



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

November 30, 2010

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-09-0042

TITLE: FINAL RULE: DECOMMISSIONING PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72; RIN-3150-AI55)

The Commission (with Commissioners Apostolakis, Magwood and Ostendorff agreeing and Chairman Jaczko and Commissioner Svinicki agreeing in part) approved the final rule as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of November 30, 2010.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-09-0042

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X	X			X	5/8/09
COMR. SVINICKI	X	X			X	11/8/10
COMR. APOSTOLAKIS	X				X	9/30/10
COMR. MAGWOOD	X				X	10/29/10
COMR. OSTENDORFF	X				X	10/19/10

COMMENT RESOLUTION

In their vote sheets, Commissioners Apostolakis, Magwood and Ostendorff approved and Chairman Jaczko and Commissioner Svinicki approved in part the staff's recommendation and provided some additional comments. Subsequently, the Commission approved the final rule in an Affirmation Session as reflected in the SRM issued on November 30, 2010.

**AFFIRMATION ITEM**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER JACZKO  
SUBJECT: SECY-09-0042 – FINAL RULE: DECOMMISSIONING  
PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72;  
RIN-3150-A155)

Approved  X  Disapproved  X  Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  X  None \_\_\_\_\_

  
\_\_\_\_\_  
SIGNATURE

03/08 /2009  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

**Commissioner Jaczko's Comments on SECY-09-0042**  
**Final Rule: Decommissioning Planning (10 CFR Parts 20, 30, 40, 50, 70, and 72)**

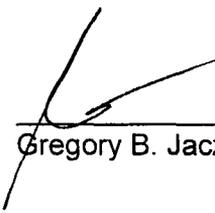
While I approve of the substance of the final rule for decommissioning planning in many respects, I disapprove of the process that has been used to modify this final rule and thus disapprove of the removal of the joint and several liability provision without first re-noticing this change for public comment.

This proposed rule was published on January 22, 2008, and during the comment period, the agency received 35 comment letters, including comments from the Nuclear Energy Institute (NEI) dated May 8, 2008. The staff responded to the comments and prepared a draft final rule for Commission consideration on October 1, 2008. But then on October 9, 2008, and November 5, 2008, after the public comment period closed and when the final rule was already before the Commission for consideration, staff held meetings with NEI to discuss the comments provided in its May letter.

In my November 18, 2008 vote, I approved of the draft final rule, with some clarifying comments. Shortly after my vote, however, on November 28, 2008, the staff requested that the final rule be withdrawn from Commission consideration due to the staff's need to "evaluate removal of final rule language in 10 CFR Part 30, Appendix A (III)(E) which would impose a joint and severally liable requirement on the guarantor of a parent guarantee." Although I approved of the withdrawal of the draft final rule, I did so with the understanding that the agency would use the additional time to develop an expanded discussion of the proposed requirement by re-noticing this limited provision in order to determine whether to propose the removal or retention of that provision.

Instead, the decision was made by the staff to simply remove the joint and several liability provision and resubmit the draft final rule to the Commission. Although removal of this provision may have been the correct thing to do with respect to reactor licensees, considerations could be different for materials licensees than for reactor licensees. The purpose of the public rulemaking process is to have these kinds of discussions in a fair and equitable setting so that each stakeholder has a chance to comment and potentially influence the final decision. Although the meetings with NEI were open to the public, I think it is likely that other interested stakeholders may have concluded that, since the comment period was over and the draft final rule was before the Commission, no further changes in the rule were going to result from the meetings and therefore no participation on their part was needed. I understand that the staff does not want to delay the issuance of this entire rule due to this one change, but re-noticing a limited portion of the rule and engaging the entire stakeholder community would be a minor effort that would yield big rewards, including increased public confidence in our process.

Therefore, consistent with my vote on November 18, 2008, I approve the contents of the rule with the exception of the removal of the joint and several liability provision proposed in the version in SECY-09-0042. Staff should re-notice the parent guarantee provision for public comment and return to the Commission with a more thoroughly vetted recommendation regarding that provision.

