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POLICY ISSUE

(Notation Vote)

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SECY-98-260

FOR: The Commissioners

FROM: Jesse L. Funches
Chief Financial Officer

SUBJECT: FY 1999 FEE RULEMAKING

PURPOSE:

This paper addresses policy issues for the FY 1999 fee rule. It is in response to the March 23, 1998, Staff Requirements Memorandum (SRM) for SECY-98-034, "FY 1998 Proposed Fee Rule," the June 12, 1998, SRM for SECY-98-095, "Licensing Model For Transfer of Fort St. Vrain Independent Spent Fuel Storage Installation License to the U S. Department of Energy (DOE), and COMSAJ-98-001/COMEXM-98-001, "Annual Fees for Storage of Spent Fuel." This paper also requests the Commission's decision on a proposed method for improving efficiencies in the assessment of Part 170 fees for small materials users. The proposed method was developed at the request of the Executive Council in response to the Program Review of The Chief Financial Officer Programs (WITS 9700380).

This paper does not contain a proposed FY 1999 fee schedule. The proposed fees will be developed based on Commission decisions on the recommendations in this paper and will be provided to the Commission during the development of the FY 1999 proposed fee rule.

This paper provides the schedule for completing the FY 1999 fee rulemaking, including a public meeting to answer questions about the proposed changes.

SUMMARY:

The Commission requested that the staff examine the current fee policies in several areas and provide recommendations to the Commission for consideration for the FY 1999 fee rulemaking.

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Currently, Part 170 fees assessed for identifiable services to specific licensees and applicants under the authority of the Independent Offices Appropriation Act account for approximately 20-25 percent of the total budgeted amount recovered through fees. The remaining 75-80 percent is recovered through Part 171 annual fees. This allocation of costs has raised Commission, licensee and Congressional questions about what can be done to shift the balance away from annual fees to Part 170 fees. In the SRM for SECY-98-034, "FY 1998 Proposed Fee Rule", the Commission directed the staff to: 1) examine the methodology for assessing fees to licensees and the activities whose costs can be recovered under Part 170; and 2) consider alternative treatment of costs attributable to the Department of Energy (DOE) that affect independent spent fuel storage facilities' annual fees (i.e., whether legislation should be pursued which would (a) either permit NRC to charge DOE for these NRC costs or (b) take these NRC costs off the fee base by funding these activities from an appropriation from the General Treasury).

The Commission also directed the staff in COMSAJ-98-001/COMEXM-98-001 to propose means to revise Part 171 in a way that gives equivalent fee treatment to NRC costs incurred in regulating both wet storage (i.e., spent fuel pool) and dry storage (i.e., independent spent fuel storage installations, or ISFSI). Under current fee regulations, Part 50 licensees whose facilities are being decommissioned and who store spent fuel in a spent fuel pool are not assessed an annual fee, but those who store spent fuel in an ISFSI are assessed an annual fee The Commission previously determined that both storage options are considered safe and acceptable forms of storage of spent fuel. NRC's intention to revise the FY 1999 fee rule to be consistent with the Commission's new policy was included in the Statement of Considerations for the FY 1998 fee rule.

Two studies have been completed in response to the cited SRMs. The first study, Attachment 1, is an examination of activities performed for individual applicants or licensees but whose costs are not recovered under Part 170. As a result of the study findings, the staff recommends that Part 170 be revised to include fees for plant specific performance assessments and evaluations (Incident Investigation Teams, Diagnostic Evaluation Teams, performance assessments of fuel facilities, plant performance reviews, etc.); reviews of responses to Confirmatory Action Letters, reports, and other reviews; and full cost recovery for project managers (i.e., licensees would be billed for all of the project manager's time, except time spent on generic activities, such as rulemaking, and leave time). The staff also recommends that public comments be solicited in the FY 1999 fee rule on the potential for including in the FY 2000 fee rule cost recovery under Part 170 for Orders and responses thereto, escalated enforcement actions, and allegations and other investigations. Assessing fees to the affected licensees to recover the cost of these activities raises legal and policy issues that warrant input from the affected stakeholders before a recommendation is made to assess Part 170 fees for some or all of these activities. The staff recommends that costs for contested hearings and responses to Part 2.206 petitions continue to be recovered through Part 171 annual fees.

The second study, Attachment 2, considered the issues related to fee treatment for spent fuel storage, and the current fee exemption policy for licensees in decommissioning or holding a possession only license. The staff is recommending that a spent fuel storage/decommissioning annual fee be assessed for all power reactor licensees regardless of their operating status and to Part 72 licensees who do not hold a Part 50 license. This fee would recover all generic costs related to spent fuel storage and reactor decommissioning Under this recommendation, the

remainder of the generic decommissioning costs would continue to be included in the surcharge assessed to the various classes of licensees based on their share of the budget.

With regard to the loss of Part 170 license and inspection fees that will result with the transfer of the Fort St. Vrain Part 72 license to DOE, the staff is not recommending any change for the FY 1999 fee rule, but recommends that legislation be proposed for FY 2000 to authorize NRC to assess Part 170 fees to all Federal agencies

This paper also provides a proposal for more efficiently recovering costs associated with license amendments filed by the smaller materials license users. As a result of the December 10, 1997, Program Review of the Chief Financial Officer programs, the Executive Council requested that the staff provide a proposal on how to be more efficient in the collection of Part 170 fees for the small materials users. Staff is recommending that small materials Part 170 amendment fees be eliminated and the costs be included in their Part 171 annual fee. This would continue efforts to streamline and stabilize fees, and would minimize efforts associated with processing these fees, which total less than $1 million annually.

This paper also informs the Commission of plans to rebaseline the annual fees for FY 1999.

BACKGROUND AND DISCUSSION:

A. Methodology for assessing fees to licensees and activities that can be recovered under Part 170.

In the March 23, 1998, SRM for SECY-98-034, "FY 1998 Proposed Fee Rule", the Commission directed the staff to examine the methodology for assessing fees to licensees and the activities whose costs can be recovered under Part 170.

The current Part 170 fees are based on Title V of the Independent Offices Appropriation Act of 1952 (IOAA), interpretations of that legislation by the Federal courts, and Commission guidance. The Commission developed the basic structure of Part 170 after the United States Court of Appeals for the District of Columbia Circuit issued four judicial decisions in late 1976 which invalidated fee schedules promulgated by the Federal Communications Commission. Following guidance contained in those decisions the Commission directed the staff to develop a fee schedule following six guidelines, which set forth the legally required parameters for assessing fees pursuant to the IOAA. As the Commission considers expanding the scope of its activities whose costs will be collected under Part 170, it is useful to review these important guidelines.

1. Fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. The term "special benefits" includes services rendered at the request of a recipient and all services necessary to the issuance of a required permit, license, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations;

2. All direct and indirect costs incurred by the NRC in providing special benefits may be recovered by fees;

3. It is not necessary to allocate costs in proportion to the degree of public or private benefit resulting from conferring a special benefit on a recipient,

4. Where the identification of the specific beneficiary of NRC activity is obscure, the cost of the activity may not be included in the cost basis for fees;

5. A fee shall not exceed the sum on the average of the direct and indirect costs which the NRC incurs in furnishing the services for a member of the class of recipients for which the fee is assessed;

6. Calculation of agency costs shall be performed as accurately as is reasonable and practical, and shall be based on specific expenses identified to the smallest practical unit associated with the rendering of the type of agency services to the particular class of recipients.

The Commission's 1978 fee schedule, and implicitly these guidelines, were upheld by the United States Court of Appeals for the Fifth Circuit in Mississippi Power and Light Co. v. U S Nuclear Regulatory Commission, 601 F. 2d 223 (5th Cir.1979), cert. denied, 444 U.S. 1102 (1980). In rejecting challenges to numerous aspects of the Commission's fee schedule, the Court specifically held.

(1) The NRC had the authority to recover the full cost of providing services to identifiable beneficiaries, even though the provision of the services benefitted both the licensee and the general public;

(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act and with applicable regulations;

(3) The NRC could charge for costs incurred in conducting environmental reviews required by NEPA;

(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule. The court also rejected petitioner's argument that the Commission's failure to charge for contested hearing was arbitrary and capricious. The court noted that in view of the difficulty in estimating in advance the costs of such contested proceedings, it found the decision to exclude these costs from fee recovery to be a "wise" one, although it expressly indicated that it expressed no opinion on whether the Commission could legally charge the applicant for contested hearings.

With this judicial endorsement, the NRC assesses fees under Part 170 for:

(1) the review of applications for and the issuance of licensing actions or other approvals; (2) reviews and approvals of topical reports; (3) preapplication consultations; (4) inspections; and (5) the costs of maintaining resident inspectors.

