December 3, 1984

POLICY ISSUE
(Notation Vote)

SECY-84-456

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: FUNDING OF NRC'S HIGH LEVEL WASTE MANAGEMENT PROGRAM COSTS UNDER THE NUCLEAR WASTE POLICY ACT OF 1982 -- USE OF NUCLEAR WASTE FUND

Purpose: To obtain Commission concurrence on funding of the NRC's High Level Waste Program (HLWP) and proposed legislative changes concerning the use of the Nuclear Waste Fund (NWF).

Category: This paper covers a significant policy matter.

Discussion: Last year the Office of Management and Budget (OMB) proposed to reduce the NRC FY 1985 budget request for NWPA-related activities by $10 million. The OMB staff proposed that the $10 million reduction could be offset by NRC using monies from the Nuclear Waste Fund (NWF) established under Section 302 of the NWPA. The method and authority to transfer monies from the Fund to NRC were not specified by OMB. Chairman Palladino's December 2, 1983 reclama letter to Mr. David Stockman (Enclosure 1) included an appeal to restore this reduction due to the uncertainty in the resolution of the complex legal issues associated with this funding approach. As a result, OMB agreed to leave the $10 million in our request to the Congress, but advised us to seek a way by which NRC could obtain monies from the NWF sufficient to meet our future needs in carrying out our NWPA responsibilities.

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Nuclear Waste Fund

Section 302 of the NWPA established the NWF to finance the disposal of high-level radioactive waste and spent nuclear fuel. The NWF receives all the revenue the Department of Energy (DOE) collects from the nuclear utilities under the NWPA disposal services contracts. The main source of revenue for the NWF is the one mill per kilowatt hour fee charged for all electricity generated by civilian nuclear reactors beginning April 7, 1983. The NWPA provides for annual review and adjustment to ensure that the fee is sufficient to recover all program costs.

Funding NRC NWPA Activities from the NWF

There is no existing law which requires that the NWF be used to finance NRC's HLWP. A legal review and analysis (Enclosure 2) was conducted to determine whether Section 302 of the NWPA and its legislative history supports a rational legal position that monies from the NWF were intended to be used to finance NRC's HLWP.

Based on this review, it was concluded that there is no basis in Section 302 as enacted or its legislative history for concluding that the NWF cannot be used to fund NRC's HLWP, if the conditions applicable to any other use of the NWF are met. On the other hand, there is little support for concluding that the NWF must be used or was ever intended to be used for that purpose.

There are two features of Section 302 which could support arguments for the use of the NWF for NRC NWPA activities. With respect to the first, the following portions of Subsection 302(d) are pertinent:

(d) ...The Secretary may make expenditures...for purposes of...

(1) ...licensing...any repository, monitored, retrievable storage facility or test and evaluation facility...;

(2) the conducting of nongeneric research, development, and demonstration activities...;

(3) the administrative cost of the radioactive waste disposal program;

The second is the principle of full cost recovery to the Government. Subsection 302(a)(4) provides that the Secretary of DOE shall propose an adjustment of fees assessed on

generators of high-level radioactive waste "to insure full cost recovery" of "the costs incurred by the Federal Government that are specified in subsection [302] (d)". These, as we have noted, include licensing, the conduct of nongeneric research, and the administrative cost of the radioactive waste disposal program.

Senator McClure, the Manager in the Senate of the bill enacted into law, stated the following concerning the funding provisions in Section 302 (Cong. Record, daily edition, December 20, 1982, pp. S15655-S15656):

> The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.
>
> The bill provides for a contractual fee, initially set at 1 mill per kilowatt-hour, which would be charged on the production of electricity from nuclear power plants. Receipts from this fee would be placed in a separate account in the Treasury established solely for this purpose and would then be appropriated for the waste program on an annual basis. According to the Congressional Budget Office this fee is adequate to cover the costs of this legislation well into the 1990's. However, the bill requires that the adequacy of the fee be reviewed on an annual basis, and the fee could be modified in the future if receipts fell below costs of the program.
>
> This funding mechanism would provide an assured source of funds to carry out the programs and would eliminate not only annual budgetary perturbations in an evermore constrained Federal budget, but the too often repeated shifts of policy direction under succeeding administrations. The nuclear waste policy, programs, and required financing would be statutorily fixed and quite predictable under this approach.

The language in Senator McClure's statement is informative legislative history because under the procedures which were followed in the passage of H.R. 3809 on December 20, 1982,

there was no conference and no conference report. Thus, the Senator's statement is the best available documentation of how the differences between the two Houses were resolved.

