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Three Empire State Plaza, Albany, NY 12223-1350  
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August 31, 2023

**VIA ELECTRONIC SUBMISSION**

Brooke P. Clark  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16 B33  
Washington, DC 20555-0001

ATTN: Rulemakings & Adjudications Staff

Re: NRC Rulemaking for Production and Utilization Facilities  
Transitioning to Decommissioning NRC-2015-0070

Dear Secretary Clark:

Enclosed please find supplemental comments submitted by the New York State Department of Public Service concerning NRC's proposed decommissioning rulemaking.

Respectfully submitted,

*s/ John J. Sipos*

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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Regulatory Improvements for Production and  
Utilization Facilities Transitioning to  
Decommissioning

10 CFR Parts 20, 26, 50, 51, 52, 72, 73, 140

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Docket No.:  
NRC-2015-0070

RIN: 3150-AJ59

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**SUPPLEMENTAL COMMENTS SUBMITTED BY  
THE NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE**

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Submitted: August 31, 2023

## NOTE REGARDING CITATIONS AND REFERENCED DOCUMENTS

All citations and references mentioned in this document are hereby incorporated by reference. Should NRC Staff be unable to obtain any such citations or references, they are requested to contact the New York State Department of Public Service for assistance.

On March 3, 2022, the United States Nuclear Regulatory Commission (NRC) invited public comments on a proposed rule entitled “Regulatory Improvements for Production and Utilization Facilities Transitioning to Decommissioning” (the Proposed Rule). 87 Fed. Reg. 12254 (Mar. 3, 2022). In response, the New York State Department of Public Service (the Department)<sup>1</sup> submitted comments contending that the Proposed Rule missed the mark and should be revised. *See* ADAMS Accession No. ML22243A206 (hereinafter “Aug. 31, 2022 comment”). Upon continued consideration, the Department has concluded that the Proposed Rule would be further strengthened by the inclusion of a new, comprehensive Decommissioning Reactor Oversight Process. Accordingly, the Department now offers the following supplemental comment on the Proposed Rule.<sup>2</sup>

## Background

As the Department noted in its initial comment, NRC’s current approach to decommissioning oversight is an industry-driven process during which a retired reactor and associated supporting systems proceed through a series of guidance documents, exemptions, and recissions at a pace selected by the owner. *See* Aug. 31, 2022 comment, at 2. This rulemaking presents an opportunity to strengthen that approach by tailoring NRC oversight more specifically to the particular challenges presented during decommissioning.

The Proposed Rule, however, misses that opportunity. Instead, the proposal focuses primarily on promoting licensee convenience by relaxing various regulatory requirements once a reactor enters its decommissioning phase. *Id.* at 7-13. And although the Department agrees that an operating reactor’s risk profile can differ substantially from that of a decommissioning reactor, the Proposed Rule should not contemplate *only relaxing* existing regulatory requirements for decommissioning licensees. Rather, it should strive to establish a sensible regulatory regime that best addresses the decommissioning’s unique challenges.

This is especially so given that, as the then-chief of NRC’s Reactor Decommissioning Branch acknowledged at the 2022 Regulatory Information Conference, public interest in site activities can increase dramatically following shutdown. Communities that have long been accustomed to an operating reactor’s

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<sup>1</sup> The Department is the staff arm of the New York State Public Service Commission (NYSPSC), which regulates New York’s electric, gas, steam, telecommunications, and water utilities, as well as its energy production facilities. The NYSPSC has a broad mandate to both ensure that New Yorkers have access to safe and reliable utility service at just and reasonable rates and to protect New York’s environment. N.Y. Pub. Serv. Law § 5. The Commission also possesses general supervisory powers over New York electric plants, which include retired nuclear power plants. N.Y. Pub. Serv. Law §§ 2(12), (13); 5; 66(1).

<sup>2</sup> The comments provided here do not necessarily reflect the views of any particular New York Commissioner.

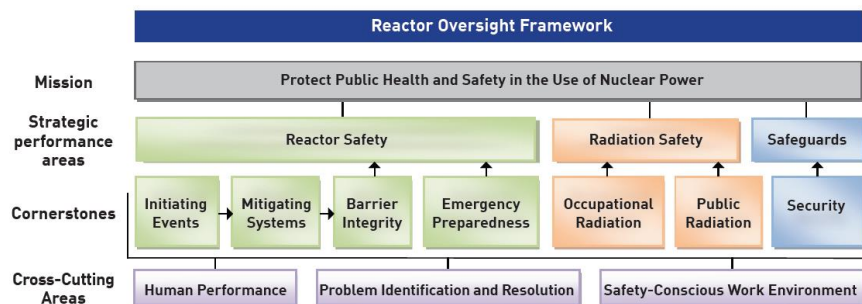
practices are suddenly confronted with new, unfamiliar activities on site and understandably have questions about how those activities will affect them. For example, it has been the Department’s experience that community members are both puzzled and concerned when they learn that, once a site enters a decommissioning phase, NRC’s inspectors are no longer on site full-time. Concerns like these can undermine public confidence in NRC and in the decommissioning work itself.

