

RULEMAKING ISSUE AFFIRMATION

June 2, 2003

SECY-03-0090

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: FINAL RULE: 10 CFR PARTS 30, 40, AND 70: FINANCIAL
ASSURANCE FOR MATERIALS LICENSEES

PURPOSE:

To request Commission approval to publish in the Federal Register a final rule that amends financial assurance requirements for certain materials licensees in 10 CFR Parts 30, 40, and 70. The amendments would bring financial assurance requirements more in line with actual decommissioning costs for these materials licensees.

SUMMARY:

This paper contains a final rule amending financial assurance requirements for certain materials licensees. Eight comments were received on the proposed rule. Staff analysis of these comments concludes that the only recommended change from the proposed rule should be to use the existing definitions of *waste processor* and *waste collector* in 10 CFR Part 20, Appendix G, rather than introducing a new definition of waste broker in the regulations.

BACKGROUND:

The staff notified the Commission of its intent to develop a rulemaking to amend financial assurance requirements for materials licensees in SECY-01-0084 (May, 9, 2001). The staff

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provided the proposed rule to the Commission on June 27, 2002, in SECY-02-0116. The Commission approved publication of the proposed rule for a 75-day public comment period, in a Staff Requirements Memorandum dated August 27, 2002. The proposed rule was published on October 7, 2002 (67 FR 62403).

DISCUSSION:

A. Current Financial Assurance Requirements for Materials Licensees

Under current decommissioning regulations, materials licensees using quantities of nuclear materials above a threshold level must provide financial assurance for decommissioning. Most materials licensees are not required to provide financial assurance. Of approximately 4900 materials licensees, only about 10 percent require financial assurance. All but the largest licensees, such as fuel cycle licensees, may base the amount of financial assurance required on either a site-specific decommissioning cost estimate approved by NRC, or one of the certification amounts in NRC regulations.

The financial assurance requirements were promulgated in 1988 as part of the decommissioning rulemaking (53 FR 24018, June 27, 1988). Revisions to some of the financial assurance requirements for materials licensees are needed because there have been changes in decommissioning costs since that time. In addition, licensing experience has revealed that, for certain types of licensees, such as waste brokers, special considerations exist that require different treatment of these licensees.

B. Proposed Changes

The proposed changes were: (1) large sealed source licensees, i.e., large irradiators, would no longer be able to use certification amounts as a basis for financial assurance, and would have to base their financial assurance on site-specific decommissioning cost estimates; (2) all waste broker licensees would have to provide financial assurance and would not be permitted to use the certification amounts. They would have to base their financial assurance on site-specific decommissioning cost estimates; (3) all certification amounts would be increased by 50 percent; and (4) licensees using decommissioning cost estimates would have to update them at least every 3 years.

C. Public Comments and Staff Responses

Eight comment letters were received. Three were from industry organizations, four from corporations, and one from an individual health physics professional. The major comments and staff responses are summarized below:

(1) Large Irradiators. Some comments opposed the proposal to require large irradiators to base financial assurance on decommissioning cost estimates. These stated that the proposed new certification amount for a sealed source licensee of \$113,000 was adequate to cover decommissioning costs. The comments noted that sources have residual market values, and these values should be considered in determining decommissioning costs. An additional

objection was that decommissioning costs depend more on the size and complexity of the facility than the sources possessed.

Response. The staff agrees that the proposed rule does not take into account the residual market value of sealed sources. This approach is both appropriate and consistent with existing NRC policy. For example, current guidance in NUREG-1727 states the following:¹

The cost estimate should clearly state that it does not take credit for any salvage value that might be realized from the sale of potential assets (e.g., recovered materials or decontaminated equipment) during or after decommissioning. If estimated credits are taken for salvage value but are not fully realized at the time of decommissioning, the cost estimate (as well as the financial assurance) may be significantly low.

The staff believes that it would be inappropriate to incorporate salvage value into certification amounts when the actual residual value can vary substantially depending on the number and type of sources at a given facility, as well as on the curies present at the time of decommissioning (which generally is not known when a licensee's certification of financial assurance is put in place). Any residual value also would be subject to variability arising from changing market conditions. Therefore, it would be inappropriate to consider these characteristics when establishing generic certification levels.

If the potential salvage value of a source were to be used to offset the estimated cost of decommissioning, the effect would be to reduce the amount of funds guaranteed by financial instruments that possess a very high level of assurance, such as a prepaid escrow fund or an irrevocable letter of credit. However, the estimated salvage value of a source does not guarantee that funds will be available when needed. Even where a potential buyer provides a contractual promise to buy the source for a specified sum, the contract provides a lower level of assurance than the protection provided by the fiduciary obligations required of financial institutions that act as trustees or guarantors of funds. A contractual arrangement between the licensee and a buyer does not include the NRC as a beneficiary with the right to demand that funds be placed into a standby trust which restricts use of the funds for decommissioning only. In contrast, a letter of credit does establish the NRC as a beneficiary and gives the NRC the right to demand that funds be placed into a standby trust reserved for decommissioning. Therefore, permitting a licensee to reduce its decommissioning cost estimate by the potential salvage value of a source would decrease the level of financial assurance as compared to the financial instruments required by current regulations.

(2) Waste Brokers. Some comments objected to the proposed rule's definition of "waste broker." These comments noted that the proposed definition would include some activities not related to waste disposal. A comment noted that the proposed requirements for waste brokers should include waste collectors but does not. A comment noted that NRC does not have a clear standard definition of "waste," and thus a definition of waste broker is premature.

¹ NUREG-1727, "NMSS Decommissioning Standard Review Plan", Appendix F, September 2000, p. F26.