Arguments that the NWF was not intended to support NRC's HLWP are that specific use of the NWF for NRC program purposes was not raised at any time during Congressional consolidation of the bills. We have not found one clear indication that Congress intended the NRC's activities relative to NWPA were to be funded from the NWF. Congress clearly considered the role of the NRC in the NWPA and gave the NRC multiple responsibilities, and had ample opportunity to include NRC as a direct user of the Nuclear Waste Fund. It is also clear that the cost analyses considered in connection with the legislation including the establishment of the per kWh charge were based upon Department of Energy estimates which did not consider non-DOE expenditures.[1]

Aside from legal considerations there are substantial policy considerations involved in any direct NRC use of monies in the NWF vis-a-vis appropriation for NRC HLWP. It appears that the policy issue is the principal determinative of the course of action which NRC should pursue.

Policy Issue:
The NRC should only consider it appropriate to fund its HLWP out of the NWF if the independence of the NRC is preserved and would be perceived to be preserved. The fundamental principle is that the NRC must be able to evaluate objectively the merits of any license application submitted by DOE. The capability of any license applicant to restrict or improperly influence the Commission's regulatory judgment is unacceptable. Thus, if the NRC is to use monies from the NWF, the amounts to be obtained ought not be determined by the Secretary of DOE nor should the Secretary be able to influence the purposes for which the funds are expended or the authority to audit expenditures. However, since only the Secretary of DOE can authorize expenditures from the NWF under Section 302(d), any monies used by NRC from the NWF would be subject both in amount and purpose to whatever level of funding and program oversight the Secretary believes necessary in carrying out his statutory responsibilities. Under these circumstances, NRC probably could not avoid an actual or at least a perceived ability of the Secretary to control or influence NRC in carrying out its NWPA responsibilities.

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1 See Congressional Record, daily edition, April 28, 1982, at pp. S4164-S4169.

Proposed Course of Action:

Therefore, it appears that the only prudent course of action is for NRC to continue to request appropriated funds to finance its HLWP.

By adopting this course of action (i.e., fund our HLWP from appropriations) we would not preclude recovery by the Treasury of the NRC HLWP costs from the NWF. To accomplish such a recovery it is proposed to amend the Atomic Energy Act to the following effect. The Secretary of DOE would pay into the Treasury from the NWF an amount certificated by the NRC to have been expended in carrying out its HLWP. These payments would continue until such time as the NRC responsibilities under NWPA are discharged. It should be noted that (1) for this approach the funds from the NWF would not be a fixed fee but would involve a detailed annual accounting of actual expenditures and would not constitute a "licensing fee" as used by the NRC under Part 170 and (2) of the total NRC NWPA-related resources budgeted for FY 1985 (approximately $21 million, including salaries and benefits), only about $14 million would be eligible for nuclear waste fund support. The remaining $7 million is for generic research in the HLWP and other NWPA activities not related to the HLWP (e.g., Section 151, financial arrangements for low-level radioactive waste site closure).

Recommendation: That the Commission:

1. Agree that NRC should continue to request Congressional appropriations to finance its HLWP (status quo).

2. Agree to propose legislation to modify Section (tbd) of the Atomic Energy Act which would require payments by the Secretary to the Treasury from the NWF those amounts certified by NRC as having been expended by NRC in conducting its HLWP. Such payments to continue until NRC discharges its responsibilities under NWPA (Enclosure 3).

3. Note:

   a. This proposal may require an increase in the 1 mil per KwH charge to HLW generators in the future.

   b. This proposal does provide for the federal government to recoup from the NWF most of NRC's NWPA-related costs.

c. This proposal would hopefully result in the Congress giving a clear statement of whether it was intended for NRC HLWP cost to be funded by the NWF.

William J. Dircks
Executive Director for Operations

Enclosures:
1. Letter to Mr. David Stockman from Chairman Palladino, dtd 12/2/83
2. Memo for John G. Davis from Guy H. Cunningham, dtd 6/4/84
3. Proposed amendment to the Atomic Energy Act of 1954

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, December 19, 1984.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, December 12, 1984, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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ENCLOSURE 1

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

CHAIRMAN

ENCLOSURE 1

December 2, 1983

The Honorable David A. Stockman
Director, Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

The Commission has been informed by your staff that its recommendation for NRC's FY 1985 budget authorization is $51.6 million less than our request, and includes a reduction of 225 full-time equivalent (FTE) staff.

We have reviewed our budget in light of your staff recommendations and we trimmed it as much as we could while still meeting our commitments. The results of our review are discussed below. We cannot carry out our various functions if we are cut to the extent your staff has recommended.