For these reasons, the Department recommends that the Proposed Rule be revised to include a comprehensive Decommissioning Reactor Oversight Program, to ensure the safe, prompt, and thorough decommissioning of reactor sites and to restore public confidence in NRC oversight.

**The Proposed Rule should be revised to include a comprehensive Decommissioning Reactor Oversight Process.**

Currently, NRC does not employ its Reactor Oversight Process to regulate decommissioning reactors and sites—rather, NRC relies on its Traditional Enforcement Process. NRC’s application of that process to decommissioning reactors is explained in NRC Inspection Manual Chapter (IMC) 2561. IMC 2561 states that “licensee decommissioning programs and procedures should be comparable to the rigor, quality, and effectiveness of those used during power reactor operation.” ADAMS Accession No. ML20358A131, at 11. Nevertheless, the framework under which NRC currently regulates decommissioning reactors is less stringent than the framework used for operating reactors and associated spent fuel pools. The Department submits that the public interest would be better served if NRC’s process for regulating decommissioning reactors more closely resembled its process for regulating operating reactors and storage pools.

Specifically, NRC should adapt its existing Reactor Oversight Process (ROP) for decommissioning reactor sites. The ROP protects public health and safety in the use of nuclear power by reviewing a licensee’s performance across three “Specific Performance Areas,” each of which is subdivided into distinct “cornerstones:”



See NUREG-1649, Revision 6, at 3 (July 2016) (ADAMS Accession No. ML16214A274). The ROP features quarterly assessments that consider nearly two dozen specific performance indicators. These performance indicators are supplemented by findings from NRC resident inspectors. Taken together, the performance indicators and inspector findings determine how the facility is categorized under the ROP’s “Action Matrix.” The Action Matrix features five categories, and a facility’s Action Matrix classification informs NRC’s response to the facility’s performance. NRC also issues annual, publicly available letters to each licensee that review each reactor’s performance over the previous year.

With the ROP, NRC can clearly measure how an individual reactor’s performance compares to its peers in the U.S. fleet, detect declining performance early, set licensee expectations as to how declining performance will be penalized, and keep the public informed about ongoing reactor performance issues.<sup>3</sup> Additionally, the ROP provides NRC inspectors with a straightforward and concrete pathway to escalate oversight in response to a licensee’s declining performance.

A Decommissioning ROP would offer similar benefits for the country’s ever-growing fleet of decommissioning reactors and densely packed spent fuel pools. The Decommissioning ROP’s Strategic Performance Areas could mirror those of the ROP by including decommissioning (rather than reactor) safety, radiation safety, and safeguards. The ROP’s radiation safety and safeguards cornerstones apply with equal force to decommissioning and could be exported wholesale to the Decommissioning ROP. The decommissioning safety Strategic Performance Area, by contrast, would require decommissioning-specific cornerstones. These could include safety events, finance, fuel integrity, emergency preparedness, and others NRC deems appropriate.

The Decommissioning ROP should also, at a minimum, assess each decommissioning reactor’s performance under objective standards similar to the ROP’s performance indicators. As it does with the ROP, NRC should generate annual letters for each decommissioning reactor that summarize the results of the agency’s oversight during the previous year. And the Decommissioning ROP should also feature formal, periodic self-assessments of the effectiveness of NRC oversight.<sup>4</sup>

Finally, as with the ROP, NRC’s regulatory oversight under the DROP should be commensurate with the safety significance of a facility’s deficient

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<sup>3</sup> The NRC has in fact already adapted this template to regulate reactors under construction with the Construction Reactor Oversight Process (CROP).

