

SUMMARY

**Statement of
Theodore J. Garrish, Deputy Director
Office of Civilian Radioactive Waste Management
U.S. Department of Energy
Subcommittee on Energy and Air Quality
Committee on Energy and Commerce
U. S. House of Representatives
March 10, 2005**

The Funding Profile for the Next Ten Years - The Department's 2004 estimate for the total amount of funds that are needed for the program from Fiscal Year 2005 through the opening of the repository was between \$9 and \$10.5 billion. The two ten-year funding profiles provided are preliminary planning estimates, subject to major assumptions.

Recommendation for Reforming the Nuclear Waste Fund to Ensure Funds - To meet the demand for increased funding the Administration has recommended funding proposals for the Program in the last several years and supports reclassification of receipts to the Nuclear Waste Fund as discretionary offsetting collections.

Challenges Facing the Repository Program Due to Funding Shortfalls - Without a change to the funding mechanism program shortfalls are likely. Such shortfalls will cause significant delays in repository construction and eventual operations threatening the very existence of the repository. If a change is not made, the country will be forced to spend billions of additional dollars in added liability costs, without solving the waste problem, since the repository will be extremely difficult to open in any reasonable timeframe.

Potential Liability Due to Pending Lawsuits - Unlike many other Federal programs, the government's need for a funding change is driven by the highly unusual contractual arrangement required by the Nuclear Waste Policy Act. About 60 lawsuits are pending in the U.S. Court of Federal Claims for damages for failure of the government to meet that obligation in 1998. The government has estimated that the damages due commercial utilities could be approximately \$2-3 billion, if the Department began operations in 2010. Each year of delay after 2010 could cost the government an additional \$500 million in damages.

Status of the Program – The Department is committed to the goal of beginning to receive and transport spent nuclear fuel and high-level waste to an NRC-licensed repository. The objective is to complete a high-quality license application and have it ready to submit to the NRC in December of this year. The Administration continues its strong support of this Program as we move forward with its implementation.

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Mr. Chairman and members of the Committee, I am Ted Garrish, Deputy Director of the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (OCRWM). I appreciate the opportunity to testify about the need for stable and sufficient long term funding for the Department of Energy's program to implement our Nation's radioactive waste management policy, as established by the Nuclear Waste Policy Act of 1982, as amended.

The mission of the Program - to safely dispose of spent nuclear fuel and high-level radioactive waste resulting from the Nation's commercial nuclear power and atomic energy defense activities - is vital to our national interest. The success of the program is necessary to protect public health and safety and the environment, to maintain our energy options and national security, to allow the cleanup of former weapons production sites, to continue operation of our nuclear powered naval vessels, and to advance our international non-proliferation goals. The implementation of the Nation's radioactive waste management policy will consolidate spent nuclear fuel and high-level waste from 125 sites in 39 states at a single secure, remote location in an arid desert, far from cities, schools and water supplies.

The Administration and Congress recognized these important national benefits and supported the Department's geologic repository program when the Congress voted to pass the joint resolution approving the Yucca Mountain site for a repository and the President signed that resolution into law in 2002. With the site approval, the program's focus shifted from scientific study to the design, licensing and construction of a repository. As you are aware, to accomplish these objectives substantial funding is necessary.

I am here today to discuss your concerns regarding the long-term financial viability of the program. Specifically you requested I discuss 1) the funding profile for the repository program for the next ten years; 2) the need for reforming the Nuclear Waste Fund to ensure proper availability of funds to support the project; 3) the challenges facing the repository program due to funding shortfalls; and 4) the potential liability facing the federal government due to pending lawsuits.

The Funding Profile¹ for the Next Ten Years

The Department's 2004 estimate for the total amount of funds that are needed for the program from Fiscal Year 2005 through the opening of the repository was between \$9 and \$10.5 billion. As you are aware, the Department is re-evaluating the program's out-

¹These "Total Program" funding profiles are for illustrative purposes assuming a 2012 or 2015 date for the start of repository operations and are based on several critical assumptions, such as, Total Program funding, the EPA radiation protection standard is in-place by December 2005, and the start of construction of various non-nuclear items, such as the Nevada rail line before receipt of NRC construction authorization. Many of these policy decisions have not yet been made and as such these profiles do not represent any decisions regarding Administration policy.

year schedule due to the Court's decision regarding the EPA standard and the lack of funding legislation. As you requested, I am providing ten-year funding profiles that are only preliminary planning estimates, subject to revision. These estimates do not represent final policy decisions that have yet to be made by the Administration. It should be noted that, if stable and adequate funding is not provided each year, the program's schedule and costs will be significantly impacted. Attached to this testimony are charts of the program's preliminary estimated ten-year funding profiles for both 2012 and 2015 assumed start dates for repository operations.