  
\_\_\_\_\_  
Gregory B. Jaczko

5/8/09  
\_\_\_\_\_  
Date

**AFFIRMATION ITEM**

**RESPONSE SHEET**

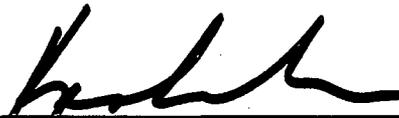
TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER SVINICKI  
SUBJECT: SECY-09-0042 – FINAL RULE: DECOMMISSIONING  
PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72;  
RIN-3150-A155)

Approved XX In Part Disapproved XX In Part Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached XX None \_\_\_\_\_

Original vote on 11/08/10

  
\_\_\_\_\_  
SIGNATURE

11/15 /10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes XX No \_\_\_\_\_

**Commissioner Svinicki's Comments on SECY-09-0042**  
**Final Rule: Decommissioning Planning**  
**(10 CFR Parts 20, 30, 40, 50, 70, and 72; RIN-3150-A155)**

I approve, in part, and disapprove, in part, the staff's draft final rule on decommissioning planning. I approve the changes to financial assurance requirements for decommissioning in concert with the changes to the majority of the reporting requirements. I disapprove the staff's recommendation for the final rule that modifies 10 CFR 20.1406 and 10 CFR 20.1501, incorporating the concept and term "residual radioactivity" into the decommissioning funding plan reporting requirements.

In its Staff Requirements Memorandum (SRM) resulting from SECY-03-0069, the Commission noted that changes in licensee operations related to the prevention of future legacy sites should incorporate a risk-informed, performance-based approach. In response to SECY-07-0177, given the complex technical issues inherent in the proposed rule, the Commission encouraged the staff to solicit public comments aggressively in order to ensure that the final rule identified and resolved any unintended consequences and appropriately balanced the most important relevant factors. In my opinion, certain of the public comments received on the proposed rule were well-justified and their incorporation would have resulted in a better final rule. I am concerned that aspects of this draft final rule having to do with the concept of "residual radioactivity" do not have a clear, quantifiable, risk-informed and performance-based safety benefit when compared to the available operating experience. In this instance, the rulemaking process was not based on substantial data demonstrating that current-day licensee sites are in jeopardy of becoming the legacy sites that this rule purports to forestall.

In the response to public comment, the staff articulates that this final rule clarified existing requirements and did not represent a new NRC position. Therefore, NRC may have been better served by revising enforcement guidance or inspection procedures, or issuing generic communications, if needed, to ensure that the concerns about the creation of legacy sites are addressed within the existing regulatory framework, while continuing to monitor licensee performance.

Going forward, the staff should provide the Commission an analysis of past decommissioning operating experience, including a list of sites or categories of licensees that the staff considers at risk of becoming legacy sites. If, as a result of this analysis, the staff develops additional risk-informed, performance-based data that indicates a need to pursue rulemaking, the staff should advise the Commission and recommend an appropriate course of action. These activities could also be informed by the senior leadership review of the recommendations of the Groundwater Task Force, which is yet to be issued. This evaluation should be provided to the Commission within one year of the date of the SRM for this SECY paper.

I have studied carefully the aspects of the public comment record documenting allegations that the proposed rule requirements necessitated a backfit analysis. In his vote, Commissioner Magwood concludes that this draft final rule "appears to come perilously close" to circumventing the agency's requirements for backfit analysis. I believe that the requirements of the new rule which I am disapproving in this vote may actually cross this line. My discomfort with the NRC's determination in this regard is part of the basis of my disapproval, specifically, of those portions of 10 CFR 20.1406 and 10 CFR 20.1501.