<sup>4</sup> The Department takes this opportunity to reiterate that NRC should retain at least one resident inspector, or alternatively assign new decommissioning inspectors, to provide ongoing oversight of a licensee’s decommissioning activities. See Aug. 31, 2022 comment, at 8.

performance. The ROP encourages compliance by calibrating NRC’s regulatory response based on the safety significance of the issues to be addressed:

NRC response plan to ROP assessment of plant performance	
ROP Action Matrix Assessment of Plant Performance	NRC Response
<b>Column 5. Unacceptable Performance</b> Increasing Safety Significance ↑	<b>Response at Agency Level</b> <ul style="list-style-type: none"> <li>• Meeting with NRC Executive Director for Operations and senior plant management</li> <li>• Order to modify, suspend, or revoke license</li> </ul>
<b>Column 4. Multiple/Repetitive Degraded Cornerstone</b> Repetitive degraded cornerstone, multiple degraded cornerstones, or multiple YELLOW inputs, or one RED input	<b>Response at Agency Level</b> <ul style="list-style-type: none"> <li>• Meeting with NRC Executive Director for Operations and senior plant management</li> <li>• Plant operator improvement plan with NRC oversight</li> <li>• NRC team inspection focused on performance issues at the site</li> <li>• Demand for Information, Confirmatory Action Letter, or Order</li> </ul>
<b>Column 3. Degraded Performance</b> One degraded cornerstone (three WHITE inputs or one YELLOW input in a cornerstone) or three WHITE inputs in any strategic performance area	<b>Response at Regional Level</b> <ul style="list-style-type: none"> <li>• Meeting with NRC regional management and senior plant management</li> <li>• Plant operator self-assessment with NRC oversight</li> <li>• Additional NRC inspections focused on cause of degraded performance</li> </ul>
<b>Column 2. Regulatory Response</b> No more than two WHITE inputs in a strategic performance area	<b>Response at Regional Level</b> <ul style="list-style-type: none"> <li>• Meeting with NRC and plant management</li> <li>• Plant operator corrective actions to address WHITE inputs</li> <li>• NRC inspection to follow up on WHITE inputs and corrective actions</li> </ul>
<b>Column 1. Licensee Response</b> All performance indicators and cornerstone inspection findings GREEN	<b>Normal Regional Oversight</b> <ul style="list-style-type: none"> <li>• Routine inspector and staff interaction</li> <li>• Baseline inspection program</li> <li>• Annual assessment public meeting</li> </ul> ↑ Increasing Regulatory Oversight

See NUREG-1649, Revision 6, at 7 (July 2016) (ADAMS Accession No. ML16214A274). NRC's actions for performance below the green level, for example, may include meetings with the licensee, additional inspections, and required reviews and response from the licensee. Further declines in performance may warrant stronger action by NRC, including a civil order or even the suspension of an operating license.

The Decommissioning ROP should feature a similar incentive structure. Although the Traditional Enforcement Process does contemplate additional inspections and higher civil penalties for repeat violations (*see generally* NRC Inspection Procedure 92702, Followup on Traditional Enforcement Actions Including Violations, Deviations, Confirmatory Action Letters, Confirmatory Orders, and Alternative Dispute Resolution Confirmatory Orders (Jan. 2008) (ADAMS Accession No. ML072820539)), those consequences are tied to an individual violation’s severity level, rather than overall plant performance. These escalated enforcement options are also highly discretionary, which undermines their deterrent effect because they consequently do not clearly set licensee’s expectations. As a result, a violation found under the Traditional Enforcement Process, for decommissioning reactor sites lacks the same “early warning” or “heads up” effect as a corresponding violation found at an operating reactor. In sum, it fails to provide NRC inspectors with the same straightforward escalation pathway found in the ROP.

For example, Crystal River averaged 0.6 decommissioning violations per year between 2014 and 2022. Vermont Yankee averaged 0.4 violations between 2015 and 2022, and Three Mile Island experienced no violations (through April 2023) during its decommissioning. San Onofre, by contrast, has averaged 2.1 violations per year since 2013, and Indian Point has averaged roughly 3.5 violations per year during its

first two years of decommissioning. NRC's response should differ based divergent patterns of compliance.

Licensees running operating reactors and storage pools understand that repeated violations and declining overall performance will lead to heightened NRC oversight in the form of additional inspections, reports, and possibly fines, thereby costing the licensee valuable staff time and money. Decommissioning licensees should be regulated under a similar incentive structure. A comprehensive Decommissioning ROP could achieve this.

### **Protecting Decommissioning Trusts**

To meaningfully incentivize compliance, the Department also urges NRC to prohibit the payment of any fines or civil financial penalties for noncompliance from a site's decommissioning trust funds. Those funds were placed in trust, often under the auspices of state PUC ratemaking authority, to protect the public interest in a safe, thorough, and prompt decommissioning. That public interest and those trusts should not be jeopardized or reduced by a licensee's noncompliant conduct. Relatedly, in performing their duties, NRC and state inspectors should not have to "factor in" or be concerned how their work to promote regulatory compliance could impact the availability of trust funds.

In closing, the Department expresses its appreciation to NRC for the opportunity to comment and would welcome further engagement from NRC on these important issues.

Dated: August 31, 2023

Respectfully submitted,

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