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DEPARTMENT OF LABOR
DIVISION OF SAFETY AND HEALTH
Radiological Health Unit
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DSI-G 2

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October 23, 1996

Mr. John C. Hoyle
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

ATTN: Chief of Docketing & Services Branch

Dear Mr. Hoyle:

Enclosed please find the New York State Department of Labor's comments on three of the Direction Setting Issues Papers (DSI's) included in the NRC's strategic assessment and rebaselining initiative (DSI 4, DSI 7, and DSI 21).

Sincerely,

Rita Aldrich
Principal Radiophysicist

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enclosure

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NEW YORK STATE DEPARTMENT OF LABOR
GENERAL COMMENTS ON NRC DIRECTION SETTING ISSUES PAPERS
AND DSI 21 "FEES"

Several DSI's that were not released for comment (i.e., Regulating a Small Number of Licensees, Management Philosophy, Management and Organization, Staffing and Core Capabilities, Independent Oversight) appear to be very relevant to the Agreement States program and should be shared with the states. The reasons given for not releasing them are that they present internal issues, are not direction-setting (Independent Oversight), or don't warrant further consideration (Regulating a Small Number of Licensees). The latter issue seems particularly relevant to discussion of DSI 4 (NRC's Relationship with Agreement States) and DSI 7 (Materials/Medical Oversight) and we do not understand why it was not included for discussion.

DSI 21 "Fees": We were particularly interested in reviewing this DSI after reviewing DSI 4 and its discussions under Option 4 (Treat Agreement States as Co-Regulators) of implementing "full fee recovery from Agreement States," and under "Funding" of modifying OBRA-90 so that NRC could charge Agreement States "to recover its oversight costs." We have remarked, in our comments on DSI 4 and DSI 7, that NRC seems to be using the issue of money to suit the argument at hand. Possible costs to the states (an unfunded mandate) is presented as an argument against transfer of NRC's remaining authority over "agreement" materials to non-Agreement States, while NRC proposes "full fee recovery" as a condition of recognizing existing Agreement States as co-regulators.

However, the only specific mention of Agreement States in the body of DSI 21 is to assert that both "safety and payment of fees" were considered when the Commission "addressed the issue" of funding Agreement State training. The Commission addressed the issue by discontinuing this funding at an annual savings of one-half to one million dollars a year (out of \$56 million spent by NRC annually which is not directly attributable to services to licensees), while continuing to fund training for foreign nationals under its international program.

The body of DSI 21 discusses how NRC should take fees (or the non-payment of fees) into consideration when making decisions, and what funding mechanisms NRC should use to "recover costs in a fair and equitable manner." The discussed mechanisms include requesting legislation to allow NRC to assess fees to non-licensees, and amending OBRA-90 and the AEA to give NRC "maximum flexibility to assess fees." Neither the Agreement States nor the non-Agreement States are specifically mentioned in regard to these expanded fee categories.

However, the Agreement States figure prominently in Appendix 21 B to the DSI (Specific Fairness and Equity Concerns Identified With 100-Percent Fee Recovery), which is apparently excerpted from a February, 1994 report to Congress. Here it is stated that, although Agreement States and their licensees cannot currently be charged annual fees under OBRA-90, NRC can assess fees for specific "services," such as "review of requests for an Agreement, periodic program reviews and training and technical assistance." These are

included in a list of NRC activities that are assessed to NRC licensees although these licensees do not directly benefit from them. Other items on the same list are NRC's International program, NRC's low-level waste activities and cleanup of former NRC licensee sites. Although these are all apparently "fairness and equity" concerns due to costs borne by NRC licensees, only the Agreement State "services" include a discussion of specific fee assessment possibilities, and a specific action already taken (discontinuing funding for training). We also note that the discussion of NRC's low-level waste (LLW) activities and their attendant cost, states that Agreement State licensees will realize an "indirect" benefit from NRC's activities, even though NRC does not now, and is not ever likely to license a LLW disposal facility. Conspicuously absent from this discussion is the direct benefit that NRC licensees are currently realizing from being able to dispose of LLW at Agreement State-licensed disposal sites.

The Appendix goes on to include costs attributed by NRC to the Agreement States program among another group of NRC activities that raise "fairness and equity concerns." In this case, NRC postulates that 70% of its activities in performing research, developing regulations and guidance and evaluating operational events for its licensees, are actually done for the Agreement States and its licensees at a prorated annual cost of \$15 million! We would respond that we develop our own regulations and guidance for licensees, that we evaluate our own operational events (accidents, incidents, etc.) and that we support these activities through fees paid by New York State licensees and taxpayers. We would also respond that whether NRC has one licensee or one million licensees, it must perform the listed functions just as the states do, as economically as possible.

It is unclear from DSI 21, what the Commission will eventually do in regard to funding mechanisms. Their preliminary view on considering fees when making decisions involves staff development of a set of "criteria for defining mandated and non-mandated activities." Non-mandated activities, once defined, will be performed on a fee-for-services basis only. The Commission will also consider comments and recommendations on specific proposals (for funding mechanisms) "if they present new approaches to improve the process or to accomplish a more equitable distribution of fees."

This appears to leave the door open to consideration of assessing "fees" to Agreement States for NRC oversight "services," or to amending OBRA-90 to allow annual fees to be charged to Agreement States for generic regulatory "overhead."

Agreement States, such as New York, have accepted the fact that no federal funding is provided for their programs since they are not delegated programs. Under our Agreement, NRC discontinued regulation in New York State and relinquished authority to the State. As independent co-regulators, we have supported our own programs without complaint. However, for NRC to propose that we not only support our own programs, but defray the federal government's administrative costs for relinquishing its authority, would be totally unacceptable.

Under such a bizarre arrangement it is quite possible that as NRC's licensee base continues to decline, the Agreement States could wind up providing the bulk of NRC's funding while having no power to limit NRC's expenditures.

President Clinton's March 4, 1995, memorandum on his "Regulatory Reinvention Initiative" required all federal regulators to address several specific questions. One of these was "whether the states or local governments could do the job, making federal regulation unnecessary." This appears to be a situation in which the Agreement States are doing the job, but a redundant layer of federal regulation continues to exist anyway, and the states may be asked to pay for it. This is not in keeping with the President's memorandum; phasing out NRC's materials program, however, is!