

July 11, 1997

FOR: The Commissioners

FROM: Jesse L. Funches /s/ Chief Financial Officer

SUBJECT: NRC'S MANDATED AND NON-MANDATED ACTIVITIES AND REVISIONS TO AGENCY POLICY ON PERFORMING REIMBURSABLE WORK FOR OTHERS

PURPOSE:

To submit for Commission approval criteria for defining the NRC's mandated and non-mandated activities and related revisions to the agency's policy on recovering full agency costs in performing reimbursable work for others. The proposed criteria and policy revisions are in response to the March 27, 1997, memorandum, "Staff Requirements - COMSECY 96-065 - Strategic Assessment Direction Setting Issue: Fees (DSI 21)."

SUMMARY:

As requested by the Commission, the criteria for defining NRC's mandated and non-mandated activities have been clarified. Clarifications to the agency's reimbursable work policy have also been developed. The policy clarifications recommended in this paper reflect how the agency is currently making decisions regarding the performance of reimbursable work. This paper requests your approval of these clarifications.

BACKGROUND:

SECY-95-012, "Reimbursement for Work Performed for Other Agencies"

On February 7, 1995, the Commission approved SECY-95-012, "Reimbursement for Work Performed for Other Agencies," which established the following policy:

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.

SECY-95-012 also established a policy that the NRC recover full agency costs in performing work for others based upon the following methodology:

- For reimbursable details to other Federal agencies, the other Federal agency is charged the salary and benefits costs NRC incurs for that employee.
- For all other reimbursable work for Federal agencies and other organizations, NRC recovers its full agency costs by charging the license fee rate in effect at the time the work is performed to recover direct salary and benefits, travel, and an appropriate share of agency overhead costs. The costs of direct contractor support NRC incurs in the performance of reimbursable work is also charged.

SECY-95-012 provides that waivers of the above policy be approved by the Executive Director for Operations. Pursuant to the January 5, 1997, reorganization approved by the Commission, the Chairman delegated authority to grant waivers for recovery of less than full cost under reimbursable agreements to the Chief Financial Officer (CFO).

Agency Authority to Accept Reimbursements and Request Appropriations

Reimbursable agreements provide NRC with additional authority to obligate funds beyond amounts provided in the agency's direct appropriations. This additional authority is not included as part of the budget authority which the NRC must collect in fees. As such, reimbursable funds do not increase the amount of fees charged to NRC licensees.

Since funds provided in reimbursable agreements represent an augmentation to the agency's appropriations, such agreements may only be entered into with specific statutory authority. The basic authority available to the NRC to obtain reimbursement from other Federal agencies for performing services is the Economy Act. The Economy Act allows Federal agencies to obtain goods and services from other Federal agencies where the head of the agency requesting the services decides the work cannot be done as conveniently or cheaply by a commercial enterprise. However, the Comptroller General has established the following general rule which limits the circumstances in which a Federal agency may obtain reimbursements from another Federal agency:

... payment for services rendered by one agency of the Government for another is not authorized where the services are required by law in carrying out the normal functions of the performing agency and for which appropriations are specifically provided. [33 Comp. Gen. 27, 31 (1953)]

For example, the Atomic Energy Act requires that the NRC license the construction and operation of civilian nuclear power reactors. Therefore, the agency requests appropriations to perform this activity and may not accept reimbursement for the expenses of this activity from another Federal agency.

The Comptroller General further elaborated on the limits placed on the Economy Act by this general rule by stating the following:

Under the doctrine of separation of powers, Congress, and Congress alone has the "power of the purse." When Congress makes an appropriation, it also establishes an authorized program level. To permit an agency to operate beyond the level that it can finance under its appropriation with funds derived

from another source would be a usurpation of the congressional prerogative. [61 Comp. Gen. 419, 421 (1982)].

Given the framework established by the statutes, Comptroller General decisions, and agency policies described above, the NRC requests appropriations directly from Congress to meet the agency's required statutory mission, as defined in the Energy Reorganization Act, the Atomic Energy Act and other laws. The NRC may lawfully accept reimbursements from other Federal agencies for performing services that are not required by statute and for which the NRC has not received appropriations.