As I mentioned in my budget submission letter in September, the NRC over the last several years has made significant efforts to reduce expenditures and staff needs in accordance with current cost saving initiatives. These efforts to cut expenditures have been most fruitful in our research budget -- our FY 1984 estimated obligations for research are $42.5 million less than our obligations in FY 1981. Thus, in real terms, our research program buying power has been cut enormously. However, strong and effective research on our remaining tasks is needed to improve the technical basis for conducting licensing and inspection activities and for making regulatory decisions.

Reducing our request for staff by 225 FTE presents us with major problems. It takes an adequate number of people to carry out our regulatory functions, and our staff needs have increased substantially as utilities have tried to complete the construction of their plants and ready them for operation. Many problems have occurred, particularly with some utilities new to the field, which require careful and repeated inspections and licensing reviews. We must exercise significantly more oversight to ensure compliance with health and safety regulations. I believe that past efforts to cut back on staff have been counterproductive in that with reduced oversight we have not always identified potential problem areas before the problems became severe. Identifying and correcting these problems requires more resources not only of the utilities but of the NRC as well. In addition, such problems have involved delays in completion of construction and readiness for operation costing many hundreds of millions of dollars.

We urgently need more staff to do our inspection job. Also, as new plants enter into service we need more people to provide operational surveillance. While some of the staff needed for these purposes can and have come from reductions in licensing efforts, the licensing load has not dropped as fast as one might expect. Plants plagued with either construction or operating problems find it necessary to stretch out the licensing process, and the additional analyses required to resolve problem areas actually add to the licensing workload.

Your staff recommended a reduction in funding partly on the assumption that the Nuclear Waste Fund established under Section 302 of the Nuclear Waste Policy Act of 1982 will provide $10 million to NRC's High Level Waste program in FY 1985. We believe that this action is not warranted until the complex legal issues associated with this funding approach are resolved. Due to the uncertainty in the resolution of the legal issues, we are appealing this funding reduction.

Additionally, our requested staff resources for Nuclear Waste Policy Act activities were reduced on the assumption that the Department of Energy's schedules had slipped. In the absence of notification by DOE of schedule slippages, we are also appealing this staff reduction. The NRC requires sufficient staff and funding to fulfill its responsibilities under the Nuclear Waste Policy Act without unnecessarily delaying the national radioactive waste program being implemented by DOE.

NRC's programs are not of a discretionary nature. They are critical to our regulatory mission. Our capacity to answer technical questions, to resolve expeditiously a myriad of engineering issues, and to assure proper completion and safe operation of nuclear plants on line and coming on line is severely strained. Although we believe our progress in improving the regulatory program is enhancing safety, incidents continue to occur. It is essential that adequate resources be provided to assure that NRC can continue to discharge fully its responsibilities to protect the public health and safety.

The Commission has reviewed the reductions proposed by your staff. Each of them is addressed in the enclosure to this letter, with an explanation of what we absolutely must appeal. Our appeal is for 152 FTE and $43.8 million.

In summary, we request that OMB approve a personnel ceiling of 3,568 FTE's and a budget authorization of $488.6 million for FY 1985.

Sincerely,

Nunzio J. Palladino

Enclosures:
1. NRC FY 1985 Budget Request
2. FY 1985 Research Budget Additional Information

NRC FY 1985 Budget Request
($ in Millions)

Nuclear Reactor Regulation

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
75.8 (716)	78.8 (756)	75.8 (716)	0.8 (18)	76.6 (734)

The OMB reduction is $3.0M and 40 FTE. We agree with a reduction of $2.2M and 22 FTE's as the result of the recent cancellation of the CRBR. We appeal 18 FTE's and $0.8M for necessary staff support to the Integrated Safety Assessment Program (ISAP) as described on page 5 of NRC's Budget Estimates FY 1985/FY 1986. ISAP is to provide comprehensive review of selected operating reactors to address all pertinent safety issues and establish the technical basis to resolve their outstanding licensing actions. The reduction of 18 FTE's will delay the full implementation of program.

Inspection and Enforcement

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
66.0 (1011)	78.6 (1144)	75.0 (1011)	3.8 (86)	78.8 (1097)

The OMB reduction consists of $3.6M and 133 FTE. The $3.6M is a net difference of the FTE reduction and $3.0M above our request for contractual assistance. OMB's position is to substitute contractual assistance for FTE. Subsequent to our budget submission in September we have determined that some of the requirements we identified in our request for the 133 FTE can be accommodated through contractual assistance. Consequently we can reduce our FTE required by 47. We, therefore, appeal the restoration of 86 FTE as follows: Operating Reactor Inspection (60), Vendor and Contractor Inspection (2), Problem Facilities (8), QA Initiatives (2), Bulletin Closeout (2), Enforcement (7), and Technical Assistance to Investigations (5). These resources will provide needed improvement in preventive effort rather than reactive effort, more timely investigative and enforcement action, and sufficient staff to keep up with the substantial increase in operating and pre-operational reactor inspections we face in FY 1985 and FY 1986.

