

The Commissioners

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February 5, 1999

SECY-99-042

FOR: The Commissioners

FROM: William D. Travers /s/
Executive Director for Operations

SUBJECT: DENIAL OF A PETITION FOR RULEMAKING: NUCLEAR ENERGY
INSTITUTE (NEI) (PRM-30-61)

PURPOSE:

To obtain Commission approval for denial of a petition for rulemaking (PRM-30-61) to amend 10 CFR Parts 30, 40, and 70, submitted by the Nuclear Energy Institute (NEI).

BACKGROUND:

The U.S. Nuclear Regulatory Commission (NRC) received the subject petition for rulemaking (PRM-30-61), from the Nuclear Energy Institute (NEI), on May 24, 1996. The petition requested that NRC amend the regulations in Parts 30, 40, and 70 to provide for alternative schedule requests for decommissioning of a facility, separate building, or outside area that has been inactive for at least 24 months and is unsuitable for unrestricted release. Specifically, the petitioner requested that facilities that are inactive, in part, for economic reasons be allowed to go on "standby" status until economic conditions in its industry improve.

The petitioner believes the current "Timeliness in Decommissioning of Materials Facilities" rule, (59 FR 36026) (hereafter Timeliness Rule) is restrictive and impacts on a licensee's ability to make commercial decisions that allow it to compete in the open market place. In addition, the petitioner believes that requiring decommissioning after 24 months of inactivity is no longer applicable given the current maturity of the nuclear industry. The petitioner contends that poorly financed companies no longer exist in the nuclear materials industry and fiscally sound companies are willing to assume the costs of keeping facilities in the standby mode. Further, NEI contends that elimination of the standby mode capability has the potential of significantly impacting important components within the nuclear industry that may be needed in future years to support expansion.

NRC's Timeliness Rule became effective on August 15, 1994. Before issuance of the Timeliness Rule, there were no requirements specifying acceptable time periods for decommissioning of nuclear material facilities after licensed activities had ceased. This resulted in instances where NRC had to issue orders to establish schedules for timely decommissioning. The Timeliness Rule established the requirements necessary to avoid problems resulting from delayed decommissioning of contaminated inactive facilities, separate

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John Buckley, NMSS/DWM
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buildings, and outdoor areas. These potential problems were reviewed during development of the Timeliness Rule, and if decommissioning is delayed for a long period of time, safety practices could become lax, key personnel could leave, management interest could wane, or bankruptcy, corporate takeover, and other unforeseen changes could occur, all of which would complicate or further delay decommissioning. Although many of the comments received on the proposed rule focused on the timing of each aspect of decommissioning, the commenters did not provide adequate rationale for selecting an alternative to the proposed 24-month period.

On August 21, 1996, (61 FR 43193) NRC noticed receipt and requested comment on the petition for rulemaking filed by NEI. The comment period closed on November 4, 1996. Notice of receipt of the NEI petition for rulemaking resulted in NRC receiving comment letters from five organizations, all favoring the petition.

DISCUSSION:

In a publicly noticed meeting held at the NRC on September 2, 1998, the staff met with NEI to discuss the concerns of the petitioner and to explore options for bringing the petition to closure. NRC staff and NEI agreed that the Timeliness Rule currently contains provisions for granting licensees alternative time schedules for initiation of decommissioning. However, NEI remained concerned that the current rule does not specify the criteria NRC uses to review and approve alternate schedule requests. NRC and NEI agreed that there is a need to clarify review criteria. This could be achieved either through rulemaking, or, through implementing guidance to the staff and licensees. NEI agreed that staff guidance may sufficiently address their concerns and volunteered to work with NRC to develop this guidance. In a letter dated September 30, 1998 (Attachment 1), NEI provided their response to the September 2, 1998 meeting acknowledging the NRC was developing guidance documents to provide clear directions and uniformity for staff review for licensee request submittals. However, NEI also requested that the petition for rulemaking be placed in abeyance until these guidance documents are finalized and accepted by NEI. The staff does not agree with this request.