DISCUSSION:

Criteria for Distinguishing Mandated and Non-Mandated NRC Activities

NRC's activities may be categorized as mandated and non-mandated. The following criteria establish that an NRC activity is **mandated**:

- Statute, Executive Order, Treaty, Convention, or Government-to-Government Agreement Requires that NRC Perform Activity. The NRC is required to carry out activities required by statutes, Executive Orders, treaties, Conventions, or government-to-government agreements which specifically assign a responsibility to the agency (as opposed to the U.S. Government as a whole). The specific implementation of these requirements may be directed by the Commission. The NRC is also required by 31 U.S.C. 1108 to prepare and submit to the President appropriation requests to carry out such activities. Unless authorized by law, acceptance of reimbursements from outside sources to fund these activities would represent an improper augmentation to NRC's appropriations since these functions are a normal part of the agency's mission for which it receives appropriations.
- Commission Decision Requires that NRC Perform Activity. The Commission may direct that NRC perform activities in support of statutes, Executive Orders, treaties, Conventions, or government-to-government agreements which do not specifically require NRC action. In this situation, the Commission's direction creates a mandate for the agency. Commission direction may be made through explicit Commission decisions or through Commission approval for funding specific activities in the agency's budget.

An example of an activity mandated by Commission decision is the NRC's nuclear safety assistance to the countries of the Former Soviet Union and Central and Eastern Europe. This assistance is made in response to statutes and Presidential decisions which mandate the involvement of the U.S. Government. However, the NRC is not required by law to provide specific assistance. Instead, Commission policy decisions, including approval of agency budget requests to the Office of Management and Budget (OMB) and the Congress, have created a mandated function for the agency. These policy decisions have resulted in the funding of salaries and benefits and overhead costs necessary to support NRC's assistance from the NRC's appropriated funds. Since these policy decisions have not required that the NRC fund its contractual support and travel costs related to this assistance, the NRC has been reimbursed for these costs from the Agency for International Development and the Defense Special Weapons Agency.

An activity is considered **non-mandated** where there is no statute, Executive Order, treaty, Convention, government-to-government agreement, or Commission decision that requires the NRC to perform a function. A statute, Executive Order, treaty, Convention, or government-to-government agreement may require that another Federal agency perform a function for which NRC assistance would be required. For example, the Department of Energy (DOE) has a statutory responsibility to assess options for the disposition of fissile materials. DOE has been appropriated funds to support this project and has requested NRC's assistance in assessing options for disposition. Since this assistance to DOE is not a required part of NRC's mission for which it receives appropriations, the NRC has obtained funding through a reimbursable agreement with DOE which recovers the agency's full costs of providing assistance.

Most of the NRC's activities are clearly mandated. For any other activity which is not clearly mandated, the staff will apply the criteria established above to determine whether the activity is mandated or non-mandated. The resources required for mandated activities will be included in agency budget submissions.⁽¹⁾

Should the staff determine that an activity is non-mandated, but should be performed as a service to an outside organization, NRC will perform the service on a reimbursable basis. Performance of non-mandated activities will generally require reimbursement of the agency's full cost of performing the services, unless a waiver is granted by the CFO.

Revisions to the Reimbursable Work Policy Established in SECY 95-012

The policy established in SECY-95-012 states that work for Federal agencies or other outside organizations that is not part of NRC's statutory mission and for which NRC receives no appropriations will be performed on a reimbursable basis by recovering full agency costs, unless a waiver to this policy is granted by the CFO. As a result of the distinctions established between mandated and non-mandated NRC activities and experience implementing the policy established in SECY-95-012, the following policy revisions are proposed:

- Recovery of Full Agency Costs for Non-Mandated Activities. The policy established in SECY-95-012 should be revised to indicate that work for Federal agencies or other outside organizations that is determined to be non-mandated will be performed only on a reimbursable basis by recovering full agency costs, unless a waiver is granted by the CFO.
- Recovery of Full Agency Costs for Selected Mandated Activities. In addition, the policy should be revised to indicate that the NRC will pursue reimbursement from Federal agencies and other outside organizations for the costs of mandated activities which are not a part of its statutory mission and for which NRC has not received appropriations. If efforts to obtain full cost recovery are not successful, the mandated activity may be performed without the need for a waiver from the CFO. For example, NRC has budgeted for and received appropriations to fund its activities related to regulatory reviews and other assistance pertaining to waste stored at the Department of Energy's Hanford site. NRC's Memorandum of Understanding with DOE regarding Hanford indicates that certain extra activities performed by NRC for DOE "may be negotiated for cost reimbursement as needed." Therefore, the full cost of NRC activities beyond the level of funding appropriated directly to the NRC would be funded

by DOE through a reimbursable agreement.

