

STRATEGIC ASSESSMENT ISSUE PAPER

DOCUMENT # 4

DSI 21: FEES

INTRODUCTION

In August 1995, the Nuclear Regulatory Commission (NRC) staff initiated a Strategic Assessment and Rebaselining Project. This project was intended to take a new look at the NRC by conducting a reassessment of NRC activities in order to redefine the basic nature of the work of the agency and the means by which that work is accomplished, and to apply to these redefined activities a rigorous screening process to produce (or rebaseline) a new set of assumptions, goals, and strategies for the NRC. The results of this project are intended to provide an agency-wide Strategic Plan which can be developed and implemented to allow the NRC to meet the current and future challenges.

A key aspect of this project was the identification and classification of issues that affect the basic nature of NRC activities and the means by which this work is accomplished. These issues fall into three categories. The first category includes broad issues defined as Direction-Setting Issues (DSIs). DSIs are issues that affect NRC management philosophy and principles. The second category includes subsumed issues. Subsumed issues are those that should be considered along with the DSIs. The third category includes related issues. These are issues that should be considered after the Commission makes a decision on the option(s) for a DSI. Also, as part of the project, other issues of an operational nature were identified. These are not strategic issues and are appropriately resolved by the staff, and are not discussed in the issue papers.

Following the reassessment of NRC activities, issue papers were prepared to provide a discussion of DSIs and subsumed issues, and to obtain a review of these broad, high-level issues. These papers are intended to provide a brief discussion of the options as well as summaries of the consequences of the options related to the DSIs. Final decisions related to the DSIs will influence the related issues which are listed, but not discussed, in each issue paper. As part of the Strategic Assessment and Rebaselining Project, the issue papers are being provided to interested parties and to the public. Following distribution of the issue papers a series of meetings are planned to provide a forum to discuss and receive comment on the issue papers. After receiving public comment on the issue papers, the Commission will make final decisions concerning the DSIs and options. These decisions will then be used to develop a Strategic Plan for the NRC. In summary, the Strategic Assessment and Rebaselining Project will analyze where the NRC is today, including internal and external factors, and outline a path to provide direction to move forward in a changing environment.

I. SUMMARY

As a Federal regulatory agency, NRC is required to perform certain functions to meet its health and safety mission. NRC receives funds for performing its functions from two sources: (1) appropriations passed by the Congress and approved by the President and (2) reimbursements from others for the performance of certain activities that are not required to be funded through appropriation. Although Congress continues to appropriate funds for NRC to perform its mission, NRC has been required to recover approximately 100 percent of these funds from fees assessed to its licensees and applicants since fiscal year (FY 1991). Specifically, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires NRC to recover approximately 100 percent of its budget for FYs 1991-1998 by assessing fees to NRC applicants and licensees. NRC does not keep these fees for agency use, but transfers them to the Department of the Treasury. Thus, OBRA-90 established a strategy to fully fund NRC's public health and safety responsibilities through sources other than general funds (taxes).

The recovery of approximately 100 percent of the NRC budget through fees in response to OBRA-90 has been highly controversial. One major controversy results from the fact that the fee-related statutes, primarily OBRA-90 and the Independent Offices Appropriation Act (IOAA) limit the assessment of fees to certain licensees and applicants. As detailed in the 1994 NRC fee policy report to Congress, fairness and equity concerns raised by licensees arise from a combination of the restriction in OBRA-90 that only the NRC licensees may be charged annual fees and the fact that not all NRC activities are required for a specific license or class of licensees. Additionally, as a result of both law and NRC policy, not all direct beneficiaries of NRC activities pay fees.

The NRC has a public health and safety mission and Congress appropriates funds for the NRC to carry out this mission and, under OBRA-90, the assessment of fees is a mechanism to provide funds to the U.S. Treasury. Concerns over who pays fees under OBRA-90 have led licensees to indicate that they are paying "fees for services" that do not directly benefit them. Licensees are more likely to be concerned when fees are not assessed to the organization that causes the NRC to perform the activity. The NRC must carry out its mission responsibilities independent of whether there are fees. This public mission concept recognizes that the NRC activities serve a need broader than just providing a specific service to a licensee or applicant. This broader need includes building and maintaining public confidence in the use of materials which is of benefit to the entire U.S. nuclear industry.

These questions and concerns raise two separate issues. The first issue involves consideration of fees in NRC decisions and the second issue involves funding mechanisms. The first issue, Direction-Setting Issue (DSI) 21, is--

In making decisions about what activities the NRC should perform in support of its mission, to what extent should fees be considered?

The options to resolve this DSI are developed within the context of the two primary types of activities that NRC performs. The first type includes program activities performed by the NRC in response to mandates (statutes, Executive Orders, treaties, etc.). The second type includes non-mandated activities that are not necessary for the NRC to meet its mandates, but the activities are performed as a "service" to another organization.

Option 1: Continue Existing Approach

NRC would not consider the payment of fees in making decisions about most mandated activities; NRC would consider fees for all non-mandated activities. NRC would seek to have Congress and the Administration explicitly address the payment of fees when adding new statutory responsibilities to NRC. This option would increase the potential that certain mandated activities may be constrained because of fee considerations.

Option 2: No Consideration of Fees for Mandated Activities

Programmatic decisions in response to NRC mandates will not be driven by fees. Specific activities conducted by the NRC will be evaluated for efficiency and effectiveness. The NRC would seek to have Congress and the Administration explicitly address the payment of fees when adding new statutory responsibilities to NRC. When the Commission is requested to perform non-mandated activities, the requestor will reimburse the NRC for the cost of performing requested activities. This option would treat all mandated activities the same with respect to fees, thereby avoiding the potential that fees would be used to prioritize NRC's mandated activities.

Option 3: No Consideration of Fees

NRC would not consider the payment of fees in making decisions about any NRC activities. The NRC would seek to have Congress and the Administration explicitly address the payment of fees when adding new statutory responsibilities to NRC. On the basis of past experience, licensees may perceive this option as raising fairness and equity concerns that have been resolved during the past five years, because the NRC would perform non-mandated activities independent of whether the requestor pays for them.