The staff believes that the amendments proposed by the petitioner conflict with the primary purpose of the Timeliness Rule, which is the effective and timely cleanup of contaminated sites. The Timeliness Rule was promulgated to avoid situations where decommissioning of these sites might be unreasonably delayed. It requires licensees to either begin decommissioning within 24 months of notification that operations have ceased or, in certain non-routine decommissioning circumstances, submit for NRC approval a decommissioning plan within 12 months of notification that operations have ceased. These requirements provide greater assurance than the earlier regulations promulgated in 1988 that licensees would be able to terminate their licenses while they are still financially solvent. Since the Timeliness Rule became effective in August 1994, approximately 25 material licensees have filed for bankruptcy, which confirms that financial stability is an appropriate concern.

Furthermore, the GEIS (NUREG-0586) prepared in connection with the 1988 modifications to the decommissioning regulation recommended the prompt dismantlement of material facilities once they have permanently ceased operations. The staff believes that the Timeliness Rule imposes certain "action forcing" requirements to ensure that this recommendation is met. The GEIS also concluded there was no health and safety benefit in delaying decommissioning for the generic material facility cases considered. The staff also believes the petitioner is incorrect in concluding that the Timeliness Rule is so restrictive that it has the potential to eliminate

important components from the nuclear infrastructure. The Timeliness Rule does include provisions for licensees to request extensions to the 24-month period of inactivity allowed before beginning decommissioning. To date, fewer than 30 licensees out of several thousand have asked to delay decommissioning activities and only three of these requests were initially denied. Each denial resulted from a lack of adequate justification. After discussions with the licensees, two of these three requests were withdrawn and one request was approved. Based on the relatively few requests received to date, the NRC concludes that the Timeliness Rule, as written, is not overly restrictive. Further, since NRC has not denied any request to delay decommissioning that was supported with adequate justification, it appears that the rule is not having an adverse impact on licensees' commercial decisions, as suggested by the petitioner.

In this regard, the staff considered two options: 1) to grant the petition and proceed to initiate rulemaking to revise the Timeliness Rule; or 2) deny the petition, but proceed to develop guidance for licensees and the NRC staff. The staff believes that the current language of the Timeliness Rule is sufficiently flexible to accommodate the petitioner's concerns through additional guidance. This is corroborated by the NRC's having granted a number of requests submitted by material licensees to continue with monitoring and maintenance, rather than having to commence decommissioning on the schedule set forth in the regulations. This significant change in circumstances is acknowledged by NEI in Attachment 1. NEI also noted in that letter that the staff is developing guidance so that the flexibility the staff has demonstrated in its actions on particular requests can be uniformly applied.

In light of this demonstrated staff flexibility under the existing Timeliness Rule and the development of uniformity through guidance, the staff does not believe that it is necessary to undertake the rulemaking requested by NEI in 1996. The staff intends to give careful consideration in its guidance development to the concerns expressed in the petition and, in this less resource-intensive way, to obviate the need for rulemaking. In this regard, the staff does not have within current budget or rulemaking priorities sufficient resources to complete a new rulemaking this fiscal year, whereas it has already commenced development of the guidance document and anticipates issuance by June 30, 1999. If NEI should conclude that a problem remains after the issuance of the guidance, it could file a new petition or resubmit the current petition without prejudice. Therefore, the staff recommends denial of the petition for the reasons outlined in this paper and more fully set forth in the Federal Register notice (Attachment 2).

The petitioner will be notified of this finding by transmittal of a letter of denial (Attachment 3) as will the appropriate Congressional committees (Attachment 4).

RECOMMENDATION:

That the Commission:

1. Approve publication in the Federal Register of the attached notice of denial of the PRM (Attachment 2).
2. Approve development of guidance to address the concerns in the NEI petition regarding implementation of the Timeliness Rule.
3. Note:

The Commissioners

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- a. A denial letter will be sent to the petitioner (Attachment 3);
- b. The Office of Public Affairs recommends that a press release not be issued because of relatively little public interest in this matter;
- c. The appropriate Congressional Committees will be informed (Attachment 4).

