NEI backfit issues related to the Decommissioning Planning rule, raised 11/5/2008

NEI (through Alex Marion and Bill Horin) elaborated on 11/5/2008 on several backfitting related issues NEI has with the Decommissioning Planning rule. Those issues are identified below, with the NRC response.

1. As described in comment F.1 of the draft final rule (p. 71), the NEI states that the rulemaking is not a clarification, as evidenced by the extensive rulemaking effort. In addition, NEI made a more general observation that the lengthy rulemaking records are making it more difficult for industry stakeholders to understand the new or amended requirements in a rule.

   Internal response: In Section XII of the draft final rule, Backfit Analysis, the NRC specifies that the clarification only applies to survey and monitoring changes being made in 10 CFR 20.1406(c) and 20.1501. These changes are described in seven pages of the draft final rule FRN, in section II.I, What Changes Are Being Made to 10 CFR 20.1406, and in section II.J, What Surveys are Required Under Amended 10 CFR 20.1501(a). The large majority of changes being made in the rulemaking which relate to financial assurance mechanisms and reporting requirements associated with decommissioning financial assurance are not considered clarifications for purposes of the backfitting discussion. Therefore, NEI is incorrect in its assertion that the NRC treated these provisions as "clarifications."

2. As described in comment G.7 of the draft final rule (p. 87) and discussed more extensively on 11/5/2008, the NEI stated that the premise for the need for the rule is based on the existence of 7 legacy sites of former material licensees. The NEI tried to identify the 7 sites, but was able to identify only one. The NEI states that none of the 7 legacy sites were power reactors, nor were the sites subject to specific effluent release guides in 10 CFR Part 50, Appendix I which are different from and more stringent than the requirements that apply to materials sites. Furthermore, NEI stated that some of the legacy sites were not licensed by the NRC or Atomic Energy Commission (AEC) during the time period when the problems at these sites began to occur. Finally, NEI stated that materials licensees are fundamentally different from power reactor licensees, in that the power reactor licensees are large corporations with substantial ongoing businesses that generate a large amount of cash flow, or are otherwise subject to cost-recovery in a regulated utility environment. Thus, NEI contends that the 7 legacy sites cannot reasonably be expected to be a proxy for possible problems at power reactors.

   Internal response: The NRC understands that the 7 legacy sites are materials facilities that operated in a regulatory era with fewer requirements and far less regulatory oversight than the current regulatory framework, as well as the fact that the nuclear power reactors are subject to the more stringent effluent release limits in 10 CFR Part 50, Appendix I. However the basis of the draft final rule, as applied to power reactors, is not based upon these considerations. Rather, the draft final rule is focused on the many

unplanned and unmonitored radioactive releases from many power reactors to the subsurface environment at the site of those reactors. This is the type of operating experience that the amended survey requirement addresses. Surveys, and the monitoring data thereby generated, will document the concentration of any contamination that may be present. Such data would be needed to understand potential migration paths. The lack of such data is what was shown to be in the technical basis for the rule a primary contributor to the creation of past legacy sites. Thus, the survey information is necessary in order for the licensee to know what decommissioning activities are likely, develop an accurate decommissioning cost estimate, and provide adequate funding to the decommissioning financial assurance account based upon that cost estimate.

Whether a licensee has a large amount of cash flow or is assured its decommissioning costs through a regulated utility environment is not relevant to the backfit considerations of this final rule, i.e., whether the rule constitutes a "substantial increase in the protection to public health and safety." The NRC concern is on the allocation of funds to the decommissioning financial assurance account during facility operations, based on a full set of information as to what is likely to be required at time of decommissioning. The amended requirements in 10 CFR 20.1501(a) and (b) will ensure that surveys are performed of significant subsurface contamination at the site during facility operations to support the licensee's decommissioning cost estimate. For power reactors, reporting the decommissioning cost estimate may not be required until a few years before reactor shut down, but collection of survey information for areas at the site with significant residual radioactivity must be performed as the need arises based on the operating characteristics and operating history of the facility.

3. As discussed in comment III.J of the draft final rule (p. 154), the NEI states that the rulemaking is more than information collection, inasmuch as licensees will be forced to develop new procedures and install new environmental monitoring equipment. NEI believes NRC should have prepared a clear statement of the value of information collections, given the high cost of such information collections by reactor licensees and that there has been no showing that reactor licensees have been prone to the kinds of actions/problems that underlie the proposed regulatory changes.

   Internal response: The NRC disagrees with the NEI on this topic. Under changes to 10 CFR Part 20, the licensees of power reactors will need to install no new environmental monitoring equipment as long as contamination at the site is not significant (i.e., residual radioactivity is at a concentration level below 25 mrem total effective dose equivalent per year at the time of decommissioning). [see pages 11, 25, 49, 72, 75, 102; proposed rule 73 FR 3815 c. 1, 3819 c. 3, 73 FR 3835 c.3]. The NEI agrees with the NRC staff that none of the operating power reactor sites now contain significant amounts of residual radioactivity. In the future, if there is reason to believe contamination at a power reactor site may exceed that level, then the licensee first would be required to perform surveys to document the extent of the contamination followed by environmental monitoring if the contamination is significant and may disperse from its current location. The NRC staff

believes that no new procedures are required, as licensee should already have procedures to survey contamination to achieve occupational doses and doses to the public that are ALARA, per § 20.1101(b). While the cost of such environmental monitoring may be substantial, the benefits of such monitoring (i.e., accurate characterization of contamination to support more accurate decommissioning costs estimates, and decommissioning account funding) justifies this potential cost.