Option 4: Fee for Service

NRC would consider the payment of fees in making decisions about all activities performed by the agency. The NRC would seek to have Congress and the Administration explicitly address the payment of fees when adding new

statutory responsibilities to NRC. This option would require substantial modification to existing legislation and may inhibit NRC's ability to effectively and efficiently perform its mission.

The second issue to be addressed, independent of which of the four options is chosen, is the question of how to recover NRC costs in a fair and equitable manner should also be addressed. That is:

- What funding mechanisms should the NRC pursue, in addition to annual appropriations with fee recovery, to fund activities that are not required to be funded through appropriations, for example, certain international activities?
- In performing reimbursable work, how should NRC address the full-time equivalent (FTE) constraints that limit the number of NRC staff?

The funding mechanisms can be developed by looking at the primary beneficiary of the work performed by the NRC. The first type of work that NRC performs is the regulation of the civilian use of nuclear materials. The regulated industry is the direct beneficiary of this work, and has only one choice of supplier, the NRC. The second type of work includes activities that serve the collective interest of the general public (e.g., certain international activities). The third type of work includes activities that serve individual organizational interests, with the organization having a choice of whether to request the service from the NRC (e.g., at the request of the Interagency Nuclear Space Review Panel (INSRP) NRC provides technical advice to the INSRP which independently reviews the safety of launches of National Aeronautics and Space Administration (NASA) space vehicles carrying nuclear material (Cassini spacecraft mission)).

Funding Mechanism 1—Recover the cost of providing requested services from the requestor, using fees and reimbursable agreements. The cost of activities that serve the collective interest of the general public would be recovered from general revenues raised from taxes.

Funding Mechanism 2 (Current Approach)—NRC applicants and licensees would continue to pay for approximately 100 percent of the appropriated budget authority. Reimbursable agreements would be used to fund all non-mandated activities.

Funding Mechanism 3—Amend OBRA-90 and the Atomic Energy Act of 1954 (AEA) to give the NRC maximum flexibility to assess fees.

Funding Mechanism 4—Rescind the Independent Offices Appropriation Act of 1952 (IOAA) and OBRA-90 so that the NRC would be fully funded through taxes, as was the case until 1968.

II. DESCRIPTION OF ISSUE

A. Background/Bases

As a Federal regulatory agency, NRC is required to perform certain functions to meet its health and safety mission. The NRC receives funds for performing its functions from two sources: (1) appropriations passed by the Congress and approved by the President and (2) reimbursements¹ from others for the performance of certain activities that are not required to be funded through appropriation. Further, funds necessary to implement the NRC statutory responsibilities must be obtained from appropriations. The table below shows the distribution of NRC FY 1995 new budget authority and reimbursable authority by the source of funding.

	<u>FY 1995 New Authority (\$M)</u>
Appropriations	\$523.9
Reimbursable Work	\$16.8

Although funds for the NRC to perform its mission continue to be appropriated, the NRC has been required to recover approximately 100 percent of these funds from fees assessed to its licensees and applicants since FY 1991. Specifically, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) requires that each year NRC recover approximately 100 percent of its budget authority obtained from appropriations, less the amount appropriated from the Nuclear Waste Fund, through fees collected from NRC licensees and applicants. NRC does not keep these fees and use them, but transfers them to the Department of the Treasury to offset the NRC's annual appropriations. A more detailed discussion of the requirements for NRC fees is in Appendix 21A.

¹ Under the authority of the Economy Act, appropriations acts, and other statutes, the NRC can receive and retain funds in addition to the agency's appropriation. These funds generally come from reimbursements for the performance of certain activities that are not required to be funded through NRC appropriations (e.g., support to the National Aeronautics and Space Administration (NASA)). The Economy Act permits the NRC to enter into reimbursable agreements with other Federal agencies. The Annual Appropriations Act also provides that monies received by the NRC for the cooperative nuclear safety research program, services rendered to foreign governments and international organizations, and the material and information access authorization programs, including criminal history checks under Section 149 of the Atomic Energy Act of 1954, as amended, may be retained and used.

In order to collect approximately 100 percent of the NRC's budget authority, the Commission follows the basic guidance from Congress which is: fees are to be established by rule; fees are to be "fairly and equitably" allocated among NRC licensees; and, to the "maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services" to the licensees (136 Congressional Record at H12692). Implementation of this requirement has been highly controversial as discussed below.

Since OBRA-90 was enacted, the NRC has published six fiscal-year fee rules (one for each fiscal year FY 1991-1996) and two minor fee rules, and has responded to two petitions for rulemaking relating to fees. More than 1,500 public comments have been reviewed and evaluated relating to the fee rules and petitions, and the NRC has responded to hundreds of Congressional letters regarding fees. Additionally, during the first four years of 100-percent budget recovery, the number of materials licenses subject to fees, including sealed source and device registrations, decreased by approximately 3,000 (from approximately 9,000 licenses to approximately 6,000 licenses). For the past two years, however, the number of materials licenses subject to fees has stabilized at about 6,000.

As a result of the concerns about the fees to recover 100 percent of the budget, the Energy Policy Act of 1992 (EPA-92) directed the NRC to review its policy for assessing annual charges under OBRA-90, solicit public comment on the need for changes to this policy, and recommend to the Congress any changes needed in existing law to prevent placing an unfair burden on NRC licensees. Although EPA-92 required only public comments on the annual fees assessed by the NRC under 10 CFR Part 171, the NRC also requested comments on 10 CFR Part 170 fee policies because of the interrelationship between licensing and annual fees. More than 500 public comments were received and evaluated by the NRC. The report on the fee policy review was sent to Congress on February 23, 1994, and recommended legislation to solve the fairness and equity concerns that had been raised. The report recommended that OBRA-90 be modified to reduce the amount to be recovered from fees by the budgeted amount for these activities (approximately 10 percent of NRC's budget). Congress did not adopt this recommendation. A detailed discussion of the cost and activities related to the fairness and equity concerns is in Appendix 21B.

Because the requested legislation was not enacted, the NRC in the FY 1995 final fee rule published on June 20, 1995, took action under the existing fee laws to help mitigate the fairness and equity concerns. The NRC treated the costs (approximately \$56 million) that have raised fairness and equity concerns, in a manner similar to the way it treated overhead, and distributed the costs among the broadest base of NRC licensees. In this way, licensees pay a portion of these costs based on their share of the total NRC budget. Commenters on the proposed FY 1995 rule indicated that, pending legislative relief by Congress to remedy the fairness and equity concerns, they supported

the NRC proposal to treat the costs like overhead and distribute the costs on the basis of the percentage of the budget directly attributable to a class of licensees.