COORDINATION:

The Office of the General Counsel has no legal objection to the denial of the petition.

William D. Travers
Executive Director
for Operations

Attachments:

1. NEI Letter dated 9/30/98
2. Federal Register Notice
3. Letter of Denial to Petitioner
4. Congressional Letters

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Executive Director
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RECORD NOTE: A draft copy of the denial of the petition was sent to OIG for information on _____.

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PROOFED BY E. KRAUS ON 7/21/98 *See previous concurrence

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, and 70

[Docket No. PRM-30-61]

Nuclear Energy Institute; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-30-61) submitted by the Nuclear Energy Institute (NEI). The petitioner requested that the NRC amend its regulations governing timeliness of decommissioning of sites and separate buildings or outdoor areas. Because the petitioner has provided no new significant information that would call into question the basis for the requirements in these regulations, the NRC denies the petition. To achieve the intent of the petition, NRC will develop guidance to clarify specific criteria to review licensee requests for alternate schedules for initiation of decommissioning of inactive contaminated sites.

ADDRESSES: Copies of the PRM, the public comments received, and the NRC's letter to the petitioner are available for public inspection or copying in the NRC Public Document Room, 2120 L Street NW, (lower level), Washington, D.C.

FOR FURTHER INFORMATION, CONTACT: Anthony DiPalo, telephone (301) 415-6191, e-mail, ajd@nrc.gov, of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001,

SUPPLEMENTARY INFORMATION:

The Petition

On August 21, 1996 (61 FR 43193), the NRC published a notice of receipt of a PRM filed by the NEI. The petitioner requested that NRC amend its regulations in 10 CFR Parts 30, 40, and 70 to provide for an alternative which could result in the delay of decommissioning of a site, separate building, or outdoor area where principal activities have not been conducted for at least 24 months, and the site, separate building, or outdoor area is unsuitable for unrestricted release in accordance with NRC requirements. Specifically, the petitioner requested that inactive facilities be allowed to go on "standby" status until economic conditions in its industry improved. The petitioner believes the requested changes are necessary because the rule, as written, has the potential to ... "eliminate important components from the nuclear industry infrastructure." The petitioner also asserted as a basis for its petition that NRC's regulations were not intended to give it jurisdiction over the commercial aspects of a licensee's activities and, therefore, NRC regulations should not impose restrictions on facilities or sites that have the potential to impact commercial decisions. Further, the petitioner believes that NRC's current regulation is not necessary given the cohesiveness and maturity of the industry today.

Public Comments on the Petition

The notice of receipt of the PRM invited interested persons to submit comments. The comment period closed on November 4, 1996. NRC received comment letters from the following five organizations: (1) Kennecott Energy; (2) Siemens Power Corporation; (3) Wyoming Mining Association; (4) National Mining Association; and (5) Babcock & Wilcox, Naval Nuclear Fuel Division. All five commenters supported the PRM. They supported amending the Timeliness Rule to permit facilities to postpone decommissioning and enter a "standby" mode in which facilities would be monitored and maintained for a predetermined time period, pending future operation.

The comments are summarized as follows:

1. All five commenters argued that the Timeliness Rule, as currently written, impacts on a licensee's ability to make commercial decisions that allow it to compete in the open market. The commenters believe that any company that has a valid NRC license and operates within the conditions of the license should have the right to decide when to start and stop operations, and when to place buildings or facilities in standby mode, rather than being forced to begin decommissioning.

2. Three commenters expressed the opinion that NRC's rationale requiring decommissioning after 24 months of inactivity is no longer practical, given the cohesiveness and maturity of today's nuclear industry. The commenters stated that NRC previously rejected a proposal for a standby mode because of the potential for site abandonment as a result of changes in a company's financial status, corporate takeover, or bankruptcy. The commenters believe that the nuclear industry has now matured and that poorly financed and poorly managed companies are no longer in business. The remaining companies are said to be stable and willing and able to assume the costs associated with keeping facilities in standby mode.