The remainder of NRC's budget authority is recovered through annual fees assessed under Part 171. Among the activities whose costs are recovered through Part 171 annual fees are some activities which provide "special benefits to identifiable recipients", but whose costs have not been assessed under Part 170 for lack of legislative authority, policy reasons or litigative risk. Specifically, the IOAA does not permit the NRC to charge other Federal agencies fees absent other legislation authorizing such assessments. While the Congress has provided the NRC with the authority to charge such fees to TVA for costs relating to the regulation of its reactors, the Congress has not authorized the NRC to assess fees to DOE or other Federal agencies for services rendered as part of our statutory regulatory mission.

For policy or legal reasons, the Commission has also not assessed fees under Part 170 for (a) review of allegations; (b) conduct of investigations; (c) issuance of enforcement orders and review of responses thereto; (d) contested hearings; (e) oversight and administration of the Agreement State program; (f) regulatory services provided to nonprofit educational institutions; (g) incident investigations; (h) performance assessments and evaluations (plant performance reviews, diagnostic evaluation teams, fuel cycle facility performance assessments, etc.); (i) reviews of submittals that do not result in a licensing action, such as responses to confirmatory action letters, reports, notifications, and financial assurance documents; and (j) vendor inspections.

As part of the fee policy review required by Section 2903(c) of the Energy Policy Act of 1992, the NRC solicited in an April 19, 1993, Federal Register notice (58 FR 21120) public comment on the option of broadening the scope of 10 CFR Part 170 to recover costs incurred for some of the activities listed in the above paragraph. Specifically, comments were sought on whether Part 170 fees should be recovered for incident investigations (i.e., Incident Investigation Team investigations of significant operational events, or IITs), allegations, contested hearings, vendor inspections, orders and amendments resulting from orders, and reviews that do not result in approvals The comments received were summarized in SECY-93-342, dated December 14, 1993, as follows

> A majority of the commenters indicated that if Part 170 were expanded, they would support billing for orders and amendments resulting from such orders. These actions, the commenters stated, although not licensee-initiated are provided to a specific licensee and should be assessed on an individual basis. One commenter argued that NRC should correct the situation in which a licensee who does not submit an amendment request recommended by an NRC generic letter until ordered to do so is not charged a fee, but a licensee who voluntarily submits such an amendment is subject to Part 170 fees.
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> With respect to the remainder of the items, most commenters believed that many activities listed in the notice do not constitute a specific service to an identifiable licensee and that the costs should continue to be collected under Part 171. For example, commenters claim that the cost of allegations and contested hearings are beyond the licensee's control and should not be billed on an individual basis. Instead, the NRC should continue to include costs for these activities in the Part 171 annual fee. Other comments indicated that investigations of allegations and contested hearings often raise generic issues of concern to all licensees. Therefore, saddling individual licensees with these additional costs is unfair and inequitable because they arise at NRC's direction,

are not requested by a licensee and are beyond a licensee's control. Others commented that all licensees benefit from these regulatory activities and that the costs should be recovered through the annual charge.

The staff agreed with the commenters that the agency should continue not to assess Part 170 fees for IITs , vendor inspections, contested hearings, allegations, and reviews that do not result in approvals. However, contrary to the position advocated by some commenters, staff recommended that Part 170 fees not be charged for orders and amendments resulting from orders. The basis for the recommendation was that many orders are used to impose civil penalties and charging for the development of orders could be perceived as imposing additional fines on the licensees. Additionally, in the case of a request for a hearing, charging for reviewing responses to orders could be perceived as penalizing a licensee for exercising its right to disagree with the NRC. The Commission approved the staff's recommendations and thus none of these costs are now recovered through Part.170 fees.

In the following years the Commission made changes to its fee schedules to streamline fees and make fees more predictable for small materials licensees. Instead of assessing Part 170 fees for individual inspections and license renewals, materials inspection and renewal costs were included in their Part 171 annual fees, a shift that those licensees supported. This policy change results in diminished Part 170 collections of approximately $4 million per year.

In the FY 1998 fee rulemaking, some steps were taken to shift costs from Part 171 to Part 170. Beginning August 10, 1998, the effective date for the FY 1998 fee rule, Part 170 fees are assessed to recover full cost for resident inspectors, to recover costs for activities conducted up to approximately 30 days after the issuance of an inspection report, and to recover costs for licensing and inspection activities performed during compensated overtime. At the time the FY 1998 fee rule was developed, we estimated that these charges would result in an additional $25 - $28 million in Part 170 collections. The estimate was based on FY 1997 data, and included: resident inspectors, $26.5 million; inspection related activities performed within 30 days after issuance of inspection reports, $400,000; and compensated overtime $1.8 million. Because there has been a reduction for FY 1999 of some 40 NRR and regional inspection direct FTE, including some resident inspectors, we anticipate recovering under Part 170 only about 75 percent of the original estimated additional amount for resident inspectors in FY 1999, or about $20 million.

This year the staff determined that this was a propitious time to revisit the prior agency decisions to exclude certain services from Part 170 fee recovery. Potential activities for Part 170 cost recovery were identified and discussed with the Executive Council and the Financial Managers Council. Based on recommendations resulting from these discussions, the Office of the Chief Financial Officer solicited input from NRR, NMSS, OE, OI, AEOD, and ASLBP on potential new activities to include in Part 170. As a result of the input received, we are recommending that the proposed FY 1999 fee rule include three new areas for cost recovery under Part 170. These are IITs and plant specific performance assessments and evaluations; reviews of reports, responses to Confirmatory Action Letters and other submittals which do not result in a licensing action; and full cost recovery for project managers (i.e., all of the project manager's time, except time spent on generic work, such as rulemaking, and leave time). We are also recommending that three other areas which are particularly contentious and for which staff offices have not been able to develop a staff position--issuance of orders and responses

thereto, escalated enforcement actions, and allegations and other investigations--remain under Part 171 for FY 1999 However, we also recommend that public comments be solicited in the FY 1999 proposed fee rule on whether to include these activities under Part 170 in the FY 2000 fee rule. The study analyzing the issues is appended as Attachment 1. We particularly call your attention to Table 1 below which summarizes the recommendations and bases as well as the estimated amounts for the activities recommended for Part 170 cost recovery.

Because the FY 1999 fee rule will not go into effect until Summer 1999, the proposed changes would not have much effect on the Part 170 collections for FY 1999, but in forthcoming years we estimate that the changes will augment the Part 170 collections by up to $25 to $30 million. However, as the agency reevaluates how to execute its safety mission, the traditional roles of resident inspectors and project managers may change Therefore, 100 percent of their time may no longer be dedicated to specific licensee sites.

TABLE 1

I. RECOMMENDED ACTIVITIES TO INCLUDE IN PART 170 (for reactor and fuel cycle licensees only)

Activity	Basis for Recommendation	Estimated Amount
IITs, plant specific performance reviews and evaluations	Identifiable service to specific licensee. Licensees who volunteer for the assessments/evaluations at NRC's request would be exempted from the fee requirement.	$4.0 to 6.0 million
Technical reviews of documents such as reports, responses to Confirmatory Action Letters, and financial assurance submittals	These submittals are a license requirement and as such their review is an identifiable service to the specific licensee.	$3.0 to 5.0 million
Full cost for Project Managers, except time spent on generic work (e g, rulemaking) and leave time	Project Manager activities support and provide a direct benefit to the licensee/site to which they are assigned. Concept is similar to resident inspectors, for which full cost is being billed effective with FY 1998 fee rule.	$20 to 22 million, maximum

II. RECOMMENDED ACTIVITIES FOR PUBLIC COMMENT ON POTENTIAL FOR PART 170 COST RECOVERY FOR FY 2000

Soliciting public comments on the potential for including the following activities in Part 170 in FY 2000 fee rulemaking would provide an opportunity to evaluate public and industry input and consider legal and policy issues prior to recommending a policy change.

Activity	Basis for Recommendation
Issuances of orders and responses thereto	Although these activities are performed for specific licensees, many orders are used to impose civil penalties; concerns with charging a fee for a civil penalty. In the case of a request for a hearing, may be viewed as a penalty for exercising rights to a hearing.
Escalated enforcement actions	Although they relate to specific licensees, escalated enforcement actions often serve generic purposes. Some are withdrawn. There are also concerns with charging a fee and a civil penalty.
Allegations and other investigations	Although they relate to specific licensees, most allegations are not substantiated Investigations frequently do not result in findings of wrong doing.

III. RECOMMENDED ACTIVITIES TO REMAIN UNDER PART 171

Activity	Basis for Recommendation
Contested hearings	Those who oppose licensing action would have incentives to request and prolong hearings to raise licensee costs. Licensees might be reluctant to oppose NRC proposed enforcement actions.
2.206 Petitions	Are filed by members of the public requesting NRC action against the licensee. Most petitions are not granted.
Reactor vendor inspections	Reactor vendors are not NRC licensees and not directly subject to most NRC regulations.

B. Fees for spent fuel storage (including the Part 72 license for Fort St. Vrain being transferred to the Department of Energy) and decommissioning activities.