In the most charitable interpretation, the consideration in the staff's analysis of the industry's voluntary Groundwater Protection Initiative (GPI) appears somewhat circular (i.e., initiatives under the GPI are clearly credited when staff concludes that new efforts related to monitoring, survey processes, and related reports will not be needed at power reactor sites to comply with the rule's new requirements, and yet the costs of efforts undertaken under the GPI are not

reflected in the cost estimates of the rule “because these costs are incurred regardless of the eventual promulgation of this final rule.”) At the very least, this kind of regulatory treatment of voluntary initiatives has the potential to create a chilling effect on future efforts.

Additionally, the NRC received comment from certain licensees questioning the potential for facilities such as radionuclide and radiopharmaceutical manufacturing sites to cause the dispersal of radioactive material in quantities that would require remediation to comply with 10 CFR 20.1402 release criteria at the time of decommissioning. These licensees, as well as academic and research and test reactor licensees, requested consideration of explicit exemption language in the rule for their classes of facilities. In the draft final rule, staff allows for no exemptions “because of the relatively high cost of remediating a legacy site compared to the cost to implement the final rule.” This logic escapes me. I believe this suggestion merited a more sincere and thoroughgoing evaluation, which should be included in the analysis requested in the fourth paragraph of this vote.

Regarding the new requirement in 10 CFR 50.82(a)(8) that licensees report the total estimated costs associated with spent fuel storage until such time as the Department of Energy removes it from the licensee site, I find merit in the comment received that there is some obstacle in estimating the duration of onsite storage and the portion, if any, of such storage cost that will be borne by the U.S. government as the result of ongoing litigation. If it is true, as the staff responds, that the spent fuel storage costs can be estimated as well as “any other estimated cost,” I fear for the validity of any of these estimates.

In light of this and other ambiguities pointed out by Commissioner Ostendorff in his vote, the implementation period for the rule should be extended to 18 months after the date of publication to allow sufficient time for staff to provide, and licensees to understand, the final version of the relevant guidance documents. I also believe that staff should expeditiously republish the draft guidance for public comment and should hold a public workshop to explain it and answer questions.

I disagree with Chairman Jaczko’s recommendation that the staff re-notice for public comment the joint and several liability provision that was included in the proposed rule. The Commission has already invited public comment on this provision and the staff’s recommendation to remove the provision from the final rule is a logical outgrowth of the public comment process. In addition, the staff has explained, in the final rule notice, the error in its previous analysis and the reasons for removing the proposal. Under these circumstances, I see no need for an additional round of public comment on the joint and several liability provision, and I find the staff’s proposal to be consistent with the possible outcomes set out in the staff request, on November 28, 2008, to withdraw its previous draft final rule.

Finally, no part of this rule or its accompanying guidance should be interpreted as altering the decision reached in the Commission’s recently-issued SRM related to Revision 2 of NRC’s guidance on decommissioning funding assurance for power reactors (Staff Requirements Memorandum, SECY-10-0082 – Explanation of Changes to Revision 2 to Regulatory Guide 1.159, “Assuring the Availability of Funds for Decommissioning Nuclear Reactors,” October 25, 2010).

#### Disapproved portions of the final rule:

I explicitly disapprove the following portions of the Decommission Planning final rule. In addition, if other parts of the draft final rule exist which reference the proposed changes to 10 CFR 20.1406 or 10 CFR 20.1501 to incorporate the concept of “residual radioactivity” into the proposed final rule, I likewise disapprove them.

10 CFR 20.1406  
10 CFR 20.1501  
10 CFR 30.35(c)(6)  
10 CFR 30.35(e)(1)(i)(C) and redesignate remaining subpart numbering  
10 CFR 30.35(e)(2)(i) and redesignate remaining subpart numbering  
10 CFR 40.36(c)(5)  
10 CFR 40.36(d)(1)(i)(C) and redesignate remaining subpart numbering  
10 CFR 40.36(d)(2)(i) and redesignate remaining subpart numbering  
10 CFR 40, Appendix A, Criterion 9(b)(2) and redesignate remaining subpart numbering  
10 CFR 40, Appendix A, Criterion 9(f)(4) and redesignate remaining subpart numbering  
10 CFR 70.25(c)(5)  
10 CFR 70.25(e)(1)(i)(C) and redesignate remaining subpart numbering  
10 CFR 70.25(e)(2)(i) and redesignate remaining subpart numbering  
10 CFR 72.30(c)(1) and redesignate remaining subpart numbering  
10 CFR 72.30(d) and redesignate remaining subpart numbering  
Subsequent changes to 10 CFR 72.13 based on the removal of above mentioned sections