3. Two commenters argued that the Timeliness Rule is regulation by exception. These commenters believe that it would be better to include generic provisions in the regulations for maintaining a licensed facility in standby mode, rather than approving individual requests for postponement of the initiation of decommissioning.

4. One commenter argued the petitioner's case that the lack of a standby provision in the Timeliness Rule has the potential to eliminate important components from the nuclear industry. It is believed that these components and facilities may be needed in future years to support continuing operation and potential industry expansion. The commenter indicated that fuel cycle facilities operate in a constantly changing economic environment. Mines and mills that have been inactive for years are now beginning to start up because of improved economic conditions. The operating status of conversion facilities and enrichment plants has fluctuated in response to international policy and the influx of low-enriched products from countries of the former Soviet Union. Commercial facilities that support the armed forces must be prepared to respond if called on.

Reasons for Denial

NRC is denying the petition for the following reasons:

1. NRC believes the current language of the Timeliness Rule is sufficiently flexible to accommodate the petitioner's concerns, and that clarification of the specific acceptance criteria could be achieved through the development of guidance.

2. NRC believes that the amendments requested by the petitioner would conflict with the primary purpose of the Timeliness Rule to effectively and efficiently clean up contaminated sites that pose a potential threat to public health and safety. The Timeliness Rule was promulgated in July 1994 to address those situations where decommissioning of contaminated sites was unreasonably delayed. The 24-month inactivity criterion related to decontamination of unused sites, separate buildings, or outdoor areas provides assurance that the licensee will undertake timely cleanup of inactive portions of its site while it is financially solvent.

3. Although the petitioner argues that the nuclear industry has matured and recognizes its responsibilities, that troubled licensees are no longer in business, and that NRC regulations provide adequate decommissioning funding assurance and transfer of ownership requirements, the NRC's experience with inactive materials licensees indicates the need for the timeliness provisions. In fact, since the Timeliness Rule became effective in 1994, approximately 25 material licensees have filed for bankruptcy. Past history with NRC materials facility decommissioning indicates that the approach taken through the Timeliness Rule is the appropriate one.

4. NRC believes that the petitioner is incorrect in asserting that the Timeliness Rule, as currently written, has the potential to eliminate important components from the nuclear industry infrastructure. For case-specific situations, delay of decommissioning is permitted by the current rule if the Commission determines that this relief would not be detrimental to the public health and safety and would otherwise be in the public interest. Licensees must describe why their request to delay decommissioning is in the public interest. Therefore, if the licensee can satisfactorily demonstrate that a proposed delay in decommissioning is not detrimental to public health and safety and is in the public interest, the delay would be granted and there should be no adverse impact on the nuclear industry infrastructure.

Since the effective date of the Timeliness Rule, August 15, 1994, fewer than 30 licensees out of several thousand have asked to delay decommissioning activities and only three of these requests were initially denied. Each denial resulted from a lack of adequate justification. After discussions with the licensees, two of these three requests were withdrawn and one request was approved. Based on the relatively few requests received to date, the NRC concludes that the Timeliness Rule, as written, is not overly restrictive. Further, since NRC has not denied any request to delay decommissioning that was supported with adequate justification, it appears that the rule is not having an adverse impact on licensees' commercial decisions, as suggested by the petitioner.

5. The Generic Environmental Impact Statement (GEIS), entitled "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" (NUREG-0586), prepared in connection with the 1988 modifications to the decommissioning regulations recommended prompt dismantlement of material facilities once they had permanently ceased operation. The GEIS concluded that decommissioning can be accomplished safely and at a reasonable cost shortly after cessation of activities. Further, the GEIS concluded that immediate decommissioning following cessation of activities eliminates the potential problems that may result from an increasing number of contaminated sites, and the potential health, safety, regulatory, and economic problems associated with maintaining an inactive nuclear facility. The Timeliness Rule imposed certain "action-forcing" requirements to ensure that the recommendations in the GEIS were met.