Recommendation for Reforming the Nuclear Waste Fund to Ensure Funds

To meet the demand for increased funding the Administration has recommended alternative funding proposals for the Program in the last three Presidential Budgets and supports legislation to enact a proposal to reclassify receipts to the Nuclear Waste Fund as discretionary offsetting collections. The Administration remains committed to pursuing an alternative funding mechanism for the repository program and I hope further discussions on the issues raised today can result in progress on this important and necessary measure.

The Nuclear Waste Funding Problem

Since 1983, a quarterly fee has been and continues to be paid by utilities who produce nuclear electricity to fund the development of a repository for disposal of their spent

nuclear fuel. According to Section 302(d) of the Nuclear Waste Policy Act, the money is to be collected for one purpose and one purpose only – performance of “nuclear waste disposal activities” through the development and operation of a repository. In actuality, much of the fees collected to date sit unused in the Nuclear Waste Fund. The current procedure used to score Nuclear Waste Fund revenues does not encourage the appropriation of the full amount of the fees received annually because the receipts do not directly offset the appropriation for the repository program.

The Department has entered into legally binding contractual agreements mandated by Congress in the Nuclear Waste Policy Act with the nuclear utilities to accept their spent nuclear fuel on a specific schedule. The Department is legislatively required to begin accepting the spent fuel for disposal beginning by January 31, 1998, and these contracts with the utilities reflect that schedule in exchange for utilities’ payment of the fee. The fact that fees are a *quid pro quo* payment in advance for a contractually required service to be performed by the federal government – a legal obligation affirmed by the federal courts – sets it apart from most other federal user charges and taxes and justifies special consideration in the budget process.

The fees are deposited into the Nuclear Waste Fund and intended to be used to pay the full cost of developing and operating the facilities needed to meet the federal government’s commitment to conduct nuclear waste disposal activities mandated by the Nuclear Waste Policy Act. The Nuclear Waste Fund was established to ensure that the Department of Energy’s commercial spent fuel disposal program would have the funds it

needed, as it needed them, to get the job done, and also to ensure that the federal taxpayer did not pay for this waste disposal program.

The utilities and their ratepayers have been keeping their part of the bargain since 1983. Unfortunately, the federal appropriations process is increasingly constraining the ability of the federal government to do its share. Because the fee revenues are classified as mandatory receipts under budget control legislation, they are treated just like general tax revenues and deposited into the federal treasury, resulting in no incentive for the Congress to use the full amount of annual receipts. As far as the millions of utility ratepayers are concerned, the fee appears to be just one more federal tax rather than a payment to ensure the delivery of a contracted service.

Over the last ten years, ratepayers of nuclear utilities have averaged annual payments into the Fund of about \$636 million, while annual appropriations from the Fund have averaged \$198 million. The total unspent balance in the Fund with interest is over \$16 billion. Until recently, the repository program's requirements were substantially below the annual fee revenues. However, that situation is changing. Beginning in FY 2007, program requirements are projected to equal or exceed projected income from the fee. To ensure that the waste fee revenues are fully available for their contractually required purpose, a new approach is necessary.

Administration Position

The program needs stable and sufficient long term funding to implement our Nation's radioactive waste management policy. The Administration believes that the fees currently paid by utilities to finance the repository should be treated as offsetting collections against the appropriation from the Nuclear Waste Fund. The amount credited as offsetting collections should not exceed the amount appropriated for the repository. This approach would allow Nuclear Waste Fund revenues received from utility contract holders in a given year, up to the amount appropriated for that year's nuclear waste disposal activities, to be reclassified from mandatory receipts to discretionary collections and available to directly offset appropriations from the Nuclear Waste Fund. The amount credited as offsetting collections would be subject to appropriations made in an Appropriation Act. Appropriations up to the amount of receipts could be provided without reducing the funding available for other federal programs.

This approach outlined in the 2005 Budget to allow fee revenues to be reclassified from mandatory receipts to discretionary collections is not new or unique. In fact, the trend in the federal budget has been to offset against outlays in many areas. Many other federal activities that generate user charges are treated this way already. A few examples are the Nuclear Regulatory Commission, and the Department of Energy's major power marketing activities. This change would simply be a technical correction that would bring the funding of the radioactive waste program into line with other practices in the federal budgeting process. It is particularly appropriate that revenues from the Nuclear

Waste Fund be made available as needed because, as stated previously, it is one of the few cases in which the federal government is, by law, contractually obligated to perform the service for which the fee is being paid.

Reclassification of the fees does not reduce Congressional control of the program's budget in any way. The Administration will still need to request and the Congress will still have to appropriate the funds, as required by the Nuclear Waste Policy Act.