In FY 1996, the NRC also took steps to stabilize annual fees. On January 30, 1996, the NRC published, for public comment, a proposed fee rule to recover the FY 1996 appropriations. The proposal included the change to stabilize fees. The NRC received eight comments on the proposed rule. This is the fewest comments received on a proposed fee rule, subsequent to the requirement to recover approximately 100 percent of the budget from fees. All commenters supported the steps taken by NRC to stabilize the annual fees, noting the 6.5-percent reduction in all annual fees. While noting that the NRC has made fees more equitable and fair, the commenters indicated, however, that they continue to believe that 100-percent fee recovery, as mandated by OBRA-90, is unfair and inequitable to licensees because they are paying for NRC costs that neither related to them nor benefit them. They urged the Commission to seek legislative relief from the requirement to recover approximately 100 percent of the appropriations from fees.

B. Discussion of Direction-Setting Issue

As indicated by the preceding section, the recovery of approximately 100 percent of the NRC budget through fees in response to OBRA-90 has been highly controversial. One major controversy results from the fact that the fee-related statutes limit the assessment of fees to certain licensees and applicants. As detailed in the 1994 NRC fee policy report to Congress, fairness and equity concerns arise from a combination of the restriction in OBRA-90 that only the NRC licensees may be charged annual fees and the fact that not all NRC activities relate to existing licensees. Additionally, as a result of both law and NRC policy, not all direct beneficiaries of NRC activities pay fees. The licensees continue to express concern about the payment of fees for these activities.

These concerns over who pays fees under OBRA-90 have led licensees to indicate that they are paying "fees for services" that do not directly benefit them. Licensees are more likely to be concerned when fees are not assessed to the organization that causes the NRC to perform the activity. On the other hand, the NRC has a public health and safety mission and Congress appropriates funds for the NRC to carry out this mission, with fees under OBRA-90 being a mechanism to provide funds to the U.S. Treasury. Viewed another way, the NRC must carry out its responsibilities independent of whether there are fees. This public mission concept recognizes that the NRC activities serve a need broader than just providing a specific service to a licensee or applicant.

This broader need includes building and maintaining public confidence in the use of materials, which benefits the entire U.S. nuclear industry.

These beliefs and concerns about fees have raised two separate issues. The first issue, the DSI, is--

- In making decisions about what activities the NRC should perform in support of its mission, to what extent should fees be considered?

C. Discussion of Subsumed Issues

The second issue, independent of the decision of the DSI, is the question of how to assess fees in the most fair and equitable manner. Thus, the second issue relates to funding mechanisms to make fees more fair and equitable. These issues are:

- What funding mechanisms should the NRC pursue, in addition to annual appropriations with fee recovery, to fund activities that are not required to be funded through appropriations, for example, certain international activities?
- In performing reimbursable work, how should NRC address the FTE constraints that limit the number of NRC staff?

D. External Factors

In developing and choosing options to resolve these issues, the following external factors are likely influences:

- Congress and the Administration will continue to emphasize balancing the Federal budget. This goal will likely result in reduced NRC budgets and the continuation of NRC fees as a source of Federal revenues. In fact, the proposed Budget Reconciliation Bill would extend the 100-percent fee recovery requirement from 1998 to 2002.
- As in the past, licensees and applicants are expected to view NRC fees as an undesirable cost.
- As part of the "reinventing Government" effort, it was suggested that the FTE ceiling for Federal agencies be eliminated. This suggestion has not been implemented. However, efforts (e.g., the Chief Financial Officer Council) continue on this issue.

III. OPTIONS

In order to develop options to address the extent that fees should be considered in making decisions about what activities the NRC should perform in support of its mission (the DSI), the work NRC performs should be examined. The NRC activities can be placed in two primary categories. The first

category includes program activities performed by the NRC in response to mandates (statutes, Executive Orders, treaties, etc.). The second category of activities are those that the NRC performs in response to external requests, but the NRC does not need to perform in order to meet its mandates; these are performed as a "service" to another organization (hereinafter referred to as "non-mandated activities"). One example of work in this area are NRC assistance to the Interagency Nuclear Space Review Panel (INSRP) in support of the NASA Cassini launch.

The options to resolve this DSI are developed within the context of the primary type of activities that NRC performs. The options follow:

Option 1: Continue Existing Approach

NRC would not consider the payment of fees in making decisions about most mandated activities; NRC would consider fees for all non-mandated activities.

Option 2: No Consideration of Fees for Mandated Activities

Programmatic decisions in response to NRC mandates will not be driven by fees. Specific activities conducted by the NRC will be evaluated for efficiency and effectiveness. When the Commission is requested to perform non-mandated activities, the requestor will reimburse the NRC for the cost of performing the requested activities.

Option 3: No Consideration of Fees

NRC would not consider the payment of fees in making decisions about any NRC activities.

Option 4: Fee for Service

NRC would consider the payment of fees in making decisions about all activities performed by the agency.

IV. EVALUATION OF OPTIONS

Under each of the four options, the NRC will continue to monitor and control its operating costs and will continue its commitment to making its regulatory program more efficient wherever it can do so without diminishing its ability to protect public health and safety. The internal NRC budget review process coupled with the review by the Office of Management and Budget and Congress ensures that the approved budget will include the resources necessary for NRC to implement its mission using an effective regulatory program. Under each of these options, efforts would continue to make fees fair and equitable. Mechanisms to accomplish this are discussed later in this paper.

Option 1: Continue Existing Approach

The current NRC practices with respect to considering the payment of fees in making decisions about its activities have evolved over time. Before FY 1991, the first year of 100-percent budget recovery, fees were not considered in making decisions about NRC activities. Before the 100-percent fee recovery requirement, this approach could be taken with no consequences because NRC only assessed fees to those who directly received the benefits of NRC actions, and the remaining portion of the budget was provided from general revenues. In response to the concerns of the licensees and Congress about the fairness and equity of fees, the Commission established the following reimbursement policy in 1995:

*For those Federal agencies and other organizations that request NRC to perform work that is not a part of its statutory mission and for which NRC receives no appropriations, the NRC will do so on a reimbursable basis." (See SECY-95-012 and the resulting Commission staff requirements memorandum (SRM) dated February 7, 1995.)