NRC FY 1985 Budget Request
($ in Millions)

Nuclear Material Safety and Safeguards

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
31.4 (346)	38.9 (389)	34.4 (346)	4.5 (43)	38.9 (389)

OMB proposes a reduction of $4.5M and 43 FTE. The dollar reduction includes salaries associated with the 43 FTE and $2.5M of contractual support both of which are in support of the Nuclear Waste Policy Act (NWPA). The dollar reduction assumes that $10.0M of contractual support will be provided by the DOE NWPA special fund - $2.5M in NMSS and the remainder in RES (see RES below). As stated in the cover letter, this reduction is not warranted until the associated complex legal issues are resolved. Therefore, we appeal this $2.5M reduction. The reduction of 43 FTE is based on OMB's assumption that the three site characterization plans that DOE is scheduled to submit to NRC in FY 1985 for analysis will be delayed. In our current discussions with DOE they have indicated no such delay. On that basis we must appeal for a restoration of the 43 FTE and associated salaries in support of the NWPA.

Nuclear Regulatory Research

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
184.9 (240)	187.9 (244)	150.6 (240)	31.5 (0)	182.1 (240)

The OMB reduction consists of $37.3M and 4 FTE. This reduction was suggested in various program areas as discussed below..

The PBF facility program funds were reduced $15.0M on the assumption that the facility would be closed down after completion of Phase I tests in FY 1984, planned Phase II results would be obtained from other facilities and FY 1984 CRBR funds should be reprogrammed to complete PBF tests in FY 1984. Based on current task force review, Phase I tests cannot be completed until early 1985. Closeout of PBF would then begin; however, high temperature data must be obtained from augmented NRU and ACRR programs requiring essentially the same funding levels ($15.0M). The primary savings obtained from cancellation of the PBF-Phase II effort will not be realized until FY 1986. Reprogramming available from FY 1984 CRBR funds is $2.0M. (The remaining uncosted FY 1984 CRBR funds for the fiscal year will provide for an orderly closeout of current projects.) Therefore, it is requested that $13.0M in FY 1985 be restored. (See Enclosure 2, Accident Evaluation and Mitigation for additional detail).

:clear Regulatory Research - Continued

:B allowance assumed a $7.5M (of the $10.0M total) reduction in High-Level Waste :search and 3 FTE on the basis that these funds will be obtained from the Nuclear :ste Fund Account. (The NRC request included only $5.8M for HLW and therefore :ould inadvertently reduce Low-Level Waste research by $1.7M). As previously stated, :is reduction is not warranted until the associated complex legal issues are resolved. :erefore, we appeal this $7.5M reduction.

Y 1985 Breeder research was reduced by $5.7M and 1 FTE in light of CRBR termina- :ion. It is recommended that $1.9M be restored to maintain a limited ongoing joint :ooperative LMFBR research with Japan, France and Germany related to code validation :nd ACRR tests. OMB does not provide funds for HTGR research. The $1.6M in this :rogram should be restored to maintain a regulatory base for the Ft. St. Vrain :eactor and to maintain cognizance of industry efforts for the HTGR consistent with :ongressional intent. (See Enclosure 2, Advanced Reactors for additional detail.)

OMB allowance assumes additional industry efforts to do more safety related R&D, and reduced the reactor facility engineering program by $5.0M. The NRC request already assumed success in encouraging more industry support. It is recommended that the $5.0M be restored to resolve degraded piping, seismic and steam generator issues. (See Enclosure 2, Reactor and Facility Engineering for additional detail.)

An additional reduction of $2.5M would result in a significant deferral of research to define the safety implication and failure modes of plant instrumentation and control systems, and human factors management analysis. It is recommended that this $2.5M reduction be restored. (See Enclosure 2, Facility Operations for additional detail.)

Program Technical Support

	FY 1985			
FY 1984	NRC Request	OMB Recommended	NRC Appeal	New Total
23.4 (371)	24.1 (375)	24.0 (371)	0.1 (4)	24.1 (375)

The OMB reduction of 4 FTE affects both the Office of Investigations (OI) and the Office for Analysis and Evaluation of Operational Data (AEOD). With the continuous increase in the number of allegations being received by NRC, an increase in OI's staffing is necessary to assure timely compliance of investigations to preclude possible delay in licensing. The reduction in AEOD staffing will curtail the program for trend and pattern analysis - a means to relate experience of the past to future health and safety issues. Continuing attention to and support of accident prevention versus accident correction is the objective of the AEOD program. We request the restoration of 4 FTE.