Editorial comments:

In addition, my approval is subject to the following editorial comments:

In the draft letters to Congress, revise the second and third sentences to read, "The final rule would require all NRC licensees to provide additional details for their decommissioning funding plans and would enhance NRC control of certain financial instruments, such as the parent company guarantee and self guarantee, to increase the assurance that adequate funds will be available to complete facility decommissioning." In addition, the fourth sentence of the first paragraph should be deleted, as well as the entire proposed second paragraph.

The following revisions should be made to Enclosure 1:

On page 106, line 3, the response to question G.25 should quantify the distance in centimeters; mostly likely intended to read, "typically in the top 15 centimeters"

On page 125, line 23, "to make" should be replaced with "to propose"

On page 144, lines 6 and 8, "5 days" should be replaced with "30 days"

On page 144, line 9, the word "quarter" should be replaced with "year"

On page 222, line 15, the word "radioactively" should be replaced with "radioactivity" to state, "subsurface material containing radioactivity"

  
\_\_\_\_\_  
Kristine L. Svinicki 11/15 /10

**AFFIRMATION ITEM**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** Commissioner Apostolakis  
**SUBJECT:** SECY-09-0042 – FINAL RULE: DECOMMISSIONING PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72; RIN-3150-A155)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below  X  Attached \_\_\_\_\_ None \_\_\_\_\_

I approve the staff's recommendation to publish the final decommissioning planning rule and agree that the rule will not have a significant impact on a substantial number of small entities, subject to setting the effective date of the rule 15 months from the date of publication to align with staff completion of the guidance documents. I have also included the comment below from former Commissioner Lyons' April 2009 vote on the issue because I think it is a necessary change.

1) Revise 20.1501 as follows to remove any ambiguity in proposed 20.1501(b), when compared to existing 20.2103(a). Corresponding changes to the Federal Register Notice would also be needed.

20.1501 (b) **Notwithstanding § 20.2103(a) of this part,** records from surveys describing the location and amount of subsurface residual radioactivity identified at the site must be kept with records important for decommissioning, **and such records must be retained in accordance with §§ 30.35(g), 40.36(f), 50.75(g), 70.25(g), or 72.30(d), as applicable.**

  
\_\_\_\_\_  
SIGNATURE

9/30/10  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

**AFFIRMATION ITEM**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MAGWOOD  
SUBJECT: SECY-09-0042 – FINAL RULE: DECOMMISSIONING  
PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72;  
RIN-3150-A155)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  X  None \_\_\_\_\_

  
\_\_\_\_\_  
SIGNATURE

29 October 2010  
\_\_\_\_\_  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

**Commissioner Magwood's Comment on SECY-09-0042-Final Rule:  
Decommissioning Planning (10 CFR Parts 20, 30, 40, 50, 70, and 72**

I approve the staff's recommendation to publish the final decommissioning planning rule in the Federal Register that would amend 10 CFR parts 20, 30, 40, 50, 70, and 72. As this rule is applied, it should provide the agency with enhanced ability to ensure the effectiveness and accuracy of licensee's decommissioning planning. However, I believe the statement of consideration for the rule and associated guidance must be clarified regarding the circumstances under which licensees should complete surveys of the subsurface in order to comply with 10 CFR 20.1501. The associated guidance should be absolutely clear that the NRC is not initiating a characterization program to identify previously contaminated areas. The staff should clarify the guidance accordingly. Although staff offers an explanation as to why the change in the rule does not require a backfit analysis, commenters on the draft rule raised the concern that changes in guidance were being used to circumvent the need for backfit analysis. While I have concluded that the proposed final rule does not cross this line, it appears to come perilously close. Staff should remain vigilant to ensure that implementing guidance is never used to impose actions on licensees that would be subject to backfit consideration if imposed through rulemaking.