As indicated by this policy, fees would be considered in deciding whether to perform non-mandated work in response to requests, and this type of work would only be performed if the requestor paid for it.

Although the NRC has not explicitly stated a policy concerning consideration of fees in making decisions about mandated activities, during the earlier years of 100-percent fee recovery, the agency did not consider the payment of fees in deciding whether or not to perform mandated activities. However, in recent years, there have been exceptions. For example, both safety and payment of fees were considered when the Commission addressed the issue of funding Agreement State training, an activity mandated by Section 274 of the Atomic Energy Act. Another example is that the payment of fees has been raised during discussions on whether to perform certain international activities in support of the NRC mission.

Payment of fees would be considered when adding new statutory responsibilities to NRC, as was done when the NRC was given oversight of the United States Enrichment Corporation (USEC) activities, and as is being done for the potential NRC regulatory oversight of Department of Energy (DOE) facilities. That is, the NRC would ask the Administration and Congress to explicitly consider who should pay for the NRC costs to implement any new statutory responsibilities.

One consequence of continuing the existing approach is that fees will be considered in making decisions about mandated activities on a case-by-case basis; this could lead to inconsistent treatment of mandated activities.

Another consequence is that in considering fees, NRC mandated activities could be prioritized on the basis of payment of fees instead of on contribution to the NRC mission. This could lead the staff to inadvertently not perform important mandated activities because of the fees consideration. Licensees, however, may see explicit case-by-case consideration of fees in decisions on NRC activities as fairer and more equitable.

Option 2: No Consideration of Fees for Mandated Activities

This option is the same as Option 1 except that all mandated activities would be treated the same. Programmatic decisions in response to NRC mandates will not be driven by fees. Specific activities conducted by the NRC will be evaluated for efficiency and effectiveness. Non-mandated activities would be treated the same as under Option 1, that is, payment of fees would be considered in deciding whether to perform the work. Payment of fees would be considered when adding new statutory responsibilities to NRC, as was done when the NRC was given oversight of the United States Enrichment Corporation (USEC) activities, and as is being done for the potential NRC regulatory oversight of Department of Energy (DOE) facilities. That is, the NRC would ask the Administration and Congress to explicitly consider who should pay for the NRC costs to implement any new statutory responsibilities. The result of adopting this option is that all NRC mandated activities would be treated the same from the standpoint of fee consideration. Thus, payment of fees would not be used to imply a priority for NRC-mandated activities. This option recognizes that NRC-mandated activities should be performed independent of the source of funds for the U.S. Treasury.

Option 3: No Consideration of Fees

Under this option, NRC would not consider fees in making decisions about any NRC activities. That is, NRC would determine the work (mandated and non-mandated) that it wanted to perform and would then use available mechanisms to recover the costs. Payment of fees would be considered when adding new statutory responsibilities to NRC, as was done when the NRC was given oversight of the United States Enrichment Corporation (USEC) activities, and as is being done for the potential NRC regulatory oversight of Department of Energy (DOE) facilities. That is, the NRC would ask the Administration and Congress to explicitly consider who should pay for the NRC costs to implement any new statutory responsibilities. This option would reinstate policies and practices that preceded the OBRA-90 requirement to recover approximately 100 percent of the budget through fees. This option differs from Options 1 and 2 in that the payment of fees would not be considered in deciding non-mandated activities. The major consequence of this option is that, on the basis of past experience, licensees may perceive it as unfair and inequitable since the

NRC would not consider the payment of fees for activities that are not necessary to meet its mandates, but that are performed as a favor to someone because NRC has the expertise to do the task.

Option 4: Fee for Service

Under this option, NRC would give full consideration to the payment of fees in deciding whether to perform all activities. Since the NRC must carry out certain activities to meet its statutory responsibilities, implementation of this option would require legislation that gives the NRC additional flexibility on how and to whom it can charge fees. Payment of fees would be considered when adding new statutory responsibilities to NRC, as was done when the NRC was given oversight of the United States Enrichment Corporation (USEC) activities, and as is being done for the potential NRC regulatory oversight of Department of Energy (DOE) facilities. That is, the NRC would ask the Administration and Congress to explicitly consider who should pay for the NRC costs to implement any new statutory responsibilities. A major consequence of this option is that the NRC would have to split its attention between its mission and financing. This could lead to the perception that the NRC may not be performing important health and safety activities because of the payment of fees. This "fee for service" concept also could potentially lead to the Commission being perceived as less independent.

V. FUNDING MECHANISMS

Independent of which of the four options discussed above is chosen, the question of how to recover NRC costs in a fair and equitable manner should also be addressed. That is, what funding mechanism should NRC pursue to recover the cost of its operations? Conceptually, the funding mechanisms can be developed by looking at the primary beneficiary of the work performed by the NRC. The first type of work that NRC performs is the regulation of the civilian use of nuclear materials. The regulated industry is the direct beneficiary of this work, and has only one choice of supplier, the NRC. The second type of work includes activities that serve the collective interest of the general public (e.g., certain international activities). The third type of work includes activities that serve individual organizational interests, with the organization having a choice of whether to request the service from the NRC (e.g., NRC review of the NASA Cassini launch for the INSRP).

The following funding mechanisms can be used with either of the above options for considering payment of fees in decisionmaking, except as noted in discussing the mechanism.

Funding Mechanism 1—Recover the cost of providing requested services from the requestor, using fees and reimbursable agreements. The cost of activities that serve the collective interest of the general public would be recovered

from general revenues raised from taxes. This funding mechanism is consistent with the NRC recommendation in its report to Congress in 1994. This approach would recognize that certain mandated activities are in the collective interest of the general public (about 10 percent of the NRC budget) and legislation would be required to provide additional flexibility with respect to whom NRC can assess fees and to reduce the amount of the appropriation to be recovered from fees. It is noted that NRC previously recommended this approach to Congress and OMB, and it was rejected. Licensees, however, continue to support this funding mechanism.