NRC FY 1985 Budget Request
($ in Millions)

Program Direction and Administration

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
32.3 (732)	32.7 (733)	32.0 (732)	0.7 (1)	32.7 (733)

The reduction of one FTE holds the Office of Inspector and Auditor at 27 FTE. This precludes handling the increase in workload placed upon the Inspection and Audit function by the Federal Manager's Financial Integrity Act of 1982 as well as by the Commission who have requested an increase in the number of audits conducted by OIA. Key audits such as implementation of the Human Factors Program Plan, the operation of the Memorandum of Understanding with the Institute for Nuclear Power Operation, and implementation of the Commission's policy on the conduct of licensing proceedings would have to be delayed.

Administrative Support

FY 1984	FY 1985 NRC Request	FY 1985 OMB Recommended	NRC Appeal	New Total
52.0	55.4	53.0	2.4	55.4

The OMB reduction of $2.4M would preclude expansion of the Document Control System (DCS) by $1.4M and ADP by $1.0M. The DCS is the primary means available to NRC to control the large document files related to License Applications. Without the availability of the requested funding, we have no satisfactory means to efficiently file, store, retrieve, and modify a very large data base. The problem we face is the expanding data base needed for the review of applications for licensing reactors and to continuously deal with the safety issues for the increasing number of reactors becoming operational. The reduction in ADP funding will delay the NRC automation network. Office automation and electronic information transfer is an essential working tool without which NRC's ability to perform its regulatory role in a timely fashion will be jeopardized. Consequently we appeal for the restoration of the $2.4M. NRC has been improving its automation capability over the past two years as one means to accommodate staff limitations.

NRC Total	465.8	496.4	444.8	43.8	488.6
	(3416)	(3641)	(3416)	(152)	(3568)

FY 1985 Research Budget Additional Detail

:cident Evaluation and Mitigation

Severe Fuel Damage

:sed on a special NRC initiated third partytechnical review, the current Phase I test eries in PBF cannot be completed before early 1985. The data obtained from post-test xamination of the damaged fuel specimens will address key issues in upgrading the urrent source term values. These tests are integral tests of fuel and fission product behavior in the accident regime below melting of fuel and without completion of these tests there would be inadequate data to determine if existing models were being correctly expressed in the existing computer codes.

Work beyond PBF Phase I temperature regimes is being re-directed to support added tests in the ACRR at Sandia and the NRU in Canada to obtain some, but not all the data sought from the PBF Phase II tests, specifically the ACRR tests will obtain measurements of fission product release above the fuel melting point while the NRU will test full length fuel rods, thereby addressing scaling calculations and the correlation of numerous separate effects, experiments.

Foreign participation in the NRU program will be encouraged. In addition to the funds being appealed, $2 million will be redirected from the current FY 1984 CRBR funding to support this work.

Advanced Reactors

LMFBR

The NRC LMFBR effort is being redirected and significantly limited to maintain agreements with LMFBR safety research programs abroad (Germany, Japan, and France). The aim is to maintain a cost-effective program to form a basis of support for licensing of an LMFBR of foreign or domestic design. By integrating foreign experimental research with the existing U.S. analytic capability, we can leverage our resources and maintain an awareness of technical advances in other counties. Of our existing foreign agreements, two involve experimental programs in FY 1984 being in the U.S., with the NRC contribution being less than half the total cost. This work was anticipated to be completed in FY 1985. The remaining effort involves the use of NRC codes in support of foreign programs, and a high level of data exchange.

Gas-Cooled Reactors

The High Temperature Gas-Cooled Reactor program was planned to keep pace with the focused industry effort currently underway and provide needed support for the continued regulatory oversight of Fort St. Vrain. This reduction will place the NRC on the critical path as the lead plant design matures and submittal of a prototype plant is developed.

;actor and Facility Engineering

;e elimination of $5 million from the FY 1985 Reactor/Facility Engineering budget ;ill require the slowdown of ongoing programs and delays of major new efforts.

;ondestructive examination (NDE) research needed to make responsible regulatory decisions ;n the adequacy of industry proposals will be severely reduced. Industry has designed ;DE methods and equipment for key materials such as stainless steel which is purported ;o detect and indicate flaw sizes. The NRC program is working to verify that NDE equip- ;ent, personnel, and methods used by industry are adequate and will provide reliable ;nservice inspection results.