Spent fuel storage/decommissioning

It is a longstanding Commission policy that annual fees not be assessed to licensees who have permanently ceased operations but who must continue to hold a license for possession or storage of nuclear material, or for decommissioning, reclamation or site restoration activities. This policy has been sustained by the Commission on several occasions

As a result, generic decommissioning costs are borne by licensees who hold licenses to operate. These costs are included in the annual fee surcharge, which is allocated to classes of licensees based on their share of the budget. Currently, reactor licensees pay approximately 89 percent of these costs, while the remaining 11 percent is allocated to the various classes of materials licensees.

Currently, holders of licenses issued under Part 72 for independent spent fuel storage installations (ISFSIs) are assessed annual fees for each Part 72 license they hold. Part 72 covers both general and specific licenses. The Part 72 general licenses are granted to licensees who hold a Part 50 license, the Part 72 specific licenses must be applied for and their issuance is not contingent upon the licensee holding a Part 50 license. Because the Part 72 general licenses are issued by regulation to all Part 50 licensees, these licenses are subject to annual fees only when they have been used; i.e., once spent fuel has been loaded into the generally-licensed ISFSI. If a licensee holds more than one Part 72 license, for example, a Part 72 general license and a Part 72 specific license for two different designs, they are assessed an annual fee for each license.

Costs for generic activities associated with storage of spent fuel in the spent fuel pool (wet storage) are included in the annual fee assessed to operating power reactors because the Part 50 licenses cover such storage. Thus, if a Part 50 licensee is in decommissioning and stores spent fuel in the spent fuel pool (wet storage), it is not assessed an annual fee. On the other hand, if a Part 50 licensee is in decommissioning and stores spent fuel in an ISFSI, it is assessed an annual fee for each Part 72 ISFSI license used.

The current policy has raised two concerns: (1) the fee structure could create a disincentive for licensees to pursue dry storage, and (2) the fairness of assessing multiple annual fees if a licensee holds multiple ISFSI licenses for different designs.

With regard to the first concern, the Commission directed the staff in COMSAJ-98-001/COMEXM-98-001 to propose revisions to Part 171 that would result in equivalent fee treatment to both wet (i e., spent fuel pool storage) and dry (i.e., independent spent fuel storage installations) storage of spent fuel.

With regard to the second concern, Duke Energy Corporation, who holds a specific Part 72 license and is contemplating also using the Part 72 general license at the Oconee Nuclear Station, requested that it be assessed only one annual fee. Duke argued that it is not fair to charge two annual fees in this case. Action on the exemption request has been deferred pending establishment of the fee policy for FY 1999.

A task force was established to study the issue of fee recovery of costs related to spent fuel storage as well as the current fee exemption for licensees in decommissioning or possession only. The task force was led by a representative from OCFO, and included representatives from NRR, NMSS, and OGC. The study is Attachment 2.

As a result of the study, the staff is recommending that each power reactor licensee, regardless of its operating status, pay a "spent fuel storage/decommissioning" annual fee. This fee, which is estimated to be about $100,000 for FY 1999, would also be assessed to Part 72 ISFSI licensees who do not hold a Part 50 license, such as Fort St Vrain. The current annual fee for

ISFSI licenses ($283,000 in FY 1998) would be eliminated. The question of the fairness of assessing multiple annual fees to licensees who utilize multiple Part 72 licenses would no longer be relevant. Materials licensees would continue to pay a share of the costs for generic decommissioning activities based on their share of the budget as part of their annual fee. As a result, we anticipate that the surcharge assessed to materials licensees would remain about the same, while each operating power reactor would pay less because the costs would be borne by more licensees. This is a fair approach because the decommissioning costs apply to those who would be required to pay. However, this is likely to result in protests from the 21 reactor licensees in various stages of decommissioning who currently don't pay annual fees and who would be subject to the new spent fuel storage/decommissioning fee (estimated to be about $100,000 per Part 50 license).

In sum, the preponderance of the agency's decommissioning costs would be spread among 124 power reactor licensees rather than the current 104 operating reactor licensees. Fees would be reduced for holders of Part 72 licenses who do not hold a Part 50 license, and for many Part 50 licensees (those without a large number of units).

Loss of license and inspection fees as a result of the transfer of the Fort St Vrain ISFSI license to the Department of Energy

In the February 4, 1998, SRM for SECY-97-304 "Response to Staff Requirements Memorandum SECY-97-144, "Potential Policy Issues Raised By Non-Owner Operators," the Commission directed the staff to make recommendations on, and obtain Commission approval for, resolution of issues related to the transfer of the Fort St. Vrain license to the Department of Energy (DOE). The Commission specifically requested that the recommendations include staff's plans for the loss of licensing and inspection fees upon the transfer of the license to a Federal agency. In the March 23, 1998, SRM for SECY-98-034, "FY 1998 Proposed Fee Rule," the Commission also directed the staff to consider alternative treatment of costs attributable to the Department of Energy that affect independent spent fuel storage facilities. In the June 12, 1998, SRM for SECY-98-095, "Licensing Model for Transfer of Fort St. Vrain Independent Spent Fuel Storage Installation License to the U S. Department of Energy (DOE)," the Commission approved staff's proposal to address this fee recovery issue in the context of the reexamination of the current annual fee policies for spent fuel storage and for licensees in decommissioning. As the Commission requested, the staff has considered whether the DOE costs should be outside the fee base (not subject to fee recovery) or whether legislation is needed to allow NRC to charge DOE and other Federal agencies Part 170 fees.

The NRC is prohibited under the IOAA from assessing Part 170 fees to DOE, and most other Federal agencies, for reviews and inspections. Thus, the cost of activities associated with reviewing applications submitted by DOE to transfer the license and any related inspections are not recovered through fees assessed to DOE. Rather, these costs are recovered through annual fees assessed to all licensees. For FY 1998, the costs for these DOE activities were approximately $120,000. The Spent Fuel Project Office (SFPO) is currently completing activities related to the transfer of the Fort St. Vrain Part 72 license to DOE. Under the current fee regulations, at the time of the transfer, DOE, as the holder of the Part 72 license, will become subject to annual fees.

Once the license transfer is complete, it is expected that licensing and inspection costs related to the DOE Part 72 license will be similar to those for other Part 72 licenses. On average, each ISFSI licensee was billed approximately $55,000 for licensing and inspection activities in FY 1998.

Although the loss of these licensing and inspection costs for the DOE ISFSI for Fort St. Vrain would not significantly impact annual fees in FY 1999 as costs for completing the staff review are not expected to exceed $50,000, the total costs for all licensing activities related to DOE could have a significant impact. For example, SFPO is currently reviewing DOE's application for a new Part 72 license for the TMI-2 fuel. It is expected that more than $200,000 will be expended in this effort in FY 1999. The total FY 1999 budgeted resources for SFPO's reviews for the Department of Energy is 1.6 FTE and $225,000 for program support, or approximately $570,000 total.

We estimate that the statutory Federal agency exemption from fees for services is about 1 percent of the total agency budget. Budgeted costs related to the Federal agency fee exemption are currently included in the annual fee surcharge assessed to all operating licensees, including Federal agencies. The surcharge costs are allocated to the various classes of licensees based on their share of the budget. Power reactors currently pay about 89 percent of the surcharge. The staff believes that there is no compelling reason for requiring other NRC licensees to pay for NRC licensing of Federal agencies.

The Commission's FY 2000 budget request submitted to OMB on September 29, 1998, proposes that further extensions of the 100 percent fee recovery requirement be based on collecting 90 percent of the NRC's new budget authority, less the appropriations from the Nuclear Waste Fund and from the General Fund for assistance provided to DOE and other Federal agencies, rather than 100 percent. The staff recommends that legislation also be submitted for FY 2000 to revise the Atomic Energy Act to give NRC authority to assess IOAA fees under Part 170 to all Federal agencies

C. Small materials user fee efficiencies.

Currently, for small materials users, predetermined fees for specified amounts by fee category ("flat" fees) are assessed under Part 170 for applications for new licenses and amendments. These flat fees are based on the average professional staff time to conduct reviews of these applications. These averages are based on five years of data and are updated every two years during the biennial fee review required by the Chief Financial Officers Act. The fee amounts are also updated each year to reflect the change in the hourly rate. The costs of inspecting these licensees and for reviewing applications for renewal of these licenses are included in the annual fee assessed to these licensees. Inspection fees were shifted from Part 170 to Part 171 in the FY 1995 fee rule as a means of streamlining and stabilizing fees. Elimination of the Part 170 flat inspection fees recognized that the "regulatory service" to licensees, referred to in OBRA-90, comprises the total regulatory activities that NRC determines are needed to regulate a class of licensees. As a basis for recommending this change, the staff indicated in SECY-95-017 that materials licensees were already paying a flat fee for inspections based on the average cost to conduct inspections for their fee category, and the routine inspection frequency is the same for all licenses in the same fee category. Less than 10 percent of inspections for these licensees

are non-routine, and combining inspections and annual fees results in essentially the same average costs per license over time. Commenters on the proposed rule agreed that the change represented a simplification and streamlining of the fee-setting procedures and allowed for greater predictability of fees.