Funding Mechanism 2 (Current Approach)—NRC applicants and licensees would continue to pay for approximately 100 percent of the appropriated budget authority. Reimbursable agreements would be used to fund services for non-mandated activities. Past experience indicates that NRC licensees are likely to view this approach as resulting in unfair and inequitable costs to them.

Funding Mechanism 3—Amend OBRA-90 and the Atomic Energy Act (AEA) to give the NRC maximum flexibility to assess fees. For example, the AEA could be changed to give NRC authority to assess fees for services (amendments/inspections) to Federal agencies similarly to what is done for commercial licensees. OBRA-90 could be amended so that NRC is not required to assess fees under IOAA. This funding mechanism would permit NRC to treat all licensees and applicants the same with respect to fees.

Funding Mechanism 4—Rescind IOAA and OBRA-90 so that NRC would be fully funded through taxes as was the case until 1968. This would result in the loss of revenues to Treasury which would mean that the Administration and Congress would have to offset the lost revenues from NRC fees through budget reductions or increased revenues from other sources (e.g., increased taxes). This approach would require the Commission to change its previous position of not involving itself in how the Congress and Administration raise Federal revenues. Licensees' fairness and equity concerns about fees and other fee-related issues would be eliminated. Further, the issue related to considering payment of fees in decisionmaking (the DSI) would be eliminated.

VI. FTE CONSIDERATIONS

As indicated in the preceding discussion, reimbursable agreements could fund certain NRC activities. However, the utilization of reimbursable agreements is constrained by the availability of FTEs. The number of staff that the NRC may have is determined by OMB during its review of the NRC budget which is appropriated. Additionally, the Federal Workforce Restructuring Act of 1994 (FWRA) limits the Federal Government's FTEs through fiscal year (FY) 1999 by placing a ceiling on the total number of FTEs that the Federal Government may have each year. To implement the FWRA, OMB has assigned FTE ceilings for each Federal agency for FY 1994 through FY 1999. If the total ceiling under the

FWRA is exceeded, an agency will not be allowed to hire any employee for any position until OMB notifies the President and Congress that the total number of Federal Government FTEs does not exceed the established limits.

Currently, this FTE ceiling is not affected by the amount of reimbursable work that the NRC performs. Therefore, even though the NRC may receive funds from reimbursable agreements, the NRC FTE ceiling established by OMB is not increased. Thus, FTEs are redirected from agency programs to perform the reimbursable work. In the near term, FTEs to support reimbursable work are available, since the NRC is operating below its FWRA allocation. However, starting in the FY 1999 timeframe, there is a high likelihood that the NRC will not be able to meet mandated requirements using less than the allocated FTEs.

OMB and the Chief Financial Officer (CFO) Council are addressing the issue of FTE for "business-like operations." In a January 3, 1996, letter to the CFO Council, OMB noted that--

Business-like organizations which can demonstrate a FTE requirement, and have identified the funds to finance them, generally, should be given the FTE levels needed for carrying out these business-like operations.

Business-like organizations should request necessary FTE initially within their own agency and, if such FTE levels are unavailable within the agency, seek involvement from the CFO council to identify interagency alternatives for meeting the organization's FTE needs. Where necessary, consistent with item 5, OMB will give favorable consideration to increases in agency FTE target levels to accommodate the needs of the business-like organization.

Since reimbursable work can and should be viewed as "business-like", the framework above could be used to address the issue associated with FTEs for reimbursable work. Therefore, when additional FTEs are needed as a result of NRC performing reimbursable work, the NRC may find it beneficial to work within the concept being developed by OMB and the CFO Council to obtain additional FTEs for reimbursable work.

VII. COMMISSION'S PRELIMINARY VIEWS

Staff actions regarding the various options should be held in abeyance pending the Commission's final decision on this issue paper. The Commission's preliminary views are:

The Commission believes that the NRC's public health and safety mission must be the foundation in making decisions about what activities the agency should perform. In making decisions on the work which the NRC will perform, the Commission does, and will continue to, consider the cost of its activities and consistently examine ways to accomplish its mission within a responsible budget. Whether the NRC's budget is funded by the public through taxes paid to the treasury or by licensees through fees paid to the treasury, the NRC's decisions about its programs should be the same. The Commission believes that fees should not be a primary factor in determining the work to be performed in response to NRC health and safety mission. It is the Commission's position that programmatic decisions should not be fee driven and should be based on their contribution to public health and safety.

The Commission does not believe that it was Congress's intent to limit the NRC's activities to those which are directly attributable to a specific regulatory action for a specific licensee or class of licensees.

In the Omnibus Budget Reconciliation Act of 1990 (PL 101-508), Congress stated that any licensee of the Commission may be required to pay, in addition to the fees for services or thing of value, an annual charge. Congressional history and language in the Conference Report which accompanied PL 101-508 takes notice and allows that 'increasing the amount of recovery to 100 percent of the NRC's budget authority will result in the imposition of fees upon certain licensees for cost that cannot be attributed to those licensees or classes of licensees.'

After review of the policy options, it is the Commission's preliminary view to approve Option 2.

Programmatic decisions in response to NRC mandates will not be driven by fees. Specific activities conducted by the NRC will be evaluated for efficiency and effectiveness.

The NRC performs two primary types of activities. These types of activities are defined as mandated and non-mandated. Mandated activities include statutes, Executive Orders, treaties, Commission decision, etc. Non-mandated activities include those activities which are not required to respond to mandates, but are performed as a 'service' to another organization. This policy option (option 2) approved by the Commission provides for a responsible decision-making process for mandated activities while allowing the NRC to assist other organizations on a reimbursable basis.

In selecting option 2 the Commission will establish a process for making its programmatic decisions based on public health and safety considerations for mandated activities. When the Commission is requested to perform non-mandated activities the requestor will reimburse the NRC for the cost of performing the requested activities.

In order to implement option 2 the staff will develop, for Commission review and approval, a set of criteria for defining mandated and non-mandated activities. These criteria will allow for a clear framework within which to consistently determine funding of NRC activities.

Two issues raised in SECY 96-019 to the Commission, in addition to the Direction-Setting Issue are also addressed. These two issues address funding mechanisms and personnel full time equivalent (FTE) ceilings.

FUNDING MECHANISM:

It is the Commission's preliminary view to support Funding Mechanism 2 which continues the agency's current approach.