. substantial reduction will also be required in seismic research which addresses ;imultaneous failure of multiple safety systems. This problem is compounded by the ;ncertainty regarding the probability and magnitude of earthquakes in the eastern United ;tates. The NRC's seismic research program has developed methodology to estimate the ;agnitude of this risk, but experimental work to validate this methodology has not been ;ompleted so that it can be reliably applied to (1) confirm the actual risk and (2) ;etermine the seismic margins in operating nuclear power plants.

Facility Operations

The reduction of $2.5 million from the Facility Operation activity in FY 1985 will eliminate the assessment of safety implications of human factors engineering aspects on advanced control room concepts, such as automation operator duties and alarm prioritization. The development and demonstration of on-line reactor noise surveillance and diagnostic techniques will be terminated, and the refinement of methods for evaluating reactor operator entry level qualifications and training requirements being developed in response to P.L. 97-425 will not be verified and refined. Initiation of a comprehensive program to understand and correlate licensee management and organizational characteristics with plant safety will be delayed.

ENCLOSURE 2

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

ENCLOSURE 2

JUN 4 1984

MEMORANDUM FOR: John G. Davis, Director
Office of Nuclear Material Safety & Safeguards

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: LEGAL CONSIDERATIONS RELEVANT TO THE FUNDING OF NRC'S HIGH-LEVEL WASTE PROGRAM LICENSING ACTIVITIES OUT OF THE NUCLEAR WASTE FUND ESTABLISHED UNDER SECTION 302 OF THE NUCLEAR WASTE POLICY ACT OF 1982

This responds to your recent request for our views on this subject. The OELD review of the subject which is attached supports the following conclusions:

- Neither the Atomic Energy Act of 1954, as amended, nor the Nuclear Waste Policy Act of 1982 (NWPA), authorizes the NRC to require the Department of Energy (DOE) to pay a licensing fee from the Nuclear Waste Fund for the licensing of a high level waste repository.

- The Nuclear Waste Policy Act of 1982 contemplates that the payment of fees required by its Section 302 to the Nuclear Waste Fund be sufficient to ensure "full cost recovery" of "the costs incurred by the Federal Government" that are specified in subsection 302(d).

- Subsection 302(d) of the NWPA specifically provides that the Secretary of the Department of Energy may make expenditures from the waste fund for purposes of the "licensing...of any repository, monitored, retrievable storage facility or test and evaluation facility..."; for "the conducting of nongeneric research, development, and demonstration activities..."; and for "the administrative cost of the radioactive waste disposal program."

- Even though the language in the NWPA refers to "licensing," we have not identified any consideration regarding its use for funding any of the related NRC licensing activities either during the enactment of the NWPA or in the subsequent Congressional consideration of DOE's implementation of it.

- Nevertheless, if responsible officials decide to use a part of the Nuclear Waste Fund to fund the NRC's high-level waste program licensing activities, there is no legal prohibition on such use in the NWPA, and, as previously noted, the specific language in Section 302 is sufficiently broad to include the recovery of such costs which are incurred by the Federal Government.

- Any use of the Nuclear Waste Fund would, under the terms of Section 302 of the NWPA, be subject to the conditions for the administration of the fund which are set forth in subsection 302(e). None of these conditions would appear to present an insuperable legal obstacle to the use of the Nuclear Waste Fund to fund the NRC's high-level waste program licensing activities under an arrangement which would be acceptable to the NRC.

- Any arrangement which could be reached on the use of the Nuclear Waste Fund for funding the relevant NRC licensing activities must accommodate certain needs which are essential from a regulatory perspective. The most obvious example is that the independence of the agency must be in fact preserved and must have the appearance of having been preserved. Thus, the amounts to be obtained from the Nuclear Waste Fund should not be determined by the Department of Energy. Neither that Department nor representatives of the nuclear industry should have the authority to inquire into the purposes for which the funds made available to NRC are expended or audit the expenditures which are made from time to time. In other words, the agency should have the same independence and control over the use of any funds made available to it from the Nuclear Waste Fund as it has over the funds which are authorized and appropriated for its use by the Congress. Although there may be practical problems in arriving at an acceptable arrangement for the use of the funds by the NRC, the conditions required by subsection 302(e) would not appear to present legal obstacles to their solution.

If you have any questions, please contact me.