In conclusion, no new significant information has been provided by the petitioner that calls into question the basis for the requirements of the Timeliness Rule. The intent of the petition will be achieved by developing guidance on the specific criteria for reviewing licensee request submittals for alternate schedules for the initiation of decommissioning of inactive contaminated sites. For the reasons cited in this document, NRC denies the petition.

Dated at Rockville, Maryland, this _____ day of _____, 1998.

For the Nuclear Regulatory Commission.

William D. Travers
Executive Director
for Operations.

Mr. Felix M. Killar, Jr.
Director, Material Licensees Programs
Nuclear Energy Institute
1776 I Street, NW., Suite 400
Washington, DC 20006-3708

Dear Mr. Killar:

I am responding to the petition for rulemaking (PRM-30-61) that you submitted to the U.S. Nuclear Regulatory Commission (NRC). The petition requested that NRC amend 10 CFR Parts 30, 40, and 70 to provide an alternative to the current provisions required for decommissioning any facility, separate building, or outside area after it has been inactive for at least 24 months.

On August 21, 1996 (61 FR 43193), NRC published a notice of receipt of the PRM and requested comments by November 4, 1996. Five comment letters were received.

NRC has considered both the petition and public comments on it. For the reasons specified in the enclosed Federal Register notice, your petition is denied. Despite this denial, as discussed in our meeting with NEI on September 2, 1998, we have initiated the development of guidance to our staff, which will also be provided to material licensees, on the criteria to be applied to requests for approval of alternate decommissioning schedules under the Commission's regulations.

Sincerely,

William D. Travers
Executive Director
for Operations

Enclosure: Federal Register Notice
Denying Petition

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 Director, Material Licensees Programs
 Nuclear Energy Institute
 1776 I Street, NW., Suite 400
 Washington, DC 20006-3708

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Sincerely,

William D. Travers
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 for Operations

Enclosure: Federal Register Notice
 Denying Petition

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The Honorable James M. Inhofe, Chairman
Subcommittee on Clean Air, Wetlands, Private
Property and Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed for the information of the subcommittee is a copy of a Federal Register notice denying a petition for rulemaking (PRM-30-61) filed by the Nuclear Energy Institute (NEI).

The petition requests that the U.S. Nuclear Regulatory Commission (NRC) amend 10 CFR Parts 30, 40, and 70, governing provisions for the timeliness of the decommissioning process at facilities of nuclear materials licensees. The petitioner's suggested amendments would have modified the NRC's decommissioning regulations in Parts 30, 40, and 70 to expressly permit material licensees to continue monitoring and maintaining facilities, separate buildings, or outside storage areas that have not been used for 24 months, rather than requiring licensees to begin the decommissioning process after 24 months of inactivity.

NRC is denying NEI's PRM for the following reasons: (1) the petition conflicts with the primary purpose of the "Timeliness in Decommissioning of Materials Facilities" rule (hereafter Timeliness Rule) to effectively and efficiently conduct decommissioning at contaminated sites that pose a potential threat to public health and safety; (2) the 24-month inactivity criterion in the Timeliness Rule provides assurance that a licensee will be able to terminate its license while financially solvent; and (3) for those instances where delay of decommissioning is warranted, the Timeliness Rule allows licensees to seek relief on a case-specific basis, provided that the licensee demonstrates the request for delay is not detrimental to public health and safety and is otherwise in the public interest.

Although the PRM has been denied, the NRC has initiated the development of guidance to its staff, which will be made available also to materia licensees, on the criteria to be applied to requests for approval of alternate decommissioning schedules under the NRC's regulations. NEI is aware of, and has expressed its encouragement of, this guidance approach.

The Commission will publish the denial in the Federal Register.

Sincerely,

Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

The Honorable James M. Inhofe, Chairman
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 Committee on Environment and Public Works
 United States Senate
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Sincerely,

Dennis K. Rathbun, Director
 Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

Identical Letter sent to The Honorable Dan Schaefer

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The Honorable Dan Schaefer, Chairman
Subcommittee on Energy and Power
Committee on Commerce
United States House of Representatives
Washington, DC 20515

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The Commission will publish the denial in the Federal Register.

Sincerely,

Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Representative Ralph Hall