Although the Commission believes that its decisions on activities the NRC should perform in support of its mission and its total budget authority should be independent of fee considerations, the Commission does believe that NRC fees should be assessed in as fair and equitable a manner as practicable.

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90) requires that NRC collect fees equal to approximately 100% of the NRC's budget. The OBRA-90 further states that these fees should be collected from NRC's licensees and applicants. The Commission has sought to comply with OBRA-90 and to distribute fees as fairly and equitably among its licensees and applicants. The NRC has reexamined its fee policy each year, issued draft fee rules for public comment, and made changes to the process to respond to those comments whenever possible within the limits of existing statute. The Commission has also addressed those concerns raised by the public and licensees about the limitations of applying fees within OBRA-90 in its Report to Congress on the U.S. Nuclear Regulatory Commission's Licensee Fee Policy Review issued in February, 1994.

The Commission believes that carrying out the intent of Congress by implementing fee policy within existing law is the most effective and efficient option. The Commission will, however, consider comments and recommendations on specific proposals if they present new approaches to improve the process or to accomplish a more equitable distribution of fees.

FTE CONSIDERATION:

It is the Commission's preliminary view to support the NRC's identification of FTEs associated with reimbursable work as business-like activities.

When the NRC receives a request to conduct an activity which is not necessary for the NRC to meet its mandates, but will provide a "service" to another organization, the NRC must consider the cost of providing the service. This cost consideration includes both dollars and FTE. The requesting organization can enter into a reimbursable agreement with the NRC and reimburse the agency for the dollars expended on providing the assistance. The requesting organization does not, however, provide FTE to the NRC.

The current FTE ceiling constraints may make it difficult, if not impossible, for the NRC to provide assistance for non-mandated activities in response to specific requests. The approach to remove those FTEs used for business-like activities from the NRC ceiling would allow the NRC to provide assistance to other government agencies and organizations which might otherwise be turned down.

APPENDIX 21A

Fees Assessed to Fully Fund the NRC Appropriation

1. NRC Fees Based on the Independent Offices Appropriation Act (IOAA)
(10 CFR Part 170)

Title V of the IOAA of 1952, 31 U.S.C. 9701, states that "it is the sense of Congress that each service or thing of value provided by an agency to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible." The head of each agency may prescribe regulations establishing the charge for the service or thing of value provided by the agency.

The NRC's predecessor, the Atomic Energy Commission (AEC) adopted its first fee schedule based on the authority of the IOAA in 1968. The first fee schedule was a limited one in that only those costs that were associated with the review of a license application and related to a specific identifiable beneficiary were included in the cost base for the establishment of the fees. An annual fee was also established at that time to recover the costs relating to license amendments and renewals. The fee schedules were revised in 1972 to recover costs associated with inspection services and were revised again in 1973 to incorporate costs created by additional statutory requirements imposed on licensing and inspection programs. These costs were those associated with environmental reviews and studies required by the National Environmental Policy Act of 1969 (NEPA) and antitrust reviews mandated by the 1970 amendments to the AEA.

The fee schedules in 10 CFR Part 170 were completely revised in 1978, taking into account the two Supreme Court decisions of March 4, 1974, relating to fees assessed under IOAA by the Federal Communications Commission (FCC) and the Federal Power Commission, and four decisions of the U.S. Court of Appeals for the District of Columbia on December 16, 1976, relating to fees assessed by the FCC. The court cases resulted from the vagueness of the language in IOAA and the implementation of Office of Management and Budget (OMB) Circular A-25 with respect to what "costs" are to be included in the fee base for recovery. The courts held that a fee for service must bear a relationship to the special benefits given to the applicant or licensee by the agency action. On the basis of these cases, the NRC removed annual fees from its Part 170 fee schedule. The NRC fee schedule promulgated in March 1978, which was based on the court cases and the Commission's fee guidelines, was challenged in the U.S. Court of Appeals for the Fifth Circuit. The court issued an opinion in August 1979 (*Mississippi Power and Light v. U.S. Nuclear Regulatory Commission*, 601 F. 2d 223 (1979) cert. denied, 444 U.S. 1102 (1980)), upholding in all respects the NRC's schedule and guidelines for fees.

In summary, the Commission guidelines for fee assessment provide that 10 CFR Part 170 fees may be assessed to persons who are identifiable recipients of special benefits conferred by specifically identified activities of the NRC. Such special benefits include all services necessary for the issuance of a required permit, license, approval, or amendment and all services necessary to assist a recipient in complying with statutory obligations or obligations under the Commission's regulations. The fees established by regulation include the direct and indirect costs of providing the service. The NRC continues to use the fee guidelines developed by the Commission in 1977 in establishing 10 CFR Part 170 fees.

Collections from Part 170 fees currently recover about 25 percent of the NRC's budget authority, excluding the high-level-waste (HLW) program. Before FY 1968, that portion of the AEC appropriation relating to regulatory activities was fully funded from the General Fund (taxes). Between FY 1968 and FY 1991, the AEC/NRC appropriation was partially funded from the assessment of fees and the remainder from the General Fund (taxes).¹ Beginning in FY 1991, the NRC appropriation has been fully funded (approximately 100 percent) from licensing and annual fees assessed to NRC licensees and applicants.

2. NRC Fees Based on OBRA-90 (10 CFR Part 171)

OBRA-90 (Public Law 101-508), signed into law November 5, 1990, requires that the NRC recover approximately 100 percent of its budget authority less the amount appropriated from the Department of Energy (DOE) administered Nuclear Waste Fund (NWF) for fiscal years 1991 through 1995 by assessing license and annual fees. OBRA-90 was amended in 1993 to extend the NRC's 100 percent fee recovery requirement through FY 1998. In the Conference Report, the Congress suggested guidelines that NRC should follow in calculating the annual fee to be assessed. The specific guidelines are as follows:

First, the appropriations received by the NRC from the NWF established under Section 302(c) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10222(c)) for licensing the DOE's nuclear waste management program are not to be recovered by the annual charges and should be subtracted from the amount of the budget authority. Second, the amount recovered through annual charges is to be reduced further by the amount the NRC receives through fees assessed on licensees through 10 CFR Part 170 of the Commission's regulations. Third, OBRA-90 provides, and the Conference Agreement reiterates, that the balance

¹ Although annual fees for operating power reactors were established under 10 CFR Part 171 in FY 1987, in compliance with the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the NRC was only required to collect 33 percent of its budget for FY 1987 and 45 percent of its budget for FY 1988-1990 respectively.