The NRC continued the initiatives to streamline its fee programs by eliminating the materials flat renewal fees from Part 170 in FY 1996 and including the costs in the materials annual fees. This action was also consistent with the January 16, 1996, final rule extending materials licenses for five years beyond their existing expiration date (61 FR 1109).

We are proposing a similar action for materials amendments. Unlike inspections and renewals, not all materials licensees request amendments. Amendments are required when the licensee elects to make changes to its licensed programs. For example, amendments are required to change the authorized place of use or the authorized users. Data indicates that approximately one-third of the materials licenses were amended during calendar year 1997. However, over five calendar years (1993 through 1997) approximately 80 percent of the materials licenses were amended. Approximately 40 percent of the licenses had more than one amendment during the five year period.

Although approximately 2500 requests for amendments to small materials licenses are received and processed each year for fee recovery purposes, less than $900,000 in Part 170 fees is collected per year for these amendments. The number of amendments as well as the Part 170 fee collections will decrease as more states become Agreement States.

The current approach for assessing materials license amendment fees is complex and labor intensive. We estimate that approximately 2.0 FTE and $3,000 in contractor support are expended annually to assess and collect these amendment fees for small materials licensees. Approximately 25 percent of the amendment requests are submitted with incorrect fee payments. In the case of underpayments, the licensee must be notified and the license amendment held in abeyance until the correct fee is received. In the case of overpayments, refunds must be authorized and processed through the Department of the Treasury. Because of various Department of the Treasury requirements, information such as tax identification numbers must be obtained and recorded in order for a refund check to be issued. These administrative burdens could be eliminated if the amendment costs were included in the Part 171 annual fee assessed to these licensees. We estimate that this option would result in an increase of less than 5 percent in the annual fees assessed to the small materials licensees.

In addition to streamlining the NRC process, this would eliminate the steps applicants and licensees currently take to submit the payments for their amendment requests. It would also eliminate any delays in approving those amendments due to incorrect payments

For these reasons, the staff recommends proposing in the FY 1999 fee rule the elimination of the Part 170 flat amendment fees and including the costs in the annual fees assessed to the materials licensees. This would provide an efficient means of recovering these costs and has merit from a cost-benefit standpoint. We believe the efficiencies to be gained outweigh any inequities that may result because not all materials licenses are amended each fiscal year. If this recommendation is not adopted by the Commission, we propose to revise the fees only at

the time of the biennial fee review and not revise them each year to reflect the hourly rate changes. This would result in fewer incorrect payments because the fee amounts would be in place for two years instead of changing each year.

D. Other fee rule changes for FY 1999

Based on the fee policy changes recommended in this paper, including the recommendation for a new annual fee category for spent fuel storage and decommissioning, and the program changes that have occurred over time, we believe that establishing new baseline fees is warranted in FY 1999 In the FY 1995 fee rule, the NRC announced that beginning in FY 1996 annual fees would be adjusted based on NRC's budget authority, changes in the number of licensees paying fees, and the amounts of licensing and inspection fees to be collected. The Statement of Considerations indicated that this method (the "percent change" method) would be used in FY 1996 through FY 1999 and fees would be rebaselined only if there was a substantial change in the NRC budget or in the magnitude of a specific budget allocation to a class of licensees. However, with the cumulative effects of the fee rule changes in FY 1998 and those recommended in this paper for FY 1999, we believe it appropriate to establish new baseline annual fees for FY 1999.

We are in the process of obtaining final data to build a new fee model necessary to calculate the proposed FY 1999 hourly rates and fees by category. However, we cannot develop preliminary fees until we receive the Commission's decisions on the recommendations in this paper. Once the Commission decisions are received, we will finalize the calculations and provide the results to the Commission for a decision on whether to rebaseline the annual fees for FY 1999 or establish the annual fees by the percent change method Based on the annual fee amounts from the fee model, policy decisions may be necessary to address extremely large fee increases

If the FY 1999 annual fees are rebaselined, the FY 1999 fee rulemaking will indicate our intent to base annual fees in FY 2000 and for the next four fiscal years on the percent change method unless there is a substantial change in the NRC budget or in the magnitude of a specific budget allocation to a class of licensees and if the 100 percent fee recovery requirement or a similar requirement is in effect.

In FY 1998, the NRC collected $458.9 million in fees. Of this amount, $454.8 million offset our appropriation. The remaining $4 1 million will be used to reduce the total amount to be collected in fees in FY 1999. This reduction will be reflected in the FY 1999 fee rule.

During FY 1999 the staff plans to reanalyze the reduced fees for small entities and include any changes in the FY 2000 fee rulemaking. The $1800 maximum small entity fee has been in effect since annual fees for materials licenses were first established in FY 1991. The $400 lower tier for small entities with relatively low annual gross receipts or supporting populations has been in place since FY 1992. In maintaining the small entity fees at those levels, the NRC has relied on the previous analysis that established a maximum annual fee for small entities and the amount of costs that must be recovered from other licensees as a result. The small entity fees were established in response to the Regulatory Flexibility Act of 1980, which requires that agencies consider the impact of their actions on small entities. Because NRC's

annual fees could have a significant impact on a substantial number of small entities, the NRC was required by the Act to perform a regulatory flexibility analysis to examine the impacts on small entities and the alternatives to minimize these impacts. The Act does not provide specific guidelines on what constitutes a significant economic impact on a small entity.

The original analysis considered the maximum fees paid per year by materials licensees including those in Agreement States. NRC's inspection and renewal costs for small materials licensees have subsequently been included in the annual fees, and the staff has recommended elsewhere in this paper that amendment costs also be included In addition, several new Agreement States have been added and these states also assess fees to their materials licensees. The staff plans to obtain and review the current Agreement States' fee schedules and consider the licensing and inspection costs included in the NRC's annual fees to determine if adjustments to the reduced fees for small entities are warranted. Any changes would be included for public comment in the FY 2000 fee rulemaking.

RECOMMENDATION:

I recommend that the Commission propose for public comment revisions to its fee policies in FY 1999 relating to activities to be billed under Part 170 and recovery of generic costs under Part 171 for spent fuel storage and decommissioning as follows:

1. expand the scope of Part 170 to include Incident Investigation Teams, performance assessments and evaluations, reviews of reports and other documents such as responses to confirmatory action letters, and full cost recovery for project managers, and that public comments be solicited on including orders and responses thereto, escalated enforcement actions, and allegations and other investigations in Part 170 for FY 2000,

2. establish a spent fuel storage/decommissioning annual fee to be assessed to all Part 50 licensees regardless of their operating status, and those Part 72 licensees who do not hold a Part 50 license, and recover the remaining generic decommissioning costs through a surcharge assessed to the various classes of licensees based on their share of the budget,

3. propose legislation for FY 2000 to amend the Atomic Energy Act to authorize NRC to assess licensing and inspection fees to all Federal Agencies (this would be in addition to legislation modifying the 100 percent fee recovery requirement);

4. eliminate flat amendment fees for materials licenses from Part 170 and include the costs in the materials license Part 171 annual fee.

The Commission should note that once the Commission's decision on the above recommendations has been made the staff will finalize its calculations on the preliminary fees and provide the results to the Commission for a decision on whether to rebaseline the FY 1999 annual fees or to establish the annual fees by the percent change method.

COORDINATION

The Office of the General Counsel has reviewed this paper and has no legal objection The Office of the Executive Director for Operations has reviewed and concurred in this paper. The Office of the Chief Information Officer has been provided a copy for information purposes.

SCHEDULING:

I request a Commission decision on this paper by December 15, 1998. This schedule is necessary in order to incorporate the decisions in the FY 1999 proposed fee rule, hold a public meeting on the proposed rule after it has been issued for comment, obtain public comments, and publish a final rule to recover approximately 100 percent of the NRC's budget authority for FY 1999. Our estimated schedule for completing the FY 1999 fee rulemaking is reflected in Attachment 3. I further request that this paper (and the Attachments) not be made publicly available because it is predecisional information and contains frank discussion of issues and options whose disclosure could make any fee litigation more difficult for the agency. In recent years, Commission papers containing fee proposals have not been made public.

Jesse L. Funches
Chief Financial Officer

Attachments: 1. FY 1999 Fee Initiatives Study
2 Spent Fuel Storage/Decommissioning Fee Study
3 Estimated Schedule, FY 1999 Fee Rule

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by Friday, November 27, 1998.