The Decommissioning Planning rule imposes no new information collection burden on licensees of power reactors, but there is an additional reporting burden for these licensees. The estimated reporting burden is documented in the OMB supporting statement for the rule. This additional burden is due to new requirements in §§ 50.82(a)(8)(v), (vi) and (vii). The burden for each of 10 licensees is estimated at 32 hours per year, for a total of 320 hours additional reporting by power reactor licensees (p. 32 of OMB supporting statement). The reporting burden also is documented in the Regulatory Analysis (RA) for the rule (p. 61 of RA). The NRC staff does not agree this reporting burden to be a high cost to power reactor licensees. NRC has made a showing that power reactors are prone to the types of problems that underlie the rule (RA p. 7).

4. In the May 8, 2008 NEI transmittal letter (see insert to ML081760135) of its comments on the Decommissioning Planning proposed rule, the NEI states that the regulatory analysis for the rulemaking is not sufficient in its claim that the legal criteria governing backfitting do not apply.

   Internal response: The NRC has stated in both the proposed rule and draft final rule that the legal criteria governing backfit do not apply because the new or amended regulations in the rule either clarify existing requirements or require the collection and reporting of information using existing equipment and procedures. These were discussed above in items 1 and 3.

   The regulatory analysis did not analyze the cost to power reactor licensees resulting from a proposed requirement (10 CFR Part 30 Appendix A, Section III.E) in the rule to include a joint and several liability clause in the Parent Guarantee. The NRC staff was under the belief that there was a guarantee on the part of the guarantor using a Parent Guarantee for the full cost of decommissioning if the licensee was unable to pay for the decommissioning, based on the introductory language of 10 CFR Part 30 Appendix A that refers to “availability of funds for decommissioning.” The staff interpreted this to mean an amount necessary to complete decommissioning.

   A 1998 final rule (63 FR 50465) allowed power reactor licensees to use a Parent Guarantee in combination with a sinking fund, and NEI maintained in its comments on the proposed rule that following that final rule, the Guarantee was for a limited specified amount. Following the 11/5/08 meeting, the staff checked its files and found an executed Parent Guarantee for the Duane Arnold power reactor. This guarantee is for a limited specified amount. The NRC staff now agrees with the NEI that inclusion of a joint and several liability provision in 10 CFR Part 30 Appendix A would constitute a change in policy from that reflected in the 1998 final rule. Since the

regulatory analysis for the present rulemaking did not analyze the costs to licensees associated with this change, including 10 CFR Part 30 Appendix A, Section III.E in the final rule would not meet backfit requirements. As a result, staff recommends that this joint and several liability provision be removed in its entirety, as it should apply consistently between materials and power reactor licensees. Removal of this provision from the draft final rule and any change in the SOC for the rule to reflect this change, however, will require re-noticing to allow all external stakeholders to comment on this change. The staff plans to achieve this through a supplemental proposed rule limited to the removal of the joint and several provision from the rule.

5. In the May 8, 2008 NEI transmittal letter of its comments on the Decommissioning Planning proposed rule, the NEI states that the review of the backfit analysis of the proposed rule was not performed by the CRGR, which was provided copies of the proposed rule and final rule for information only. NEI requested that the draft final rule should be reviewed by the CRGR. NEI also reiterated its request that the CRGR treat the comments of NEI on the draft final rule as a backfit appeal to be resolved by the CRGR.

   Internal response: The CRGR is an NRC internal organization, and the nature and scope of its activities with respect to a specific regulatory action are not the proper subjects of public comment in a rulemaking proceeding. Moreover, the CRGR was provided with the draft final rule package, and the Chairman of the CRGR confirmed that they did not see any need to review the rulemaking package. It may be useful in the future when transmitting the information package on a draft final rule to the CRGR, for the transmittal memorandum to explicitly state that the staff expects the CRGR to communicate to the EDO any backfitting concerns it identifies as the result of its review of the rulemaking package. It may also be appropriate for the CRGR to revise its Charter to reflect the procedure and circumstances for reviewing such rulemaking packages.

   NEI's May 8, 2008 request that the CRGR treat its comments on the proposed decommissioning planning rule as a plant-specific backfitting appeal is not a valid request. The appeal process set forth in Management Directive 8.4 applies to facility-specific backfits and does not apply generic requirements being considered publicly through a notice and comment rulemaking process. The considerations in a facility-specific backfitting appeal are different in nature from the backfitting considerations applicable to a generic rulemaking. The CRGR has never treated backfitting comments on a rulemaking as a facility-specific backfitting appeal.

   The staff followed the Commission’s directions as stated in SRM-SECY-07-0134. With respect to arguments made by Bill Horin on 11/5 that the SRM was not consistent with comments made on the Commissioners’ individual voting sheets, it is not uncommon for the final SRM to differ from certain aspects of individual vote sheets. But the final SRM represents the position of a majority of the Commission. The process of generating an SRM often involves significant negotiations after the votes. Here, this is indicated by the passage of some weeks between the votes and the SRM’s issuance.