

November 28, 2008

MEMORANDUM TO: Chairman Klein  
Commissioner Jaczko  
Commissioner Lyons  
Commissioner Svinicki

FROM: Martin J. Virgilio */RA/*  
Deputy Executive Director for Materials, Waste,  
Research, State, Tribal and Compliance Programs  
Office of the Executive Director for Operations

SUBJECT: COMMISSION APPROVAL TO WITHDRAW SECY-08-0144, "FINAL  
RULE: DECOMMISSIONING PLANNING (10 CFR PARTS 20, 30,  
40, 50, 70, AND 72; RIN 3150-AH45)"

Staff is requesting Commission approval to withdraw SECY-08-0144, "Final Rule: Decommissioning Planning (10 CFR Parts 20, 30, 40, 50, 70, and 72; RIN 3150-AH45)" from Commission consideration due to staff's need to evaluate removal of draft final rule language in 10 CFR Part 30, Appendix A (III)(E) which would impose a joint and several liability requirement on the guarantor of a Parent Guarantee. This proposed requirement was part of the rule published for public comment in the Federal Register on January 22, 2008.

Background on staff's recommendation is:

- On November 5, 2008, Nuclear Regulatory Commission (NRC) staff held a public meeting with the Nuclear Energy Institute (NEI). The purpose of the meeting was to allow NEI to elaborate on written comments that they had submitted on May 8, 2008, during the proposed rule's public comment period. The NEI reiterated a number of issues identified in its May 8, 2008, comments, but staff further re-evaluated only two of these issues following the November 5, 2008, public meeting. These two issues concerned the backfit analysis and a proposed requirement in the Parent Company Guarantee used to provide decommissioning funding assurance.
- Other than the "Parent Company Guarantee" matter (discussed below), staff re-evaluated its actions on the backfit analysis for the rule, and has determined that all of its actions have been consistent with regulatory requirements. Thus, the staff does not agree with NEI comments regarding the backfit analysis.

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- Staff also re-evaluated the proposed requirement regarding the Parent Company Guarantee. This would require a Parent Company to be responsible for any cost overruns of its subsidiary company, if the subsidiary company as an NRC licensee uses the Parent Company to assure sufficient funds are available to complete future decommissioning activities {it would provide for “joint and several liability” of the Parent Company}. The NEI asserted in its May 8, 2008, public comments and again on November 5, 2008, that promulgation of this requirement would be a policy change. After careful evaluation, the staff agrees that imposing such liability generically by rule, as opposed to case by case determinations, would be a change in NRC policy. The staff did not realize that this would represent a change in policy and, as a result, the change in policy is not reflected in the rule’s Regulatory Analysis or backfit assessment, which is an error.
- As a result of its re-evaluation, the staff is recommending that the Commission authorize withdrawal of the draft final rule.

If the Commission allows the staff to withdraw the draft final rule, the staff will consider whether to remove or continue the proposed requirements related to Parent Company Guarantees. If the staff determines to keep the provisions, a limited re-noticing of the rule will be required that will include expanded staff discussion of the change and appropriate backfit considerations. If the staff determines to remove the provision, a revised final rule package will be prepared and forwarded to the Commission which will include in the draft Federal Register Notice an expanded discussion of the response to the comments that resulted in removal of those provisions. The staff will also issue a press release to inform the public of the staff’s intent to further review the proposed Parent Company Guarantee requirements.

SECY, please track.

cc: SECY  
OGC  
OCA  
OPA  
CFO