Commission Staff Office comments, if any, should be submitted to the Commissioenrs NLT Monday, November 16, 1998, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Office of the Chief Financial Officer

FY 1999

FEE INITIATIVES STUDY

October 1998

ATTACHMENT 1

Table of Contents

EXECUTIVE SUMMARY

Currently, Part 170 fees assessed for identifiable services to specific licensees and applicants under the authority of the Independent Offices Appropriation Act account for approximately 20-25 percent of the total budgeted amount recovered through fees. The remaining 75-80 percent is recovered through Part 171 annual fees This allocation of costs has raised Commission, licensee and Congressional questions about what can be done to shift the balance away from annual fees to Part 170 fees. In the March 23, 1998, Staff Requirements Memorandum (SRM) for SECY-98-034, "FY 1998 Proposed Fee Rule," the Commission directed the staff to examine the methodology for assessing fees to licensees and the activities whose costs can be recovered under Part 170.

The Office of the Chief Financial Officer (OCFO) conducted a study, with input from various program offices, to develop a response to the SRM. The study examined activities performed for individual applicants or licensees but whose costs are not recovered under Part 170. This examination resulted in the identification of eight potential areas for Part 170 cost recovery. The concept of assessing Part 170 fees for these activities was discussed with the Executive Council and the Financial Managers Council.

The resulting fee initiatives and proposed actions for each were provided to the Offices of Nuclear Material Safety and Safeguards (NMSS), Nuclear Reactor Regulation (NRR), Enforcement (OE), and Investigations (OI), the Office for Analysis and Evaluation of Operational Data (AEOD), and the Atomic Safety and Licensing Board Panel (ASLBP) for comment. The Regions were also asked for comments, and specific comments were received from Regions III and IV. The comments were evaluated and discussions were held with concerned offices where there was strong disagreement with the proposed actions.

The fee initiatives and recommendations resulting from the study findings are summarized in the following table If the recommendations are adopted, it is estimated that approximately $27 to $33 million would be shifted to Part 170. This would result in Part 170 fees accounting for approximately 30 percent of the total fees collected.

FEE INITIATIVE:	RECOMMENDATION FOR COST RECOVERY:
1. Inspections: licensee-specific performance reviews and evaluations, incident investigations, vendor inspections	Part 170 fees for reactor and fuel cycle licensees, except those licensees who volunteer at NRC's request. Continue to recover costs for vendor inspections through Part 171 annual fees. Estimate for Part 170: $4 to $6 million
2. Reviews: responses to Confirmatory Action Letters, reports and financial assurance submittals	Part 170 fees for reactor and fuel cycle licensees. Estimate for Part 170: $3 to $5 million
3. Orders and responses to orders	Part 171 annual fees for FY 1999 fee rule, solicit public comments on including in Part 170 in FY 2000 fee rule
4. Contested hearings, 2.206 petitions	Part 171 annual fees
5. Escalated enforcement actions	Part 171 annual fees for FY 1999 fee rule, solicit public comments on including in Part 170 in FY 2000 fee rule
6. Allegations and other investigations	Part 171 annual fees for FY 1999 fee rule, solicit comments on including in Part 170 in FY 2000 fee rule.
7. Full cost for project managers	Part 170 fees for reactor and fuel cycle licensees. Leave time and time spent on generic activities, such as rulemaking, would be excluded. Estimate for Part 170. $20 to $22 million, maximum
8 Work performed during uncompensated overtime	Do not assess Part 170 fees

I. BACKGROUND

Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, 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 FYs 1991 through 1999 by assessing fees.

The NRC assesses two types of fees to recover its budget authority. First, license and inspection fees, established in 10 CFR Part 170 under the authority of the Independent Offices Appropriation Act (IOAA), 31 U.S.C. 9701, recover the NRC's costs of providing individually identifiable services to specific applicants and licensees. Examples of the services provided by the NRC for which the fees are assessed are the review of applications for the issuance of new licenses, approvals, and renewals (except for small materials licensees, whose renewal costs are included in their annual fees), and amendments to licenses or approvals. Second, annual fees, established in 10 CFR Part 171 under the authority of OBRA-90, recover generic and other regulatory costs not recovered through 10 CFR Part 170 fees.

For policy or legal reasons, the Commission has not assessed fees under Part 170 for: (a) review of allegations; (b) conduct of investigations; (c) issuance of enforcement orders and review of responses thereto; (d) contested hearings; (e) oversight and administration of the Agreement State program; (f) regulatory services provided to nonprofit educational institutions; (g) incident investigations; (h) performance assessments and evaluations (plant performance reviews, diagnostic evaluation teams, fuel cycle facility performance assessments, etc.); (i) reviews of submittals that do not result in a licensing action, such as responses to confirmatory action letters, reports, notifications, and financial assurance documents; and (j) reactor vendor inspections.

As part of the fee policy review required by Section 2903(c) of the Energy Policy Act of 1992, the NRC solicited in an April 19, 1993, Federal Register notice (58 FR 21120) public comment on the option of broadening the scope of 10 CFR Part 170 to recover costs incurred for some of the activities listed in the above paragraph. Specifically, comments were sought on whether Part 170 fees should be recovered for Incident Investigation Teams (IIT's), allegations, contested hearings, vendor inspections, orders and amendments resulting from orders, and reviews that do not result in approvals. The comments received were summarized in SECY-93-342, dated December 14, 1993, as follows:

> A majority of the commenters indicated that if Part 170 were expanded, they would support billing for orders and amendments resulting from such orders. These actions, the commenters stated, although not licensee-initiated are provided to a specific licensee and should be assessed on an individual basis. One commenter argued that NRC should correct the situation in which a licensee who does not submit an amendment request recommended by an NRC generic letter until ordered to do so is not charged a fee, but a licensee who voluntarily submits such an amendment is subject to Part 170 fees.
>
> With respect to the remainder of the items, most commenters believed that many activities listed in the notice do not constitute a specific service to an identifiable licensee

and that the costs should continue to be collected under Part 171. For example, commenters claim that the cost of allegations and contested hearings are beyond the licensee's control and should not be billed on an individual basis. Instead, the NRC should continue to include costs for these activities in the Part 171 annual fee. Other comments indicated that investigations of allegations and contested hearings often raise generic issues of concern to all licensees. Therefore, saddling individual licensees with these additional costs is unfair and inequitable because they arise at NRC's direction, are not requested by a licensee and are beyond a licensee's control. Others commented that all licensees benefit from these regulatory activities and that the costs should be recovered through the annual charge.

The staff agreed with the commenters that the agency should continue the policy of not assessing Part 170 fees for IIT's , vendor inspections, contested hearings, allegations, and reviews that do not result in approvals. However, contrary to the position advocated by some commenters, staff recommended that Part 170 fees not be charged for orders and amendments resulting from orders. The basis for the recommendation was that many orders are used to impose civil penalties and charging for the development of orders could be perceived as imposing additional fines on the licensees. Additionally, in the case of a request for a hearing, charging for reviewing responses to orders could be perceived as penalizing a licensee for exercising its right to disagree with NRC. The Commission approved the staff's recommendations and thus none of these costs are now recovered through Part 170 fees.

In the FY 1998 fee rulemaking, some steps were taken to shift costs from Part 171 to Part 170. Beginning August 10, 1998, the effective date for the FY 1998 fee rule, Part 170 fees are assessed to recover full cost for resident inspectors, to recover costs for activities conducted up to approximately 30 days after the issuance of an inspection report, and to recover costs for licensing and inspection activities performed during compensated overtime

In the March 23, 1998, Staff Requirements Memorandum (SRM) for SECY-98-034, "FY 1998 Proposed Fee Rule," the Commission directed the staff to examine the methodology for assessing fees to licensees and the activities whose costs can be recovered under Part 170.

II. FEE INITIATIVES FOR FY 1999

As a result of the OCFO's examination of activities performed for specific licensees or applicants, but whose costs are not currently recovered under Part 170, eight areas were identified as potential areas for cost recovery under Part 170. This study reexamined fee policies in those eight areas. The eight fee initiatives, the historical basis for not charging Part 170 fees for the activities, and the comments received from agency offices on whether these costs should be recovered under Part 170 are summarized below:

FEE INITIATIVE 1: CHARGE PART 170 FEES FOR ALL INSPECTIONS, EXCEPT REACTOR VENDOR INSPECTIONS

A. All licensee-specific performance reviews and evaluations (e.g., Diagnostic Evaluation Team assessments led by AEOD and NMSS performance assessments of fuel facilities)

B. Vendor inspections

Currently, Part 170 fees are assessed for routine and non-routine inspections, and performance assessments and evaluations which result in the issuance of inspection reports. Part 170 fees are not currently assessed for performance reviews and evaluations that do not result in the issuance of an inspection report, nor for vendor inspections.

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A. Except for Systematic Assessments of Licensee Performance (SALPs), Part 170 fees have not been assessed for licensee-specific performance reviews and evaluations because they do not result in the issuance of inspection reports. SALPs are subject to Part 170 fees because they are considered to be inspections, are assigned inspection report numbers, and inspection reports are issued.

