



MEMORANDUM

January 21, 2016

To: House Committee on Energy and Commerce
Subcommittee on Environment and the Economy
Attention: Will Batson

From: David M. Bearden, Specialist in Environmental Policy, 7-2390

Subject: **Responses to Questions for the Record of a Hearing held by the Subcommittee on Environment and the Economy, House Committee on Energy and Commerce, December 3, 2015, “Nuclear Waste Fund: Budgetary, Funding, and Scoring Issues”**

This memorandum responds to the questions you submitted for the record of a hearing held by the Subcommittee on Environment and the Economy of the House Committee on Energy and Commerce on December 3, 2015, at which I testified on behalf of the Congressional Research Service (CRS). The hearing examined budgetary, funding, and scoring issues for the Nuclear Waste Fund.

I have prepared the following responses to the questions you submitted to CRS for the hearing record. Each question and response is presented separately below in the same order as outlined in the letter from Chairman Shimkus that you forwarded to me on January 7, 2016.

Question

Much of the discussion regarding the nature of the Nuclear Waste Fund assumes that the funding for a used fuel management program is in a “lockbox” in a Treasury Department account waiting to be spent by the Department of Energy. Is this assumption accurate?

Response

Although some may use the term “lockbox” to describe certain accounts of the U.S. Treasury in terms of the accounts being dedicated to the funding of specific purposes, the statutes that authorize these accounts do not refer to them using this term. Section 302 of the Nuclear Waste Policy Act authorized the Nuclear Waste Fund as a “separate fund” of the U.S. Treasury.¹ Congress did not use the term “lockbox” in the language of the statute.

As discussed in the CRS testimony, the Nuclear Waste Fund is financed with receipts from the collection of fees from nuclear utilities, and interest accrued on the unobligated balance of receipts credited to the fund that are invested in U.S. Treasury securities. The fees are authorized to fund the permanent disposal of “spent” or used nuclear fuel (or solidified high-level radioactive waste derived from spent nuclear fuel)

¹ 42 U.S.C. §10222.

created from the generation of electricity involving civilian nuclear reactors, and various supporting activities including assistance to affected states, local governments, and tribes.²

The Nuclear Waste Fund is one of numerous separate or special fund accounts of the U.S. Treasury financed with receipts collected for specific purposes. These accounts function similarly to trust fund accounts, although they are not categorized within the federal budget as trust funds per se. As observed by the U.S. General Accounting Office (GAO, later renamed the Government Accountability Office) in the Third edition of the *Principles of Federal Appropriations Law*,

Special fund accounts are established to record receipts collected from a specific source and earmarked by law for a specific purpose or program...As a general proposition, special funds operate like statutorily designated trust fund accounts with little substantive difference other than that the authorizing legislation does not designate them as trust funds...The Nuclear Waste Fund, 42 U.S.C. § 10222(c), is an example.³

The Anti-Deficiency Act generally provides that no federal department or agency may obligate federal funds absent an appropriation or in excess of an appropriation, regardless of whether the account financing the appropriation is a trust fund or special fund account dedicated to a specific purpose.⁴ Receipts credited to some federal trust fund and special fund accounts are authorized as permanent (i.e., mandatory) appropriations available directly for obligation to carry out their dedicated purposes, whereas others are subject to discretionary spending under annual appropriations acts.

The Nuclear Waste Policy Act did not authorize permanent appropriations to carry out the purposes of the statute. Section 6 explicitly provides that the authority of the statute to “incur indebtedness, or enter into contracts, obligating amounts to be expended by the Federal Government shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.”⁵

The availability of receipts credited to the Nuclear Waste Fund to carry out the purposes authorized in the Nuclear Waste Policy Act therefore is subject to annual appropriations acts, and applicable limitations on federal spending. Consequently, receipts credited to the Nuclear Waste Fund are not available to the Department of Energy to obligate for the authorized uses of the fund until the receipts are appropriated, regardless of the accumulated balance.

Question

Will you clarify the differing nature of the authorized cap of the Nuclear Waste Fund relative to what's actually available to appropriate?

Response

The Nuclear Waste Policy Act did not establish a specific cap on receipts from the collection of nuclear utility fees to finance the Nuclear Waste Fund, nor on appropriations of these receipts credited to the fund. The statute establishes criteria for determining the amount of the fees. The level of appropriations is dependent upon receipts credited to the fund that are made available to the Department of Energy in annual appropriations acts, subject to limitations on total federal spending.

² For further discussion of the authorized uses of the Nuclear Waste Fund and related issues, see CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by Mark Holt.

³ U.S. General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, Third Edition, Volume III, September 2008, GAO-08-978SP, available on the GAO website: <http://www.gao.gov/products/GAO-08-978SP>.

⁴ 31 U.S.C. §1341.

⁵ 42 U.S.C. §10105.

Limitations on Fee Collections

Section 302(a) of the Nuclear Waste Policy Act authorizes the collection of nuclear utility fees at a specific rate of “1.0 mil per kilowatt-hour” (equivalent to 1/10 of one cent per kilowatt-hour), up to a total amount that would be “sufficient to offset expenditures” for the authorized uses of the Nuclear Waste Fund.⁶ As stated in the CRS testimony, the Department of Energy suspended the collections of nuclear utility fees on May 16, 2014, as a result of litigation in the U.S. Court of Appeals for the District of Columbia Circuit. This litigation challenged the present need for the fees, considering the status of the licensing process for a repository and the reasonableness of plans and assumptions upon which to estimate the funding needs.⁷

However, the fees are not capped. Collection of the fees potentially may resume if an adequate method were developed to estimate the funding needs to carry out the purposes of the Nuclear Waste Fund. As authorized in Section 302(a)(4) of the Nuclear Waste Policy Act, resumption of the collection of the fees would be subject to a congressional review process.

