

**POLICY ISSUE**  
(Notation Vote)

March 23, 2006

Secy-06-0065

FOR: The Commissioners

FROM: Luis A. Reyes  
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SUBJECT: OFFICE OF THE INSPECTOR GENERAL RECOMMENDATIONS ON  
DECOMMISSIONING FUNDING ASSURANCE

PURPOSE:

To obtain Commission approval of the staff's recommendation to address the Office of the Inspector General's (OIG) recommendations in OIG-06-A-07 that the NRC: (1) require verification of decommissioning fund balances from trustees and (2) require specific prudent investment restrictions for decommissioning trust funds.

BACKGROUND:

On February 6, 2006, the OIG issued its audit report entitled "Follow-up Audit of the Nuclear Regulatory Commission's Decommissioning Fund Program" (OIG-06-A-07). The stated purpose of the audit was to identify opportunities for improvement in the U.S. Nuclear Regulatory Commission (NRC) decommissioning funding assurance program (for operating power reactors), and evaluate the implementation of recommendations made in an earlier OIG audit report, OIG 99A-16, dated February 1, 2000.

In OIG-06-A-07, the OIG recommends that the Executive Director for Operations (EDO) seek, and the Commission provide, direction on whether to (1) require verification of decommissioning trust fund balances from trustees, and (2) require specific prudent investment restrictions for decommissioning trust funds. The OIG concluded that without these two requirements in place, all of the decommissioning trust funds accumulated to date are "at risk."

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The OIG also recommends that the EDO implement certain quality assurance measures for the staff's review of biennial decommissioning funding status reports and update the NRC's formula in 10 CFR 50.75 for calculating a minimum decommissioning cost estimate to determine required levels of decommissioning funding assurance. The staff is responding separately to the OIG recommendations made to the EDO regarding quality assurance and the NRC formula. The first two items listed above regarding which Commission direction is being sought are viewed as Commission policy matters and are the subject of this paper.

#### DISCUSSION:

##### Verification of Decommissioning Fund Balances By Trustees

In OIG-06-A-07, the OIG states that "NRR cannot verify" that licensees are providing reasonable assurance of decommissioning funding "consistent with prudent business practices." Prudent business practices, according to the OIG, call for the verification of trust fund balances by, at a minimum, requiring "trustees to report . . . directly to the NRC" the value of trust funds. The OIG states that NRR "merely relies on licensee representations for the amount accumulated in decommissioning trust funds based on 10 CFR 50.9." This regulation provides in relevant part:

Completeness and accuracy of information. (a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

In the OIG's view, decommissioning trust funds are at risk because the NRC (in addition to not having "specific prudent investment restrictions," as discussed below) does not require trustees to verify decommissioning trust fund balances. Therefore, the OIG's first recommendation is that the NRC require trustees to verify decommissioning trust fund balances.

The staff disagrees with this recommendation, and accordingly disagrees that the trust funds are at risk due to the lack of required trustee verification, for the following reasons.

First, the NRC relies on the requirements of 10 CFR 50.9 to ensure complete and accurate information is submitted not only with respect to biennial decommissioning funding status reports, but also concerning a wide range of information supplied by licensees upon which public health and safety determinations are made. Moreover, licensees, when providing information to the NRC, are subject not only to 10 CFR 50.9, but are also subject to criminal penalties under Section 223 of the Atomic Energy Act of 1954, as amended, 42 USC 2273, for willfully violating the regulation, and subject to criminal penalties under Section 1001 of Title 18 of the U.S. Code, for making a material false statement, regardless of whether the statement in question is made under oath or affirmation. Thus, there would appear to be ample incentive for licensees to accurately report the balances of their trust funds, given the foregoing provisions.

Second, it is unclear to the staff to what degree requiring trustees to file reports with the NRC would improve the level of certainty that trust funds are at the level that licensees report. The assumption that licensees could file false information with the NRC could equally apply to the trustees. Furthermore, even if the level of certainty increases, the staff is aware of no previous cases where licensees filed false trust fund balance information. Thus, the staff questions whether the new requirement proposed by the OIG is worthwhile, particularly since other regulatory authorities such as state public utility commissions continue to have decommissioning funding oversight roles for the vast majority of licensees, i.e., licensees that are electric utilities or that have access to non-bypassable charges.