Original signed by
Guy H. Cunningham, III

Guy H. Cunningham, III
Executive Legal Director

Enclosure:
OELD Legal Review

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OELD Review of the Legal Considerations
Relevant to the Use of the Nuclear Waste Fund
to Fund the NRC's High-Level Waste Licensing Program

I. Introduction

Section 302 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10222, Pub. Law. 97-425, established the Nuclear Waste Fund to finance the waste disposal program. The Fund receives all the revenue the Department of Energy (DOE) collects from the nuclear utilities under the disposal services contracts. The main source of revenue for the Fund is the one mill per kilowatt hour fee charged for all electricity generated by civilian nuclear reactors beginning April 7, 1983. The NWPA provides for annual review and adjustment to assure that the fee is sufficient to recover all program costs.

The purpose of this review is to determine the light, if any, which existing law sheds on the availability of that fund to fund the NRC's high-level waste licensing program. This specific question was not raised in the Congressional consideration of the bills which were finally enacted in 1982. We have not identified any instance in which the question has been raised in the subsequent Congressional consideration of DOE's implementation of the NWPA.[1/]

1/ See e.g., H. Rep. No. 98-755 on the Energy and Water Development Appropriation Bill, 1985, 98th Cong., 2d Sess., p. 138, May 15, 1984; Hearings on Energy and Water Development Appropriations For 1985, Parts 5 and 6, 98th Cong., 2d Sess.; and Oversight Hearing by the House Subcommittee on Energy and Environment of the Committee on Interior and Insular Affairs, "Implementation of the Nuclear Waste Policy Act", Serial No. 98-5, 98th Cong., 1st Sess., May 26, 1983.

There is no existing law which requires that the Fund be used to fund NRC's high-level waste programs.[2/] Thus, this review focuses only on whether Section 302 of the NWPA and its legislative history supports a rational position that, from the legal standpoint, the Fund could be made available for NRC high-level waste program purposes.

Before reaching that precise issue, we first mention overarching elements which the NRC must consider even if the Fund were made available under Section 302.

The NRC should only consider it appropriate to fund its high-level waste program activities out of the Nuclear Waste Fund if the independence of the NRC were preserved and could be perceived to have been preserved. Thus, if the NRC is to use moneys from the Nuclear Waste Fund, the amounts to be obtained ought not be determined by the Secretary of Energy, nor should the Secretary have the authority to inquire into the purposes for which the funds are expended or the authority to audit expenditures that are made from time to time.

The fundamental principle to be kept in mind is that the NRC is an independent regulatory agency. It must be able to evaluate objectively the merits of any license application submitted by DOE. The capability of any

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2/ The question of whether NRC can require DOE to pay a licensing fee for the high-level waste repository is a separate one. See Section 161w. of the Atomic Energy Act of 1954, as amended, and its legislative history.

license applicant to restrict or improperly influence the Commission's regulatory judgment is unacceptable.

II. Section 302 of The Nuclear Waste Policy Act of 1982

The major material for this review is provided by the language of Section 302 as enacted and its meager legislative history. There is no basis in that material for a rational conclusion that the Nuclear Waste Fund not be used to fund NRC's high-level waste licensing activities, if the conditions applicable to any other use of the Fund are met. On the other hand, a conclusion that the Fund must be used for that purpose has no compelling support in the section or in its legislative history. Thus, this review essentially is a marshalling of the arguments for and against the use of the Fund on the basis of the language of Section 302 and its legislative history.

Strikingly, "licensing" is one of the uses specifically identified in Subsection 302(d) for which the Secretary of the Department of Energy may use the Nuclear Waste Fund. The following portions are pertinent:

> (d) ...The Secretary may make expenditures...for purposes of...
>
> (1) ...licensing...of any repository, monitored, retrievable storage facility or test and evaluation facility...;
>
> (2) the conducting of nongeneric research, development, and demonstration activities...;

(3) the administrative cost of the radioactive waste disposal program;

* * * * *

Another feature of Section 302 is readily apparent from its text. This is its statement of the principle of full cost recovery. Subsection 302(a)(4) provides that the Secretary [of DOE] shall propose an adjustment of fees assessed on generators of high-level radioactive waste "to insure full cost recovery" of "the costs incurred by the Federal Government that are specified in subsection [302] (d)". These, as we have noted, include "licensing", the conduct of nongeneric research, and the administrative cost of the radioactive waste disposal program.

The relevant legislative history, such as is available, squarely supports the purpose of the Nuclear Waste Fund. Senator McClure, the Manager in the Senate of the bill enacted into law, had this to say about the funding provisions in Section 302 (Cong. Record, daily edition, December 20, 1982, pp. S15655-S15656):

> The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.