Questions have been raised as to whether the Office of Management and Budget has authority to reclassify the fees through administrative action. It is my understanding that, if the Administration were to unilaterally reclassify the fees through administrative action, it would be a departure from past practice but does not appear to be prohibited by law. Nonetheless, if the Administration were to reclassify the fees unilaterally, it is my understanding that the Budget Committees and the Congressional Budget Office would have to make the same change. Absent the Budget Committees' concurrence with such an administrative action, the administrative fee reclassification would not be reflected in congressional scoring of appropriations actions.

I believe a new approach would help assure stable and sufficient funding so the program can build and operate a repository for the Nation.

Challenges Facing the Repository Program Due to Funding Shortfalls

Without a change to the funding mechanism, program funding shortfalls are likely. Such shortfalls, in turn, will cause significant delays in repository construction and eventual operations, will limit progress, and will threaten the very existence of the repository.

Everyone loses if this funding problem is not solved. Since 1995 both the Administration and Congress have been aware of the constraints the budget process imposes on the Nuclear Waste Fund. Both Branches have expressed the need for funding reform.

If a change is not made, the government will be forced to spend billions of additional dollars in added liability costs without solving the waste problem, since the repository will be extremely difficult to open in any near-term timeframe. Nuclear waste will remain at sites near communities and water supplies throughout the country, and we will not have finished the job of cleaning up the Cold War legacy at defense sites.

Potential Liability Due to Pending Lawsuits

The government's need for a funding change for the repository program, unlike many other Federal programs, is driven by the highly unusual contractual arrangement required by the Nuclear Waste Policy Act. Whenever the Federal government, pursuant to an explicit statutory requirement, makes a legally binding contractual commitment to perform a well-defined service in exchange for payments that cover the costs of that

service, it should treat those payments in a way that ensures that they are used for the statutorily-specified contracted purpose.

The Federal government is contractually obligated to perform the service for which Nuclear Waste Fund fees are paid. About 60 lawsuits are pending in the U.S. Court of Federal Claims for damages for failure of the government in 1998 to meet that obligation. The Court of Appeals has already established liability in some of the cases. The passage of legislation to help assure adequate funding for the waste program would send a strong signal to the ratepayers and utilities that the Federal government is indeed serious about meeting its obligations.

The Department has estimated that the damages due commercial utilities for the Department's delay in accepting waste in 1998 could be approximately \$2-\$3 billion, if the Department began operations in 2010. Without funding legislation and a decision on the EPA standard, each year of delay after 2010 could cost the government an additional \$500 million in damages.

Some argue that because of federal budget constraints, now is not the time to increase appropriations for the waste program, much less to make changes in the budgetary treatment of the waste fee. If past decisions are any guide, federal courts are not likely to accept funding limitations as an excuse for failure to meet contractual obligations.

Status of the Program

Now, let me focus on current program activities. Recently, there have been comments that the Program has serious problems. On the contrary, the Program is well situated for the future. We are moving ahead deliberately, step-by-step, toward development of a geologic repository at Yucca Mountain. Here are some of the reasons why this Program is poised for success:

- We have an approved site for the geologic repository. Congress approved the Yucca Mountain site in Nye County, Nevada for development as a repository in 2002. Lawsuits have affirmed the constitutionality of the process; therefore, we have a location for the development of a repository site.
- We have a draft of the entire license application in the process of refinement. We are making improvements to the analysis and presentation of information, with the objective of completing preparation of a high quality license application by the end of this calendar year.
- Transportation activities have begun in earnest. We issued Records of Decision for both transportation mode and the rail line corridor through Nevada. We are currently preparing an Environmental Impact Statement for the specific rail alignment within that corridor. Institutional activities to include the States as partners have also begun.

- We are requesting the full funding amount necessary to complete those tasks we can reasonably accomplish in FY 2006. The Department will continue to request annual funding appropriate to meet project requirements.
- The Administration continues its strong support of the Program as we move forward with its implementation.

This program does, however, face challenges involving parties outside the Department that I would like to note.

First, the U.S. Court of Appeals for the District of Columbia Circuit vacated the Environmental Protection Agency's Yucca Mountain radiation protection standard with regard to its 10,000 year regulatory compliance period. EPA is currently working to revise its Yucca Mountain radiation standard to conform to the court's direction. We remain optimistic that EPA's work in promulgating the standard will be contemporaneous with our work on the license application and that both will be ready by the latter part of the year.

The second challenge is being addressed today – the need for sufficient and stable long-term funding for the Program. Currently, there is no incentive in the budget scoring process for Congress to appropriate the full Administration request and to use all of the Nuclear Waste Fund fee receipts to construct the Yucca Mountain repository.

Despite these challenges, the Program is fundamentally on sound footing and we are poised to make significant progress in the coming year.