(after subtracting the amounts estimated to be received from the NWF and Part 170) of the NRC's annual budget is to be recovered from the NRC's licensees through annual charges. The annual charge should be assessed under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual charges. The schedules of annual charges, which are to be established by rule, should "fairly and equitably" allocate the total amount of the charges to be recovered among its licensees and, to the "maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services" to the licensees. 136 Cong. Rec. at H12692.

The conferees recognized that a substantial portion of the NRC's annual expenses, while not attributable to individual licensees and thus not recoverable under the IOAA, are attributable to classes of licensees. Thus, NRC should allocate generic costs that are attributable to a given class of licensee to that class. The conferees also recognized that certain expenses cannot be attributed either to an individual or to classes of NRC licensees and indicated that the NRC should fairly and equitably recover these expenses from its licensees through the annual charge even though these expenses cannot be attributed to individual licensees or classes of licensees. These expenses may be recovered from the licensees as the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. 136 Cong. Rec. at H12692, 3. Since FY 1991, the NRC has fully funded its appropriation (approximately 100 percent) from the assessment of license and annual fees. Annual fees assessed under 10 CFR Part 171 currently recover about 75 percent of the NRC's budget authority, excluding the high-level-waste (HLW) program.

APPENDIX 21B

Specific Fairness and Equity Concerns
Identified With 100-Percent Fee Recovery¹

The NRC has met the first objective of OBRA-90, that is, collecting approximately 100 percent of its budget authority through the assessment of fees. For FY 1991, the NRC recovered 98 percent of its budget; for FY 1992, 99 percent of its budget; for FY 1993, 98 percent of its budget; for FY 1994, 97 percent of its budget; and for FY 1995, 100 percent of its budget.

Despite this success, many NRC licensees, as well as members of Congress, have expressed concerns about the fairness and equity of NRC fees. These major concerns evolve from the inability of the NRC to meet the principle summarized by one commenter related to the fee policy review; namely, that if the NRC is to be funded through user fees rather than taxes, then "each direct beneficiary of NRC's activities—not merely its 'licensees'—should contribute to an extent commensurate with the benefits it receives."

This principle cannot be met because not all direct beneficiaries of NRC activities pay fees because of legislative constraints and Commission policy. Moreover, fees are based on the agency's costs to perform its regulatory responsibilities, rather than on the licensee's perception of benefits received. This leads some licensees to conclude that the fees for regulatory activities related to them are not commensurate with the benefits they receive.

Licensees have persistently noted that they are billed for costs not directly related to services provided them. This concern comes up when costs for some NRC activities are not assessed to the beneficiaries of the activities because of legislative constraints and Commission policy. Thus, to recover approximately 100 percent of the budget, these costs must necessarily be assessed to licensees that do not directly benefit from those activities. For this reason, the legislative requirement to collect approximately 100 percent of the budget authority through fees inherently burdens licensees unfairly.

Three types of activities are not assessed to the direct beneficiary, but rather to other NRC licensees. They are activities that (1) are not attributed to or associated with an existing NRC licensee or class of

¹ Excerpted from "Report to Congress on the U.S. Nuclear Regulatory Commission's License Fee Policy Review Required by the Energy Policy Act of 1992," February 1994, and SECY-95-017, January 25, 1995.

licensees; (2) are not assessed Part 170 licensing fees or Part 171 annual fees based on existing law or Commission policy decisions; and (3) support NRC operating licenses and others.

Under OBRA-90, annual fees can only be charged to NRC licensees. Therefore, costs of activities that cannot be attributed to an existing NRC licensee or class of licensees must be assessed to NRC licensees that do not directly benefit from them. The first major group of activities includes:

- International cooperative safety program and international safeguards activities
- Agreement State oversight
- Low-level waste disposal generic activities
- Site decommissioning management plan activities not recoverable under 10 CFR Part.170

For FY 1995, the fees for the first major group of activities were equivalent to \$29.3 million, of which \$26.1 million was assessed to power reactor licensees and \$3.2 million to other licensees.²

The NRC budget includes certain international activities that are not directly related to NRC applicants or licensees. These activities are performed because they benefit U.S. national interests. The NRC is required to perform some of these activities by the Atomic Energy Act and, therefore, must budget for them (e.g., the issuance of licenses for the import and export of radioactive material or equipment). Examples of international activities that are not directly related to NRC applicants and licensees are statutorily required consultations with Executive Branch agencies on export activities within their jurisdiction; assistance to countries or international organizations that provide limited benefit to NRC's regulatory programs; and support of international safeguards activities related to nuclear non-proliferation.

The NRC oversees and administers the Agreement States program by reviewing and approving new agreements, performing periodic program reviews to determine their adequacy and compatibility, developing guidance, and providing technical assistance (e.g., inspection assistance) and training to the Agreement States.

² In this review, the dollar amounts used are the amount of the FY 1995 fees that would have been assessed for the activities. The amounts for any specific year would depend on the budget for the activities for that year.

Because neither the Agreement States nor their licensees are NRC licensees, they cannot be charged annual fees under OBRA-90. The NRC can assess 10 CFR Part 170 fees for specific services (e.g., review of requests for an agreement, periodic reviews of the programs, training and technical assistance) rendered to an Agreement State. The Commission changed its fee policy in FY 1995 with respect to assessing certain costs to Agreement States and decided to seek reimbursable agreements for travel, training, and technical support costs in FY 1997. Beginning in FY 1997, these costs would be excluded from the NRC budget (SRM 2/10/95; SECY-95-017).