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William D Magwood, IV

10/29/10

Date

**AFFIRMATION ITEM**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER OSTENDORFF  
SUBJECT: SECY-09-0042 – FINAL RULE: DECOMMISSIONING  
PLANNING (10 CFR PARTS 20, 30, 40, 50, 70, AND 72;  
RIN-3150-A155)

Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  None \_\_\_\_\_

W. Ostendorff  
SIGNATURE

10/19/10  
DATE

Entered on "STARS" Yes  No \_\_\_\_\_

## **Commissioner Ostendorff's Comments on SECY 09-0042, "Final Rule: Decommissioning Planning"**

I approve publication of the final rule on decommissioning planning as proposed by the staff in SECY 09-0042 which would: (1) require that licensees minimize their introduction of radioactivity into the site; (2) require that licensees survey subsurface contamination to identify significant radioactivity; (3) revise the financial assurance requirements in Part 30, 40, 70, and 72, and (4) revise the 10 CFR 50 reporting requirements for licensees with a decommissioning power reactor. However, I believe the statements of consideration for the rule and the associated guidance need to be substantially clarified regarding the circumstances under which licensees are required to complete surveys of the subsurface required by 10 CFR 20.1501 to avoid the unintended consequence of unnecessary extensive monitoring by NRC licensees.

Efforts to prevent the creation of legacy sites are important given the safety and public confidence challenges which may result from a site not having the financial or technical means to decommission. Additional operational monitoring of potential subsurface contamination, while not an operational safety issue, may lead to legacy sites or erosion of public confidence if not properly identified, monitored, and accounted for in anticipated costs for decommissioning. I recognize that the staff undertook extensive public interactions on the rule by holding a public meeting and a roundtable discussion to gather input. The staff's efforts have resulted in an extremely comprehensive and thoroughly vetted rule.

While I believe issuance of the rule has merit, it is critical that the NRC clearly communicate what the new rule requires of our licensees. The rule package and guidance as currently written contain ambiguous and conflicting information regarding the process, methods, and thresholds used to determine the need and extent of required additional subsurface surveys. My understanding is that the revised 10 CFR 20.1501 would require that licensees complete subsurface surveys only in the limited instances where there is reason to believe that significant subsurface contamination is present. However, this of course requires licensees to have done some initial evaluation to determine the existence and extent of unmonitored subsurface contamination. The process for this initial evaluation and the threshold for requiring subsurface surveys are not clearly articulated in the rule package or the guidance. This lack of clarity may have contributed to the concerns raised by some stakeholders that the rule would require significant site characterization and monitoring.

For example, the draft guidance outlines how to determine if a facility has the potential for unmonitored subsurface leakages, but does not articulate the various non intrusive and non-resource intensive methods for evaluating whether such leakage has occurred or whether the amount of contamination present warrants additional monitoring. A second example is the conflicting information in the rule about the threshold for when additional surveys will be required. Page 1 of the rule implies that the NRC is requiring additional surveys even in the absence of any evidence of contamination to determine whether additional monitoring is required as follows: "licensees may be required to perform site surveys to determine whether

residual radioactivity is present in subsurface areas.” However, in other parts of the rule, the staff implies that no additional survey requirements are being imposed. Specifically, page 81 states, “the NRC believes that there is no incremental burden for these licensees, except to read and understand the final rule...”. Other similar apparent contradictions are found throughout the proposed federal register notice. The Commission, in SRM- SECY -03-0069, previously directed the staff to be “... clear to licensees and the staff how much characterization information is enough”. In accordance with this direction, the staff should clarify in the rule and associated guidance the process, methods, and thresholds for determining when additional subsurface surveys are required. This will ensure that the rule does not result in the unintended consequence of unnecessary monitoring in cases where it is not warranted.