B. Vendor inspections have not been subject to Part 170 fees because the vendors are not licensed by NRC.

INITIAL PROPOSED ACTION:

Recover the costs for all licensee-specific inspections, performance assessments and evaluations through full-cost Part 170 inspection fees assessed to the specific licensees, except those for which the licensee volunteers at NRC's request. No change to current policy of not assessing Part 170 fees for vendor inspections

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with OCFO proposal except indicated that Part 170 fees should be charged for vendor inspections. Part 170 fees should be assessed for 10 CFR Part 71 (Transportation) and 10 CFR Part 72 (Storage) licensees and Certificate of Compliance (CoC) holders. All CoC holders are vendors, and a great deal of NMSS activities involve vendor/CoC holders. Moreover, the fabricators are inspected and should be assessed Part 170 fees for quality assurance/fabrication inspections as well.

The current approach of including the costs of inspections of small materials licensees in their annual fees assessed under Part 171 should be retained. Most of these are small-scale efforts that would be too labor-intensive to track individually.

Follow up to NMSS comment: Discussions were held with NMSS staff regarding their comments that the proposal should also apply to CoC holders. It was explained that the proposals regarding vendors referred to reactor vendors, who are not NRC licensees. The materials vendors, who hold NRC licenses as defined in 10 CFR 170.5, are subject to Part 170 fees. Because "Materials license" is defined in Part 170 to mean a license, certificate, approval, registration, or other form of permission issued pursuant to Part 30, 32 through 36, 39, 40, 61, 70, 71 and 72, the proposals would apply to CoC holders and registrants. Part 76 will be added to the "Materials license" definition in the FY 1999 fee rule.

NRR: NRR performance assessment activities include Systematic Assessment of Licensee Performance (SALPs), Plant Performance Reviews (PPRs), and Senior Management Meetings (SMMs). Performance assessments are done solely at the discretion of NRC (i e., no regulatory requirement mandates their preparation nor do licensees request them) within a regularly scheduled time frame and are not related to licensee's performance. NRR believes that these assessment efforts should not be part of the revised Part 170 fee rule. NRR believes that the costs of Diagnostic Evaluation Team (DET) assessments should be recovered through Part 170 fees because these assessments are initiated when licensee performance degrades.

Vendor inspections should be billable to each specific vendor under Part 170. However, the cost and benefit of the additional collection burden to the NRC should be addressed before making a determination whether these costs should be recovered under Part 170.

AEOD: It is AEOD's view that Diagnostic Evaluation Team (DET) evaluations and Incident Investigation Team (IIT) investigations should remain fee billable under Part 171 (annual fees) rather than become fee billable under Part 170 (fee for service).

A total of 10 IITS have been conducted since the Incident Investigation Program (IIP) was established in 1985. A review of IIT findings and follow up staff actions indicates that IITs generally result in a combination of generic technical lessons and generic regulatory lessons with some plant-specific findings and follow up actions. Historically the generic technical and regulatory lessons have provided the most significant and the dominant insights provided by IITs. The generic lessons from IITs have resulted in: issuance of new regulatory requirements (i.e , NRC regulations); new regulatory guidance, bulletins; information notices; and revisions to NRC regulatory programs and process (e.g , inspection procedures and staff training). For example, the new rule on physical barriers for nuclear power plants was a direct result of the TMI IIT findings We believe that this situation would make it inappropriate and unfair to an individual licensee or certificate holder to have to bear the entire cost burden for generic lessons that affect an entire industry, type of licensee, or certificate holder. Additionally, more recent IITs have involved smaller certificate holders, such as the Indiana Regional Cancer Center in Indiana, PA. Imposing the full cost of an IIT on a relatively small materials licensee or certificate holder having limited financial resources could prove to be a major financial hardship to the licensee or certificate holder. DETs have also resulted in significant generic lessons and therefore we believe should also continue to be billed under Part 171.

REGION III: NRC should charge vendors for inspections of equipment manufactured to be used at licensed facilities to meet regulatory requirements. Recovery for licensee-specific assessments should include assessment of the licensee's safety conscious work environment (e.g., the assessments conducted at Millstone)

REGION IV: Agree with OCFO proposal to charge for these activities under Part 170.

RECOMMENDATION:

Assess Part 170 fees for all reactor and major fuel cycle licensee inspections, including licensee-specific performance reviews, evaluations and incident investigations (i.e, Incident Investigation Team investigations of significant operational events, or IITs). Licensees who

volunteer to participate in a performance review or other type of inspection at NRC's request would be exempted from the Part 170 fee. Continue to recover costs for inspections of reactor equipment vendors in the Part 171 annual fees assessed to reactors.

BASIS FOR RECOMMENDATION:

Inspections, licensee-specific performance reviews and evaluations, and incident investigations are services necessary to assist the identifiable recipient in complying with statutory obligations under the Commission's regulations. Although some generic benefits may be derived from these activities, they primarily provide a specific benefit to the licensee. Part 170 fees are currently assessed for SALPs because they are considered inspections and inspection reports are issued. Vendors of reactor equipment are not NRC licensees, and are only subject to limited NRC regulation (i.e, Part 21). "Materials license" is defined in 10 CFR 170.5 to include certificates, approvals, registrations, or other form of permission granted under 10 CFR Part 30, 32 through 36, 39, 40, 61, 70, 71, and 72. Therefore entities certified by the NRC, such as the Gaseous Diffusion Plants and transportation certificate of compliance holders would be subject to Part 170 fees for these activities. These Part 170 fees would not apply to smaller materials licensees because the costs of small materials license inspections are included in the Part 171 annual fees assessed to those licensees.

FEE INITIATIVE 2: CHARGE PART 170 FEES FOR REVIEWS THAT DO NOT RESULT IN APPROVALS

A. Responses to Confirmatory Action Letters

B. Report, notification, and financial assurance reviews

Currently, Part 170 fees are not assessed for review of Confirmatory Action Letter responses and reviews of other submittals for which an approval is not required. Examples are financial assurance reviews, reviews of uranium recovery licensees' land use survey reports, and reviews of 10 CFR 50.71(e) final safety analysis reports (FSARs).

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A. Part 170 fees have not been assessed for the review of responses to Confirmatory Action Letters because they are not considered to be an inspection nor do they result in an approval.

B. Part 170 fees have not been assessed for report, notification, and financial assurance reviews that do not result in a license amendment. Certain notifications that result in amendments to materials licenses are specifically exempted from Part 170 fees because no technical review is required (e.g , amendments to portable gauge licenses issued in accordance with NUREG-1556, Vol. 1, to reflect notifications of Radiation Safety Officer changes).

INITIAL PROPOSED ACTION:

- Recover the costs for report reviews, financial assurance reviews, and responses to Confirmatory Action Letters through Part 170 fees assessed to the specific licensees. For report reviews, a flat fee may be established. No change to the current policy of not assessing Part 170 fees for materials licensee notifications that do not result in a technical review.

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with the OCFO proposal. For the Gaseous Diffusion Plants, consideration could be given to assessing fees for NRC review of annual submissions of Safety Analysis Report updates and periodic reports of self-approved changes under 10 CFR 76.68. These submissions are similar to license-specific 10 CFR 70.32 changes to fuel facility Emergency Plans, Physical Security Plans, and Fundamendal Nuclear Material Control Plans, which NRC reviews to decide whether we agree or not with the licensees' "no decrease in the effectiveness" determinations.

The proposed action should apply to those Part 71 or 72 vendors/CoC holders, who are, in fact, not considered specific licensees. Further, it should be clarified that, in addition to Confirmatory Action Letters, the proposed actions apply to those activities associated with NRC generic communications and Demands for information (DFI).

NRR: Most Confirmatory Action Letters (CALs) which do not arise from the enforcement process are issued by the regions with NRR concurrence Licensee responses to CALs must be reviewed and approved by the Staff before the licensee may take action. Project Managers have historically opened licensing action Technical Assignment Controls (TACs) for CALs; therefore, CALs are already fee recoverable. A further evaluation of consistency between headquarters and regions in items of tracking should be made to ensure uniformity for fee billing purposes. CALs which are related to the enforcement process are not now, and should not be, fee billable

NRC staff reviews related to 10 CFR 50.54, and 50.71(e) should be fee recoverable under Part 170.

REGION III: Agree with OCFO proposed action. From a Regulatory Information Tracking System (RITS) coordination standpoint, concerned over the added complexities/administrative requirements that may be necessary for implementation. Will probably need to develop some specific operating procedure to make this work. Right now many of these activities are not separately captured in RITS (i.e., CALs). Need to keep in mind also how quickly some activities get/need to get executed. Supports NRR comments.

REGION IV Agree with OCFO proposal.

RECOMMENDATION:

Assess reactor and major fuel cycle licensees Part 170 fees for reviews of reports, such as land use survey reports filed by uranium recovery licensees, financial assurance submittals, 10 CFR

50.71(e) final safety analysis reports (FSARs), responses to Confirmatory Actions Letters, except those related to the escalated enforcement process, and reviews of other documents that do not result in an approval.

