed please find comments submitted by the New York State Department of Public Service concerning NRC's interim guidance.

Respectfully submitted,

s/ John J. Sipos

JOHN J. SIPOS
Deputy General Counsel
RYAN COYNE
Assistant Counsel
BRIDGET FRYMIRE
Utility Supervisor
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223
(518) 486-1922
John.Sipos@dps.ny.gov

INTRODUCTION

The New York State Department of Public Service (the Department) submits this comment in response to the U.S. Nuclear Regulatory Commission's (NRC) request for public comment on NRC's draft proposed Interim Staff Guidance (ISG) titled "Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal." *See Draft Interim Staff Guidance: Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal*, 88 Fed. Reg. 40337-02 (June 21, 2023). The proposed ISG's purpose "is to provide the NRC staff's regulatory position to licensees of nuclear power reactors regarding the use of funds from the decommissioning trust fund dedicated to the radiological decommissioning of a reactor facility for the disposal of major radioactive components (MRCs) while the facility is in an operational status." *Id.*

New York currently has four operational nuclear power reactors, each of which is located on the shores of Lake Ontario: James A. FitzPatrick Nuclear Power Plant, Nile Mile Point Nuclear Station Units 1 and 2, and the R.E. Ginna Nuclear Power Plant. The draft ISG does not appear to affect Indian Point Nuclear Generating Units 1, 2, and 3, as the reactors at those units have permanently ceased operations and no longer generate electricity or revenues. Indian Point is, however, one example of a site at which licensees opted to store MRCs on-site while the reactors remained operational. The photos below depict the on-site storage buildings that currently house steam generators that were replaced at Unit 2 (2000) and Unit 3 (1989).

Indian Point Unit 2 Steam Generator Storage Building

Indian Point Unit 3 Steam Generator Storage Building

Through a series of rate orders beginning in the early 1990s, the New York State Public Service Commission (NYSPSC)[1] authorized regulated utilities that

[1] The Department is the staff arm of the NYSPSC, which regulates New York's electric, gas, steam, telecommunications, and water utilities, as well as its energy production. *See* N.Y. Pub. Serv.

owned reactors to collect money from New York ratepayers and set those funds aside for the reactors' eventual decommissioning. The Decommissioning Trust Funds (DTFs) for each of these sites were thus capitalized with New York ratepayer funds, and the NYSPSC accordingly retains a regulatory interest in the licensees' use of those funds.[2]

For the reasons that follow, the Department submits that the draft ISG should be strengthened by several modifications. First, the final ISG should clarify that exemptions will not be granted if the NDT in question cannot reasonably be expected to fund not only radiological decommissioning, but also projected site restoration and spent fuel management costs. Second, when considering an exemption application, the NRC must not assume that the reactor will remain operational beyond its current license term. And lastly, the final ISG should specify that any supplemental funding mechanisms relied upon by an exemption applicant must inure to the benefit of any subsequent license holders. Absent such a condition, the host state, host community, and ratepayers could be left with an un-remediated site owned by an insolvent business entity. The Department submits that these changes will further the NRC's stated goal of ensuring that sufficient funds must remain available and accessible to decommission reactors once they have permanently ceased operations and that such exemptions are granted only under truly "extraordinary circumstances." *Thomas E. Magette on Behalf of EnergySolutions, LLC; Notice of Denial of Petition for Rulemaking*, 73 Fed.Reg. 62220-01.

BACKGROUND

The NRC's decommissioning regulations date to 1988 and are premised on the regulated utility model. At that time, it was generally assumed that vertically integrated utilities would be responsible for decommissioning their power reactors while simultaneously operating other revenue-generating assets. The DTFs were not, at that time, intended to provide any financial assurance whatsoever with respect to projected site restoration or spent fuel management expenses. Rather, they were designed only to provide "reasonable assurance" that funds will be available to reduce "residual radioactivity" to a level that would permit license termination. *See* 10 C.F.R. 50.2; 50.75(a).

Times, however, have changed. Much of the merchant power industry has now shifted to a model under which decommissioning-specific entities with no

---

Law § 5. The comments provided here do not necessarily reflect the views of any particular New York State Public Service Commissioner.

[2] The NYSPSC also possesses general supervisory powers over all "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).

ongoing revenue sources acquire retired reactor sites with the intention of terminating the license, restoring the site, and managing the spent fuel using only DTF funds. It has thus become commonplace for these licensees to seek—and for the NRC to grant—numerous license exemptions authorizing the expenditure of trust monies for non-decommissioning purposes. *See, e.g.,* Holtec Decommissioning Int'l, LLC, Docket No. 50-255 (Nuclear Regulatory Comm'n) (Dec. 13, 2021) (ADAMS Access No. ML21286A506) (exempting Holtec from the requirements of 10 C.F.R. 50.82(a)(8)(i)(A) and 10 C.F.R. 50.75(h)(1)(iv) and allowing the use of Palisades Nuclear Plant NDT funds for spent fuel management and site restoration activities); Holtec Decommissioning Int'l, LLC, Docket Nos. 50-003, 50-247, and 50-286 (Nuclear Regulatory Comm'n) (Nov. 23, 2020) (ADAMS Access No. ML20309A781) (granting, over New York State's objections, the same exemption concerning Indian Point Nuclear Generating Station Units 1, 2, and 3); Holtec Decommissioning Int'l, LLC, Docket No. 50-293 (Nuclear Regulations Comm'n) (Aug. 22, 2019) (ADAMS Access No. ML19192A086 (granting similar exemption concerning Pilgrim Nuclear Power Station).