Limitations on Annual Appropriations

Appropriations of receipts credited to the Nuclear Waste Fund are subject to limitations on federal spending established both in statute and through congressional procedures. For example, the Budget Control Act of 2011 (BCA, P.L. 112-25) established caps on discretionary spending through FY2021.⁸ Recently, the Bipartisan Budget Act of 2015 (P.L. 114-74), enacted on November 2, 2015, increased the caps on discretionary spending for FY2016 and FY2017.⁹ Procedurally, congressional budget resolutions also limit total discretionary spending. In addition, each annual appropriations bill is limited by the sub-allocations made by the House and Senate Committees on Appropriations.

Appropriations from the Nuclear Waste Fund have been provided through the annual appropriations bill for Energy and Water Development and Related Agencies that includes funding for the Department of Energy. The accumulated balance of receipts credited to the Nuclear Waste Fund remains available for appropriation among the competing funding priorities within the cap on total discretionary spending and the sub-allocation for Energy and Water Development and Related Agencies each fiscal year.

As noted in the CRS testimony, the Department of Energy reported a balance of \$34.3 billion in net investments and interest combined in the Nuclear Waste Fund, as of the end of FY2015.¹⁰ Enacted December 18, 2015, the Consolidated Appropriations Act, 2016 (P.L. 114-113, H.R. 2029) appropriated \$3.6 million from the Nuclear Waste Fund for the Nuclear Waste Technical Review Board, and did not include any appropriations derived from the Nuclear Waste Fund for other nuclear energy activities.¹¹

⁶ 42 U.S.C. §10222(a).

⁷ For a discussion of litigation related to the Nuclear Waste Fund, see CRS Report R44151, *Yucca Mountain: Legal Developments Relating to the Designated Nuclear Waste Repository*, by Todd Garvey and Alexandra M. Wyatt.

⁸ The BCA also authorizes sequestration of mandatory appropriations to control federal spending. See CRS Report R42506, *The Budget Control Act of 2011 as Amended: Budgetary Effects*, by Grant A. Driessen and Marc Labonte.

⁹ P.L. 114-74 also altered various other parameters of the federal budget. See CRS Insight IN10389, *Bipartisan Budget Act of 2015: Adjustments to the Budget Control Act of 2011*, by Grant A. Driessen.

¹⁰ U.S. Department of Energy, Office of Inspector General, Office of Audits and Inspections, *Audit Report: Department of Energy Nuclear Waste Fund's Fiscal Year 2015 Financial Statement Audit*, OAI-FS-16-03, December 2015, available on the Department of Energy website: <http://www.energy.gov/sites/prod/files/2015/12/f27/OAI-FS-16-03.pdf>.

¹¹ The explanatory statement accompanying H.R. 2029 indicated that the agreement on the final bill “includes no funding derived from the Nuclear Waste Fund” for nuclear energy activities. See *Congressional Record*, Vol. 161, No. 184, Book II, December 17, 2015, p. H10103.

Question

Your testimony describes a permanent, indefinite appropriation known as the Judgment Fund to pay legal claims against the federal government. Will you please clarify why claims resulting from the federal government's breach of contract with utilities are paid for out of the Judgment Fund instead of the Nuclear Waste Fund?

Response

The Judgment Fund of the U.S. Treasury is a permanent, indefinite appropriation available to pay eligible claims owed by the United States for which payment is “not otherwise authorized by law” in separate appropriations.¹² If no separate appropriation is provided, payment from the Judgment Fund is authorized for *final* judgments, awards, compromise settlements, and interest and costs specified in the judgments, owed by the United States. The Judgment Fund only can be used for the payment of claims that are final, meaning the monetary award cannot be changed or overturned.¹³

The Nuclear Waste Policy Act authorizes the use of appropriations from the Nuclear Waste Fund for specific “radioactive waste disposal activities” and does not refer to the payment of eligible damage claims for the private costs of interim storage of “spent” or used nuclear fuel incurred by utilities. As specified in Section 302(d) of the statute, eligible radiation disposal activities include:

- identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility;
- conducting nongeneric research, development, and demonstration activities;
- administrative costs of the radioactive waste disposal program;
- costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;
- costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and
- assistance to affected states, local governments, and Indian tribes.¹⁴

Absent the authorized use of the Nuclear Waste Fund or another account of the U.S. Treasury, the Judgment Fund has been the source of federal funds to pay eligible damage claims owed by the United States for private interim storage costs incurred by nuclear utilities. As noted in the CRS testimony, the Department of Energy reports that a total of \$5.3 billion had been paid from the Judgment Fund as of the end of FY2015 for eligible damage claims filed by nuclear utilities, and estimates a remaining liability of \$23.7 billion for future claims as nuclear utilities continue to incur interim storage costs.¹⁵

¹² 31 U.S.C. § 1304.

¹³ For further discussion of the eligible uses of the Judgment Fund, see CRS Report R42835, *The Judgment Fund: History, Administration, and Common Usage*, by Vivian S. Chu and Brian T. Yeh.

¹⁴ 42 U.S.C. §10222(d).

¹⁵ U.S. Department of Energy, Office of Inspector General, Office of Audits and Inspections, *Audit Report: Department of Energy Nuclear Waste Fund's Fiscal Year 2015 Financial Statement Audit*, OAI-FS-16-03, December 2015, pp. 20-21.