Consistent with Departmental and Program objectives, the Yucca Mountain Project's main focus in FY 2005 is on improving and completing the license application. The required elements of design, performance assessment, safety analyses, and technical data in the license application must be sufficient for the NRC to conduct an independent review and reach a decision to issue a construction authorization. The application must demonstrate that the repository can be constructed and operated and that the health and safety of the public will be protected.

Conclusion

We are committed to the goal of beginning to receive and transport spent nuclear fuel and high-level waste to an NRC-licensed repository. Toward that end, our objective is to complete a high-quality license application and have it ready to submit to the NRC in December of this year.

The Administration believes that the fees currently paid to the government by utilities to finance the repository should be treated as offsetting collections against the appropriation from the Nuclear Waste Fund. We will continue to work within the Administration and

with our Congressional counterparts to provide the funding needed to meet Yucca Mountain's programmatic requirements.

I appreciate the efforts of the Committee to explore ways to properly align the Nuclear Waste fees with the expenditures for Yucca Mountain.. We appreciate your holding this hearing to address the Program's need for stable and sufficient long-term funding.

This concludes my prepared statement. I will be pleased to respond to any questions the Committee may have.

**DEPARTMENT OF ENERGY
OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT
TEN-YEAR FUNDING PROFILES**

**2012 START OF OPERATIONS
(dollars in thousands)**

	FY 2006 Request	FY 2007 Request	FY 2008 Request	FY 2009 Request	FY 2010 Request	FY 2011 Request	FY 2012 Request	SUBTOTAL	FY 2013 Request	FY 2014 Request	FY 2015 Request	TOTAL
Total Program Requirements	\$ 651,447	\$ 1,019,503	\$ 1,169,740	\$ 1,616,000	\$ 1,804,000	\$ 1,911,000	\$ 1,520,000	\$ 9,691,690	\$ 1,090,000	\$ 850,000	\$ 850,000	\$ 12,481,690

Funding From:

Nuclear Waste Fund Fee Income	\$ 300,000	\$ 519,503	\$ 619,740	\$ 765,000	\$ 766,000	\$ 767,000	\$ 769,000	\$ 4,506,243	\$ 772,000	\$ 620,000	\$ 620,000	\$ 6,518,243
Nuclear Waste Fund Corpus - Interest	\$ -	\$ -	\$ -	\$ 301,000	\$ 488,000	\$ 594,000	\$ 201,000	\$ 1,584,000	\$ 38,000	\$ -	\$ -	\$ 1,622,000
Defense Nuclear Waste	\$ 351,447	\$ 500,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 3,601,447	\$ 280,000	\$ 230,000	\$ 230,000	\$ 4,341,447
Total Funding	\$ 651,447	\$ 1,019,503	\$ 1,169,740	\$ 1,616,000	\$ 1,804,000	\$ 1,911,000	\$ 1,520,000	\$ 9,691,690	\$ 1,090,000	\$ 850,000	\$ 850,000	\$ 12,481,690

**2015 START OF OPERATIONS
(dollars in thousands)**

	FY 2006 Request	FY 2007 Request	FY 2008 Request	FY 2009 Request	FY 2010 Request	FY 2011 Request	FY 2012 Request	FY 2013 Request	FY 2014 Request	FY 2015 Request	TOTAL
Total Program Requirements	\$ 651,334	\$ 1,019,503	\$ 1,169,740	\$ 1,391,000	\$ 1,404,000	\$ 1,711,000	\$ 1,695,000	\$ 1,365,000	\$ 1,175,000	\$ 1,060,000	\$ 12,641,577

Funding From:

Nuclear Waste Fund Fee Income	\$ 300,000	\$ 519,503	\$ 619,740	\$ 765,000	\$ 766,000	\$ 767,000	\$ 769,000	\$ 772,000	\$ 774,000	\$ 778,000	\$ 6,830,243
Nuclear Waste Fund Corpus - Interest	\$ -	\$ -	\$ -	\$ 76,000	\$ 88,000	\$ 394,000	\$ 376,000	\$ 313,000	\$ 171,000	\$ 52,000	\$ 1,470,000
Defense Nuclear Waste	\$ 351,334	\$ 500,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 550,000	\$ 280,000	\$ 230,000	\$ 230,000	\$ 4,341,334
Total Funding	\$ 651,334	\$ 1,019,503	\$ 1,169,740	\$ 1,391,000	\$ 1,404,000	\$ 1,711,000	\$ 1,695,000	\$ 1,365,000	\$ 1,175,000	\$ 1,060,000	\$ 12,641,577

These "Total Program" funding profiles are for illustrative purposes assuming a 2012 or 2015 date for the start of repository operations and are based on several critical assumptions, such as, Total Program funding, the EPA radiation protection standard is in-place by December 2005, and the start of construction of various non-nuclear items, such as the Nevada rail line before receipt of NRC construction authorization. Many of these policy decisions have not yet been made and as such these profiles do not represent any decisions regarding Administration policy.