> The bill provides for a contractual fee, initially set at 1 mill per kilowatt-hour, which would be charged on the production of electricity from nuclear power plants. Receipts from this fee would be placed in a separate account in the Treasury established solely for this purpose and would then be appropriated for the waste program on an annual basis. According to the Congressional Budget Office this fee is adequate to cover the costs of this legislation well into the 1990's. However, the bill requires that the adequacy of the fee be reviewed on an annual basis, and the fee could be modified in the future if receipts fell below costs of the program.
>
> This funding mechanism would provide an assured source of funds to carry out the programs and would eliminate not only annual budgetary perturbations in an evermore constrained Federal budget, but the too often repeated shifts of policy direction under succeeding administrations. The nuclear waste policy, programs, and required financing would be statutorily fixed and quite predictable under this approach.

The language in Senator McClure's statement is informative legislative history because under the procedures which were followed in the passage of H.R. 3809 on December 20, 1982, there was no conference and no conference report. Thus the Senator's statement is the best available documentation of how the differences between the two Houses were resolved. As far as the Nuclear Waste Fund is concerned, e views expressed by House Committees on the bills they reported are consistent with the views expressed in the Senator's statement; indeed the basic structure for the establishment and operation of the fund originated in the House.[3/] Illustrative

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3/ Congressional Record, daily edition, December 20, 1982, at page S15654. See also H. Rep. No. 97-785, Part 1 on H.R. 6598, 97th Cong., 2d Sess., August 20, 1982 at pp. 19-20, 79-80; and H. Rep. No. 97-491, Part 1 on H. R. 3809, 97th Cong., 2d Sess., April 27, 1982, at pp. 15-18, 58-61.

of these views is the following excerpt from H. Rep. No. 97-785, Part 1 at p. 79:

> "Essentially, all activities of the Secretary authorized by this act and all additional activities required to establish, construct, license, operate and eventually decommission repositories are to be paid for from sums deposited in the Nuclear Waste Fund."

Arguments that the Nuclear Waste Fund cannot legally be used to fund NRC high-level waste licensing programs must find support somewhere other than in the language of Section 302 and its legislative history. These arguments must be grounded on the fact that the specific use of the fund for NRC licensing program purposes was not raised during the Congressional consideration of the bills. Similarly, the cost analyses considered in connection with the legislation were based upon Department of Energy estimates which appear not to have considered non-DOE expenditures.[4/] Finally, the use of the Fund for NRC purposes apparently has not been raised in subsequent Congressional consideration of DOE's implementation of the NWPA.[5/]

4/ See Congressional Record, daily edition, April 28, 1982, at pp. S4164-S4169.

5/ NRC on February 23, 1984, responded to the following written question by Senator Simpson as a part of its FY 1985 budget hearings:

> "Does the Commission consider it to be (i) appropriate or (ii) legal to fund the Commission's high-level waste program activities out of the Nuclear Waste Fund established under Section 302 of the Nuclear Waste Policy Act of 1982?"

The conclusions reached in our review of the subject are consistent with the February 23, 1984 response to the question.

III. Conclusion

Considering the competing arguments, clearly in our judgment the preferred legal conclusion on the basis of statutory interpretation is that the Nuclear Waste Fund is available under Section 302 to fund NRC's high-level waste licensing programs. See generally Sutherland Stat. Const. §§ 45.12, 46.01-46.04 (4th ED.). Agreement on this milestone means that there are no legal barriers on the face of Section 302 to such use of the Nuclear Waste Fund. There are, however, issues remaining which would have to be accommodated. These include:

- The conditions in subsection 302(e) of the NWPA for the administration of the waste fund obviously would have to be satisfied;

- Agreement regarding which NRC costs properly fall within the categories set forth in subsection 302(d) of the NWPA; and

- Arrangements for NRC's use of the fund would have to be suitable so that in the NRC's judgment its independence as a regulatory agency would not be compromised or appear to be compromised.

ENCLOSURE 3

ENCLOSURE 3

PROPOSED AMENDMENT

"The Atomic Energy Act of 1954, as amended, is further amended by adding a new Section (tbd) as follows:

> 'Section (tbd). The Secretary of the Department of Energy is authorized and directed to pay into the general treasury of the United States from the Nuclear Waste Fund established by the Nuclear Waste Policy Act of 1982 (herein referred to as the "Act"), at the end of each fiscal year commencing in FY 198 , an amount equal to the sum of monies certified by the Nuclear Regulatory Commission as having been expended to carry out its High-Level Waste Program as required by the Act. Such payment by the Secretary shall continue for each fiscal year thereafter until the Nuclear Regulatory Commission advises the Secretary that it has discharged its responsibilities under the Act or is no longer expending monies in connection therewith, or both. The Secretary is relieved of any oversight responsibilities under the Act with respect to the amount(s) and purpose(s) of the funding expended or planned by the Nuclear Regulatory Commission for its High-Level Waste Program.'"