BASIS FOR RECOMMENDATION:

Although no specific approval results from these reviews, the reviews are services provided to identifiable recipients that assist them in assuring compliance with NRC regulations. "Materials license" is defined in 10 CFR 170.5 to include certificates, approvals, registrations, or other form of permission granted under 10 CFR Part 30, 32 through 36, 39, 40, 61, 70, 71, and 72. This definition will be revised in the FY 1999 fee rule to include Part 76. Therefore, entities certified by the NRC, such as the Gaseous Diffusion Plants and transportation certificate of compliance holders, would be subject to Part 170 fees for these activities. These Part 170 fees would not apply to smaller materials licensees because they file a limited number of reports for review, many documents they file do not require a technical review, and implementation would be difficult and resource intensive. In addition, as a separate action, staff is proposing that the amendment fees for the small materials licensees be eliminated and the amendment costs recovered through their Part 171 annual fees.

FEE INITIATIVE 3: CHARGE PART 170 FEES FOR ORDERS AND RESPONSES TO ORDERS

A Issuance of Orders

B. Reviews and other actions related to responses to orders

Currently the agency does not charge Part 170 fees for the development of orders issued pursuant to 10 CFR 2 202, or for amendments specifically resulting from such orders

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A and B. Part 170 fees are not assessed for the development of Orders and the review of responses to such orders because in cases where the order proposes the imposition of a civil penalty, the assessment of these costs could be viewed as augmenting the amount of the civil penalty and could discourage licensees from contesting proposed enforcement actions. In other instances, orders are safety-related and modify the license or impose additional requirements for safety reasons. Public comments on the review of fee policy conducted in accordance with the Energy Policy Act of 1992 supported changing this policy; however, the Commission decided to continue the policy because most orders are used to impose civil penalties and charging for orders could be perceived as additional fines to the licensee, or in some cases, as a penalty for a licensee exercising its rights to disagree with the NRC.

INITIAL PROPOSED ACTION:

Establish Part 170 fees for the issuance of Orders and amendments or other reviews resulting from such Orders, but exclude hearing costs.

SUMMARY OF OFFICE COMMENTS:

NMSS Generally agree with OCFO's proposal; however, must consider whether implementation costs outweigh the amount of the fees that may be collected. Since most orders issued by the agency are for materials licensees, NMSS questions whether the resources required to implement Part 170 fee collection for orders will exceed the amount recovered. This could happen due to the significant new burden for tracking the time for individual materials licenses. Most materials Part 170 license fees are flat fees rather than full cost recovery because of the cost associated with the collection.

NRR: Supports Part 170 fees for the issuance of orders and amendments or other reviews resulting from such orders; however, hearing costs should be excluded.

REGION III: Agree with the proposed action. A civil penalty is the consequence of poor performance. The order and resultant amendments are actions separate from the penalty and should be fee recoverable.

REGION IV: Agree with OCFO proposal. Fees should be recovered for the efforts of the staff to lift/satisfy the order (at Millstone, a substantial amount of FTE was spent verifying that the licensee had satisfied the order and was not part of an inspection documented with an inspection report)

OE: OE comments regarding Fee Initiative 7 are also relevant to Fee Initiative 3, concerning orders. In particular, we believe that charging a fee for issuance of an order imposing a civil penalty does serve as a penalty for exercising the right to disagree with a proposed NRC action.

RECOMMENDATION:

Do not include development of orders and review of responses to orders in Part 170 for FY 1999. Seek public comments in the FY 1999 fee rulemaking on including these activities in Part 170 in the FY 2000 fee rule.

BASIS FOR RECOMMENDATION:

This area is contentious and raises legal and policy issues. Although many respondents agreed with the initial proposal to assess Part 170 fees for the development of orders and the review of the responses, several major concerns were raised. Following receipt of the written comments, a meeting was held with OE management and staff and OGC, NRR, NMSS, and OCFO representatives to discuss these concerns. Many orders are used to impose civil penalties and there are concerns with charging a fee in addition to a civil penalty. In the case of an order imposing a civil penalty where the licensee objects to the civil penalty, the fee for the order may

be viewed as a penalty for exercising rights to protest the civil penalty Depending on the licensees' responses, orders may be withdrawn or modified In the case of misconduct, an order may be issued to the individual rather than the licensee. It could be argued that enforcement actions and civil penalties also serve to benefit the industry as a whole. There are very few cases of clearly deliberate wrongdoing. We note that not all orders are enforcement orders, some are issued as the result of a safety issue. Assessment of Part 170 fees to recover the costs of such orders would not raise the same policy issues that Part 170 assessments for civil penalty orders would raise. Seeking public comment in the FY 1999 fee rulemaking on including these activities in Part 170 in the FY 2000 fee rule would provide an opportunity to evaluate public and industry concerns and further consider the legal and policy issues prior to recommending a policy change.

FEE INITIATIVE 4: CONTINUE TO RECOVER COSTS FOR CONTESTED HEARINGS AND 2.206 PETITIONS THROUGH PART 171 ANNUAL FEES

A. Contested hearings

B. 2.206 Petitions

Currently Part 170 fees are assessed for uncontested hearings required by statute; however, Part 170 fees are not assessed for contested hearings or for development of responses to 10 CFR 2.206 petitions. For example, hearings at the operating license (OL) stage are not subject to Part 170 fees because such hearings are not mandatory under the Atomic Energy Act unless requested by a person whose interest may be affected by the proceeding. Hearings for a construction permit (CP) application are subject to Part 170 fees since the Atomic Energy Act requires a hearing at the CP review stage, even if no hearing is requested.

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A. and B. If Part 170 fees are charged for contested hearings, those who oppose the licensing action would have the incentive to request and prolong hearings to raise licensee costs Licensees might be reluctant to oppose NRC proposed enforcement actions based on fee considerations. Historically, the preponderance of 2.206 petitions are not granted and thus the agency has chosen not to assess licensees for its review costs under Part 170.

INITIAL PROPOSED ACTION:

No change to current policy of not assessing Part 170 fees for review of 10 CFR 2.206 petitions and for contested hearings. Charging for contested hearings would likely be very contentious

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with OCFO proposal regarding not charging Part 170 fees. As we understand, in the current Part 171 methodology hearing and 2.206 costs are spread to all licensees charged Part 171 fees in a particular fee category. This would result, for example, in all

uranium recovery licensees paying for the contested hearing of just one uranium recovery licensee. We do not think it is fair to spread the costs in this manner. We believe the annual fee allocation methodology should be changed to spread the costs over all licensees rather than just one class. Our basis for this is that requests for hearing are often initiated or supported by national groups interested in the industry as a whole rather than local groups

NRR: A 2.206 petition is requested by an entity, other than the licensee, "to modify, suspend, or revoke a license, or for such other action as may be proper." These petitions have been classified as other licensing activities which have not been fee recoverable. We believe that it would be unfair to ask a licensee to pay the NRC to process a petition whose sole purpose is to take action against the licensee. If a petition is granted, an enforcement action may be taken for the root cause, which will have its own fee recovery situation. (See NRR's comments on enforcement below).

ASLBP: Concur with proposal of not assessing Part 170 fees for contested licensing hearings not required by regulation. These hearings are held strictly at the request of third party intervenors over which applicants and licensees have no control. Often they do not involve negligence, malfeasance, or untoward conduct by applicants or licensees, and their outcome frequently reveals that the health, safety and environmental problems alleged by the intervenors do not exist. Under these circumstances, charging licensees or applicants for these hearings would be contentious These same principles regarding licensing hearings are also applicable to 2.206 proceedings.

REGION III Agree with OCFO proposal.

REGION IV: Agree with OCFO proposal.

RECOMMENDATION:

Do not assess Part 170 fees for contested hearings and 2.206 petitions; continue the current methodology for recovering the costs through Part 171 annual fees.

BASIS FOR RECOMMENDATION:

The respondents unanimously supported the initial proposal to continue to recover the costs of contested hearings and 2.206 petitions through Part 171 annual fees. Assessing Part 170 fees for contested hearings would provide incentives to those who oppose the licensing action to prolong the hearings to raise the licensee's costs. The 2.206 petitions are filed by members of the public requesting NRC actions against the licensee Most 2.206 petitions are not granted.

Under the current budget structure, it would not be possible to identify the costs for contested hearings and 2.206 petitions in order to allocate the costs in the manner suggested by NMSS. While ASLBP's resources for adjudicatory reviews are identified in the agency budget, other costs related to hearings and costs for 2.206 petitions are not separately identified. Resources for hearings and 2.206 petitions for the uranium recovery class of licensees are identified in NMSS's detailed budget; however, such costs are not identified for other classes of licensees. In addition, even if the budgeted costs were identifiable, allocating contested hearing and 2.206

petition costs to all classes of licensees would mean that some classes of licensees would be paying for costs not previously allocated to them. For example, in the FY 1995 rebaselining of annual fees, no adjudicatory review resources were allocated to the independent spent fuel storage, transportation, rare earth, and uranium recovery classes of licensees. Attempting to address concerns for only certain classes of licensees may have other unintended consequences. For example, under the suggested methodology, materials licensees could bear a percentage of the costs for reactor contested hearings if the preponderance of budgeted costs for adjudicatory reviews in a given fiscal year was related to power reactors.