- Reimbursements of NRC Staff Travel Expenses. From time to time, NRC staff are invited by outside organizations to participate as technical advisors or lecturers in out-of-town conferences, meetings, or training programs. Invitations from these outside organizations normally include an offer of reimbursement of the employee's travel expenses for attending the event. Reimbursement is normally accepted under one of the following legal authorities:
 - Under 5 U.S.C. 4111, employees may accept payment of travel, subsistence, and other expenses incident to attendance at meetings, but only if the donor is exempt from taxation under section 501(c)(3) of the Internal Revenue Code (religious, charitable, scientific, educational, etc.).
 - NRC's Salaries and Expenses Appropriation Act permits moneys received for services rendered to foreign governments and international organizations to be retained and used by the agency.
 - Under the Economy Act, another Federal agency may offer to reimburse NRC for travel expenses of an employee to provide assistance to that agency.

The minimal NRC staff salaries and benefits and overhead costs associated with these trips are not generally reimbursable by the outside organization. It is estimated that outside organizations pay for less than 50 NRC trips per year.

Approval by agency management of staff participation in such conferences, meetings, or training is granted based upon the best interests of the NRC. In these cases, NRC is not prohibited from funding the full costs of staff participation in such activities with our appropriated funds. In addition, NRC is not required by law or regulation to participate. However, since funds are not specifically budgeted for these events, it is in NRC's financial interests to accept reimbursements for travel costs in cases where statutory authority exists to do so. Therefore, the policy of recovering full agency costs for performing reimbursable work should not apply to these reimbursements.

- International Assistance Activities. The NRC expends a modest level of resources associated with planning and implementing the following types of international assistance activities: on-the-job training for foreign assignees; limited advice on regulatory matters to representatives of foreign regulatory organizations (generally one to two day meetings to provide technical assistance); and admission of foreign representatives to training courses at NRC's Technical Training Center on a tuition free, space available basis. These assistance activities contribute to strengthening regulatory programs abroad and support U.S. foreign policy and national security interests. Given the minimal NRC staff resources associated with this assistance and lack of any incremental technical training costs, the policy of recovering full agency costs should not apply to this assistance.

Utilization of Agency Staff Resources on Reimbursable Work

While reimbursable agreements from other Federal agencies provide additional funding, they generally do not provide additional full-time equivalents (FTE) to the agency. Therefore, the Commission's March 27, 1997, SRM regarding DSI 21 directed that NRC should identify the FTEs associated with reimbursable activities and seek OMB support for the separation of these FTEs from the agency's total budget FTE ceiling.

As part of the FY 1999 budget planning process, the staff is identifying the additional FTE resources required for reimbursable work. These FTEs are being separated from the agency's FTE ceiling for our direct appropriated activities and will be identified to OMB as "business-like." In accordance with OMB's January 3, 1996, letter to the Chief Financial Officers Council (see attachment), the staff will request, as necessary, that OMB approve increases in the agency's FTE level in order to accommodate these "business-like" activities. Since the Federal Workforce Restructuring Act of 1994 establishes a government-wide FTE ceiling for each year through FY 1999, OMB's ability to respond to our request will depend upon the status of FTEs government-wide.

RECOMMENDATIONS:

It is recommended that the Commission:

- Approve the criteria delineated in this paper for determining mandated and non-mandated agency activities.
- Approve the following revisions to NRC's policy of recovering full agency costs through reimbursable agreements:
 - NRC will pursue reimbursement from Federal agencies and other outside organizations for the costs of mandated activities which are not a part of its statutory mission and for which NRC has not received appropriations.
 - NRC will perform work for Federal agencies and other outside organizations that is determined to be non-mandated only on a reimbursable basis by recovering full agency costs, unless a waiver is granted by the CFO or the work meets one of the exceptions noted below:
 - NRC will accept reimbursement of travel expenses from outside organizations to advise or lecture in conferences, meetings, or training programs when authorized by statute. In such cases, the NRC will not seek to recover the salary and benefits or overhead costs associated with the travel.
 - NRC will continue to provide on-the-job training, limited regulatory advice, and formal technical training to foreign representatives without requiring reimbursement of costs.

COORDINATION:

The Office of the General Counsel has no legal objection to this paper.

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1. An exception would be made for excluding those resources from the NRC's budget submission for a mandated activity that is not a required part of our statutory mission where another Federal agency is funding the activity.