Response. The staff agrees that, as suggested by these comments, the proposed definition is problematic. The final rule does not include a definition of waste broker, but instead uses the existing definitions of waste processor and waste collector that are already in 10 CFR Part 20, Appendix G.

The staff believes that the potential problems being addressed by the rule are clear, regardless of whether the term “radioactive waste” is explicitly or consistently defined, and that it is unnecessary to define the term in this rulemaking. In addition, because the term has been used in current regulations and guidance in various contexts, defining it in this rulemaking could have unintended consequences.

(3) Frequency of Required Decommissioning Cost Updates. Several comments stated that the 3-year time frame for periodic decommissioning cost estimate updates is too frequent and that every 5 years would be more reasonable. One comment stated that cost estimates should be reassessed every 5 years in order to coincide with the license renewal process. This comment stated that, for irradiators, decommissioning does not involve disposal of materials as radioactive waste and, therefore, the stated impetus for the 3-year period (i.e., recent increases in radioactive waste disposal costs) does not apply. Another of these comments stated that NRC's proposal will be burdensome and appears to be driven by short-term investment performance and anticipation of higher waste disposal costs. This comment countered that the history of investments over long periods of time (40 years or more of facility lifetime) is very positive, and that licensees have taken steps to lower their waste disposal costs by reducing the volume of decommissioning waste that will be generated and by increasing the recycling of materials to other nuclear facilities.

Response. The staff believes that the proposed requirement to update decommissioning cost estimates every 3 years will help to ensure that financial assurance obtained by licensees will not become inadequate as a result of changing disposal prices or other factors. Increasing waste disposal costs have been and continue to be an NRC concern. However, decommissioning costs also may change for a variety of licensee-specific reasons (e.g., because of changes in the size and scope of operations) as well as for other reasons that may be out of a licensee's control (e.g., inflation). The proposed 3-year cost estimate updates are intended to capture changes in estimated costs regardless of cause, and to help ensure that the level of financial assurance required of each licensee is appropriate. The proposed requirement is appropriate, therefore, even for licensees that are not expecting to incur any significant waste disposal costs, as well as for licensees that may be taking steps to reduce the volume of decommissioning waste (which is only one component of decommissioning costs).

Although it would be less burdensome to require updates every 5 years as opposed to every 3 years, the staff believes that this would entail too great a risk that cost estimates could become significantly low.

CHANGES FROM THE PROPOSED RULE:

The definition of waste broker has been removed as discussed above. Section 30.35(c)(5) has been revised to require financial assurance of all waste processors and waste collectors. Implementation dates have been inserted in appropriate places in the rule.

STRATEGIC PLAN GOALS:

The rule would maintain safety by providing enhanced assurance of adequate/timely decommissioning. If a site is not decommissioned because of insufficient funds, there is an increased likelihood of contamination and/or exposure of members of the public. The rule would increase public confidence in NRC by reducing the likelihood that a State or local government would be forced to pay for decommissioning of a facility. It would make NRC financial assurance regulations more realistic and effective. Although the cost burden on licensees required to provide financial assurance would increase, the increase would be no more than necessary to maintain parity with increased decommissioning costs.

AGREEMENT STATE ISSUES:

No comments were received from Agreement States on the published proposed rule. The draft final rule was sent to Agreement States for review and comment on April 11, 2003, and no comments were received.

The Conference of Radiation Control Program Directors (CRCPD) has been developing amendments to the Suggested State Regulations for financial assurance. The staff has coordinated with CRCPD in preparing NRC's rule.

RESOURCES:

The staff estimates that 2.4 full time equivalents (FTE's) have been needed to develop this rulemaking. Implementation -- future guidance revision, and review of additional decommissioning cost estimates, will require an estimated 0.5 FTE. In addition, more frequent review of decommissioning cost estimate updates will require an estimated 0.1 FTE per year. Contractor support for the rulemaking is estimated at approximately \$160,000. These resources are within existing budget allocations.

COORDINATION:

In SECY-03-0069, "Results of the License Termination Rule Analysis," May 2, 2003, the staff made a number of recommendations, including additional changes to financial assurance requirements. The rule changes contained in this final rule address some decommissioning funding issues raised in SECY-03-0069. Financial assurance rule changes recommended in SECY-03-0069, if approved by the Commission, will be the subject of a separate, future rulemaking.

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

objections. The rule changes information collection requirements. The proposed rule was submitted to the Office of Management and Budget (OMB) before it was forwarded to the Federal Register for publication.

RECOMMENDATIONS:

That the Commission:

1. Approve for publication, in the Federal Register, the amendments to Parts 30, 40, and 70 (Attachment 1).
2. Note:
 - a. That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification regarding economic impact on small entities and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b);
 - b. That a Regulatory Analysis has been prepared for this rulemaking (Attachment 2);
 - c. That an Environmental Assessment is included in the Federal Register notice under "Environmental Assessment and Finding of No Significant Environmental Impact";
 - d. That appropriate Congressional committees will be informed of this action;
 - e. That NRC has determined that this action is not a major rule, under the Small Business Regulatory Enforcement Fairness Act of 1996, and has confirmed this determination with OMB. This determination will be reflected in correspondence to the President of the Senate, the Speaker of the House of Representatives, and the General Counsel of the General Accounting Office (Attachment 3); and
 - f. That resources to complete and implement this rulemaking are included in the current budget.

/RA by William F. Kane Acting For/

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Attachments:

1. Federal Register Notice
2. Regulatory Analysis
3. SBREFA Form

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*See Previous Concurrence

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