No existing LLW disposal facilities are licensed by the NRC. Therefore, the NRC generic LLW regulatory activities do not directly support an existing NRC licensee or class of licensees. However, some NRC licensees, as well as some Agreement State licensees, will realize an indirect benefit from these NRC LLW expenditures because they will eventually dispose of LLW at sites that are expected to be licensed in the future. The last item in this group covers those activities relating to the Site Decommissioning Management Plan (SDMP), the purpose of which is the cleanup of previously licensed sites. Currently, costs are being expended for liabilities created by past licensees. Although 10 CFR Part 170 licensing and inspection fees are assessed to those SDMP sites with an NRC license, the generic costs incurred (e.g., identification of sites to be included) and the costs of NRC's review and inspection of unlicensed sites are included in the annual fee assessed to existing materials and fuel facility licensees. Although these costs are related to the materials and fuel facility classes of licensees, they are neither necessary for regulating existing licensees nor do they provide any benefit to the existing licensees. These types of activities take place from time to time, most often in the materials area. Another example is the recent issue surrounding previous nuclear-related human experiments by the Federal Government which could require the expenditure of material-related resources, but the activity would not be necessary for regulating existing materials licensees. Rather, the activity would be performed in response to problems created by previous use of nuclear materials.

The second major group of activities for which costs are not assessed to the direct beneficiary involves specific NRC costs that can be attributed to either NRC licensees or other organizations but are not assessed to them because of legislative constraints or Commission policy. The following licensees are not assessed certain fees or pay reduced fees:

- Most Federal agencies are not assessed Part 170 fees.
- Nonprofit educational institutions are not assessed any fees.
- Small entities are assessed reduced annual fees.

For FY 1995, the fees for this second major group of activities were equivalent to \$13.5 million, of which \$12 million was assessed to power reactors and \$1.5 million to other licensees.

The first category of costs includes those activities for which the NRC is unable, on the basis of existing law, to charge a fee to specific applicants or licensees even though they receive an identifiable service from the NRC. These activities include licensing reviews and inspections for Federal agencies (other than the Tennessee Valley Authority (TVA) and the United States Enrichment Corporation).³ The IOAA prohibits the NRC from assessing 10 CFR Part 170 fees to Federal agencies for the costs of these activities. These activities include reviews of Department of Defense (DOD)/Department of Energy (DOE) naval reactor projects; licensing reviews and inspections of Federal nuclear materials users, such as Veterans Administration hospitals, Army irradiators, and NASA radiographers; safety and environmental reviews of the DOE West Valley Demonstration Project and the DOE Hanford Vitrification Project; and reviews of advanced reactor designs submitted by DOE. In addition, EPA-92 exempts from annual fees certain federally owned research reactors used primarily for educational training and academic research purposes.

In addition to certain licensees being exempted by law, two groups of licensees are either exempted or pay reduced fees based on prior Commission fee policy decisions. Nonprofit educational institutions are exempted from 10 CFR Part 170 fees and 10 CFR Part 171 annual fees.⁴ The Commission has also reduced annual fees for those licensees who qualify as small entities. These reduced fees are consistent with the Regulatory Flexibility Act of 1980 requirement that agencies consider the impact of their actions on small entities.

A third major group of activities that raises fairness and equity concerns is NRC's regulatory support to Agreement States and generic decommissioning and reclamation activities. With respect to the support to Agreement States, the

³ Section 161w. of the Atomic Energy Act of 1954, as amended, authorizes the NRC to impose fees under 10 CFR Part 170 on a Federal agency that applies for or is issued a license for a utilization facility designed to produce electrical or heat energy (e.g., licensing reviews and inspections of TVA's nuclear power plants) or which operates any facility regulated under sections 1701 or 1702 of the Atomic Energy Act (the enrichment facilities of the United States Enrichment Corporation).

⁴ In 1993, the Commission rescinded and then later restored the generic exemption from annual fees for nonprofit educational institutions.

Offices of Nuclear Regulatory Research (RES) and Nuclear Material Safety and Safeguards (NMSS) perform generic regulatory activities for nuclear materials users. This includes performing research, developing regulations and guidance, and evaluating operational events. These generic activities provide the basis for NRC to regulate its approximately 7,000 materials licensees, as well as for the Agreement States to regulate their approximately 16,000 materials licensees. However, the NRC cannot charge the Agreement State licensees an annual fee to recover a portion of the cost of these activities. Thus, only 30 percent (7,000 NRC licensees of the total population of 23,000) of the materials licensees can be assessed an annual charge to recover the cost of generic activities that support all materials licensees. This means that about \$15 million (in FY 1993 fees) or 70 percent of the materials users generic regulatory costs could be considered as not being attributed to NRC materials licensees. Generic decommissioning and decommissioning/reclamation activities support both licenses authorizing operation and possession-only licenses and must be performed independent of the number of operating licenses. However, under current NRC policy, only licenses that authorize operations are assessed annual fees to recover these generic decommissioning and reclamation costs.

For FY 1995, the fees for the third major group of activities were equivalent to \$20.4 million, of which \$18.2 was assessed to power reactors and \$2.2 to other licensees.

Excluding low-level-waste costs totaling \$7 million which are distributed to large and small generators, the remaining \$56.2 million in costs for activities, which have raised fairness and equity concerns, are now allocated to the broadest base of NRC licensees that pay annual fees. The allocation is based on the amount of the budget directly attributable to a class of licensees and results in, for instance, power reactors paying 89 percent of the cost of these activities. This allocation method was adopted by the Commission in FY 1995 given that Congress and OMB have not pursued the legislative actions recommended in the NRC fee policy report to the Congress.

ACRONYMS

AEA	Atomic Energy Act of 1954, as Amended
AEC	Atomic Energy Commission
CFO	Chief Financial Officer
COBRA	Consolidated Omnibus Budget Reconciliation Act
DOD	Department of Defense
DOE	Department of Energy
DSI	Direction-Setting Issue
EPA-92	Energy Policy Act of 1992
FCC	Federal Communications Commission
FTE	Full-Time Equivalent
FY	Fiscal Year
FWRA	Federal Workforce Restructuring Act of 1994
HLW	High-Level Waste
INSRP	Interagency Nuclear Space Review Panel
IOAA	Independent Offices Appropriation Act of 1952
NASA	National Aeronautics and Space Administration
NEPA	National Environmental Policy Act of 1969
NMSS	Office of Nuclear Material Safety and Safeguards
NRC	Nuclear Regulatory Commission

ACRONYMS (continued)

NWF	Nuclear Waste Fund
OBRA-90	Omnibus Budget Reconciliation Act of 1990
RES	Office of Nuclear regulatory Research
SDMP	Site Decommissioning Management Plan
SRM	Staff Requirements Memorandum
TVA	Tennessee Valley Authority
USEC	United States Enrichment Corporation