As the NRC is aware, this new paradigm is the subject of an ongoing rulemaking in which the Department has previously commented. *See* Comments Submitted by the N.Y. State Dep't of Pub. Serv., Docket No. 2015-0070 (Aug. 31, 2022) (ADAMS Accession No. ML22243A206). Nevertheless, the Department submits that these industry trends also have implications for this draft ISG and therefore respectfully urges the NRC to consider the following before issuing its final guidance on this matter.

I. Exemptions should not be granted if the NDT in question cannot reasonably be expected to fund not only radiological decommissioning, but also projected site restoration, spent fuel management costs, and other expenses.

The draft ISG features a list of information that would assist NRC staff in assessing a licensee's exemption request. That list includes:

> A licensee identifies and the NRC confirms that *a large projected surplus* in DTF reserves compared with the site-specific cost estimate for a facility; . . . [and]
>
> A licensee demonstrates that the current and projected DTF amounts required for decommissioning provide *adequate assurance that funds will be available throughout the decommissioning period*.

Draft Interim Staff Guidance: Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal, 88 Fed. Reg. 40337-02 (June 21, 2023) 3-4 (ADAMS Accession No. ML23150A051) (emphasis added). While at first glance these might seem like sensible considerations, their imprecision risks rendering them almost meaningless.

But to offer truly meaningful protection in the modern era, these criteria must recognize that, for many reactor sites, returning the property to productive reuse may depend almost entirely on DTF funds. Accordingly, the Department recommends that the final ISG clarify that the phrases "large projected surplus" and "adequate assurance that funds will be available throughout the decommissioning period" mean that the NDT in question can reasonably be expected to fund not only radiological decommissioning, but also projected site restoration and spent fuel management costs.

II. When considering an exemption application, the NRC should not engage in non-conservative financial analyses or assume that the reactor will remain operational beyond its current license term.

Also listed among the information that may assist NRC staff in evaluating an exemption request:

> A licensee demonstrates that *the time period, estimated before the permanent cessation of operations and commencement of major radiological decommissioning activities will begin*, is sufficiently long to provide for the accumulation of funds in the DTF.

Id. at 4 (ADAMS Accession No. ML23150A051) (emphasis added).

The Department submits that this "time period estimated before the permanent cessation of operations" should extend no longer than the facility's current license term. To do otherwise would be to effectively pre-judge a future license renewal proceeding. And the Department submits that a conservative approach to this determination is advisable in any event. As the recent closures of Vermont Yankee Nuclear Power Station, Kewaunee Power Station, and Crystal River Unit 3 Nuclear Generating Plant demonstrate, it is certainly not unheard of for reactors to cease operations before their operating licenses expire—sometimes unexpectedly.

III. Any supplemental funding mechanisms relied upon by an exemption applicant must inure to the benefit of any subsequent license holders.

Finally, the draft ISG suggests that exemption applicants should identify existing and potential funding mechanisms that are or could be made available (for example, parent company guarantee, parent company support agreement, or cash injection) to cover future shortfalls in a DTF. *Id.* (ADAMS Accession No. ML23150A051). This is also a sensible consideration but does not go far enough.

To be meaningful, any such mechanism must continue to protect the DTFs even after future license transfers. As discussed above, merchant generators are increasingly transferring reactor sites to specialized businesses for decommissioning. In those cases, a current operating licensee's financial wherewithal would be irrelevant to determining whether the NRC (and the public) have "adequate assurance that funds will be available throughout the decommissioning period." *Id.* Current industry trends have superseded the NRC's original assumptions regarding the continuation of the traditional utility financial structure. Accordingly, the final ISG should specify that any "potential funding mechanisms" identified by the licensee must inure to the benefit of any subsequent license holders and ensure the safe, prompt, and comprehensive clean up and restoration of such sites so that they may be returned to their host communities.

The Department appreciates this opportunity to comment on these important issues.

Respectfully submitted,

s/ John J. Sipos

JOHN J. SIPOS
Deputy General Counsel
RYAN COYNE
Assistant Counsel
BRIDGET FRYMIRE
Utility Supervisor
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223
(518) 486-1922
John.Sipos@dps.ny.gov

Dated: September 13, 2023