#### Specific Prudent Investment Restrictions for Decommissioning Trust Funds

The OIG's second recommendation is that the NRC should "require specific prudent investment restrictions for decommissioning trust funds." According to the OIG, without such specific restrictions (and trustee verification of fund balances), all of the accumulated decommissioning trust funds are at risk. The staff disagrees with this recommendation and the OIG's conclusion that all of the trust funds are at risk without specific NRC investment restrictions.

It should be noted at the outset that at the end of 2003, new investment restrictions in 10 CFR 50.75(h) applicable to non-electric utility licensees became effective. Basically, the new restrictions prohibit decommissioning trust fund investments in licensee and nuclear sector securities or obligations, and require that investments be made in accordance with the "prudent investor standard" referred to in the regulations of the Federal Energy Regulatory Commission (FERC) but only in the absence of applicable state or Federal investment standards. The restrictions do not apply to electric utility licensees because the Commission recognized that other regulatory authorities have oversight of such licensees' decommissioning trust funds.

The staff does not agree that the NRC should require specific or more detailed investment restrictions for several reasons. First, the NRC historically has declined to inject itself into the financial management details of decommissioning funding, particularly in the case of regulated licensees, which still make up most licensees. As the Commission previously stated in Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, Advance Notice of Proposed Rulemaking, 61 FR 15427, 15428 (April 8, 1996) "the NRC recognized in the 1988 decommissioning rule [10 CFR 50.75], the PUCs' [public utility commissions'] and FERC's authority to set annual contribution rates to decommissioning funds and to establish investment and other management criteria for the funds. The PUCs and FERC also actively monitor these decommissioning funds as part of their rate regulatory responsibility." The furthest the NRC has gone is to impose on non-electric utilities, i.e., those not subject to traditional cost of service rate-making regulation, the new 2003 restrictions which basically follow the FERC's rules (18 CFR 35.32). Otherwise, the NRC's policy has been not to inject itself into the financial affairs of licensees, whether in the specific financial area of decommissioning funding assurance or more broadly in the general area of licensees' financial qualifications to safely operate and maintain their facilities.

Second, according to the Federal Deposit Insurance Corporation (FDIC), which examines trust operations at FDIC-insured banks, as of August 2004 all states except one have adopted the Uniform Prudent Investor Act (UPIA) or a quasi-UPIA. The UPIA basically provides for the duties and responsibilities of trustees including those duties and responsibilities relating to investment portfolios. Given state legislation adopting the UPIA to govern trust investments, as well as any other investment requirements of public utility commissions or FERC, the staff does not believe the NRC should step in with potentially inconsistent requirements.

If the NRC were to undertake to impose new specific investment restrictions, it should be recognized that at this time the NRC lacks the expertise to develop and continually reassess investment restrictions. Special expertise would have to be acquired in order to assess and properly balance levels of investment risk against licensees' and the public's interests in maximizing investment returns to ensure that sufficient decommissioning funds are accumulated. Clearly, the NRC would want to minimize the likelihood of decommissioning trust funds performing poorly due to new specific investment restrictions, thereby unintentionally undermining the objective of 10 CFR 50.75.

#### RECOMMENDATIONS:

The staff does not believe that there is a need to require verification of trust balances by trustees and to require specific investment restrictions beyond the restrictions in 10 CFR 50.75(h). However, the OIG recommendations are essentially policy matters and the staff agrees that they should be referred to the Commission for consideration and that the Commission should decide whether the staff should undertake efforts to implement the recommendations. The staff recommends that the Commission make no changes with regard to verification of trust balances by trustees or requirement of specific investment restrictions.

#### RESOURCES:

Because the staff does not recommend implementation of the OIG proposals, the staff has not developed detailed resource impacts. Should the Commission decide to pursue rulemaking, the staff would typically budget 2.4 FTE over a two-year period and specialized contract resources on the order of \$100K would be needed. Implementation costs resulting from rulemaking would depend upon the extent of the rule changes.

#### COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.

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