FEE INITIATIVE 5: ASSESS PART 170 FEES FOR ESCALATED ENFORCEMENT ACTIONS

A. Escalated Enforcement

Currently Part 170 fees are assessed for direct professional staff time for enforcement actions; however, Part 170 fees are not assessed for OE time (including Regional Enforcement Coordinator time), or the time of other agency offices (NRR, NMSS, OGC, the Regions, and OEDO) to process and issue a notice of violation or civil penalty.

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A Part 170 fees have not been assessed for escalated enforcement actions because in some cases the fee could be much greater than the civil penalty, which is intended to encourage or force a licensee to comply with the NRC requirements. In addition, a considerable amount of the NRC staff time at the escalated enforcement stage is management time, which is already included in the hourly rate.

INITIAL PROPOSED ACTION:

To address concerns about the fee being greater than the civil penalty, establish a specific Part 170 fee with a cap for escalated enforcement actions for reactors and fuel cycle licensees. No change to the current policy of not assessing Part 170 fees for escalated enforcement actions for other materials licensees

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with OCFO proposal. If fees are charged to other fuel cycle licensees for escalated enforcement actions, it would be appropriate to also charge fees for escalated enforcement actions to the certificate holders for the Gaseous Diffusion Plants under 10 CFR Part 76. However, the initiative does not make clear how the "cap" for fuel cycle licensees will be established. The scope should be expanded to include storage licensees (both site-specific and general) under 10 CFR Part 72. Also, consideration should be given to transportation (Part 71) vendors and CoC holders.

NRR: No objection to fee recovery for escalated enforcement if the enforcement action is issued (i.e., we shouldn't charge licensees for enforcement time if the enforcement action is dropped to a non-escalated action or is dropped altogether). NRR supports proposal to institute

a cap for escalated enforcement actions so that the resulting fee would not be greater than the civil penalty.

ASLBP: Enforcement hearings should not be subject to Part 170 fees. Because most enforcement hearings involve small materials licensees with limited financial resources or individuals who have been removed from nuclear activities for alleged infractions of NRC regulations, charging them for hearings (which could be quite costly, especially if staff's time is figured in) could eliminate opportunity for "their day in court." This deprivation of hearing rights in turn could result in innocent parties being unfairly punished if the accused are unable to defend themselves because of financial considerations.

OE: OE understands the proposed action would assess fees for OE time (including Regional Enforcement Coordinator Time) to process and issue a notice of violation (NOV) or civil penalty to reactor and fuel facility licensees, but with a cap to preclude the fee being greater than the civil penalty. However, in cases in which no civil penalty is proposed, any fee assessed would exceed the penalty.

An April 10, 1987, OE memorandum (on a similar proposal) noted that a court has held that the NRC may recover the full cost of providing a service to an identifiable beneficiary, regardless of the incidental public benefits flowing from the provision of that service. However, "... no fee may be charged to a private party when there is no identifiable beneficiary, i.e., when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." The principles enunciated in these cases remain valid. As then stated, OE still believes that civil penalties benefit broadly the general public or serve an independent public interest.

While the purpose of the enforcement program has been modified slightly in the years since the memorandum was written, the purpose continues to have the same general goal of protecting the public and the environment. As the memorandum notes, the purpose of the NRC enforcement program is to encourage licensee compliance, and thus serves the public interest rather than the interest of specific licensees.

In addition to the legal concerns, there are practical ones, such as the record keeping that would be required to implement such a system, considering that over 80 cases would been covered last fiscal year. This, and other concerns, were noted in the 1987 memorandum. OE does not have a basis for estimating the costs that would be recovered.

We continue to agree with the views expressed in the 1987 memorandum and believe that there may by legal impediments to charging fees in this manner. As a policy matter, we believe that charging fees in these cases would amount to a surcharge on the civil penalty, when one is issued, and would cause considerable negative reaction among the agency's stakeholders. Further, it seems even more anomalous to charge fees in cases in which a Notice of Violation is issued without a civil penalty.

REGION III: Agree with OCFO proposal.

REGION IV: Agree with OCFO proposal to recover escalated enforcement time, but consider it important for the Part 170 billable facilities to be better defined. The different categories of the 10 CFR for Part 40, 50 and 72 need to be addressed. We agree with caps being implemented for escalated enforcement actions for reactors and fuel cycle licensees.

RECOMMENDATION:

Do not include escalated enforcement actions in Part 170 for FY 1999, but solicit public comments in the FY 1999 fee rulemaking on the potential for including escalated enforcement actions in Part 170 in the FY 2000 fee rule.

BASIS FOR RECOMMENDATION:

Although a majority of respondents agreed with the proposal to establish Part 170 fees, with a cap, for escalated enforcement actions, others raised legal and major policy concerns, such as concerns with charging a fee and a civil penalty (see **BASIS FOR RECOMMENDATION, FEE INITIATIVE 3**). In addition, some escalated enforcement actions are withdrawn. Soliciting comments in the FY 1999 fee rulemaking on the potential for including escalated enforcement actions in Part 170 in the FY 2000 fee rule would provide an opportunity to evaluate public and industry input and further consider the legal and policy issues.

FEE INITIATIVE 6: CHARGE PART 170 FEES FOR ALLEGATIONS AND OTHER INVESTIGATIONS

A. Allegations

B. Other Investigations

Currently, Part 170 fees are not assessed for allegations or investigations, including investigations resulting from inspection findings.

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A and B. Part 170 fees have not been assessed for allegations and investigations because they do not result in inspection reports. Such assessments would create incentives for opponents of facilities to file allegations to raise licensee costs.

INITIAL PROPOSED ACTION:

Recover the cost of allegations and investigations for reactor and fuel cycle licensees through Part 170 fees assessed to the specific licensee. Most allegations are filed by employees and a correlation can be made to licensee performance. This would be consistent with the policy for performance-based inspections. A specific fee with a cap may be established.

SUMMARY OF OFFICE COMMENTS:

NMSS: Disagrees because allegations can be made by outsiders where a correlation cannot be made to licensee performance, and charging fees would be contrary to NRC's current policy of not notifying licensees of allegation inspections. We also believe OCFO should review its methodology for charging Part 171 fees. There is no stronger correlation between allegations, particularly those filed by outsiders, and licensee performance than there might be for many filings of CFR 2.206 petitions (which the OCFO proposal would exclude from Part 170). NMSS has experienced allegations made by one vendor against another to achieve a market advantage. Therefore, the allegation may be suspect, and work done on the allegation and subsequent investigation should not be charged under Part 170.

As we understand the current Part 171 methodology, allegation and investigation costs are spread to all licensees charged Part 171 fees in that fee category. This would result in all fuel cycle licensees paying for the allegations made against a few fuel cycle licensees. We do not think it is fair to spread the costs in that manner. We believe the annual fee allocation methodology should be changed to spread the costs over all licensees rather just one class.

Certificate holders (e.g , Gaseous Diffusion Plants) should be treated the same as fuel cycle licensees, and materials licensees would be excluded. Also, the scope should be expanded to include storage licensees (both site-specific and general) and vendors/CoC holders under 10 CPR Part 72. Consideration should be given to transportation (Part 71) vendors and CoC holders.

NRR: Does not support OCFO's proposed action. Allegations are brought forth by entities other than the licensees about an action that the licensees may have taken contrary to regulation or relating to the harassment of employees. In general, NRR thinks it is inappropriate to charge licensees for inspections and reviews associated with allegations. The NRC has a policy of accepting anonymous allegations based on the information provided. Every allegation is evaluated to some extent. This means that a person or group could maliciously submit a large number of concerns and thereby negatively affect a licensee through the NRC.

OI For numerous legal and policy reasons, OI strongly opposes the proposal.

1. Assessing fees covering the cost of our investigations is inconsistent with the Quality Standards for Investigations issued by the President's Council on Integrity and Efficiency (PCIE) One of the general standards for investigative organizations provides that "in all matters relating to investigative work, the investigative organization must be free, both in fact and appearance, from impairments to independence; must be organizationally independent; and must maintain an independent attitude." To achieve this, the PCIE asserts that there cannot be "external impairments." Specifically there must not be external conditions which would influence the extent and thoroughness of the investigative scope, how the investigation is conducted, who should be interviewed, what evidence should be obtained and the appropriate content of the investigative report.

We are concerned that if the costs of investigations are billed under Part 170, the nature and thoroughness of investigations will be improperly skewed by fee considerations and undue pressure will be placed on the office by licensees under investigation to conduct more limited investigations.

2. In many cases, OI develops sufficient information to refer the matter to the Department of Justice for possible criminal prosecution In some of these cases, the Department of Justice asks us to do additional investigatory work to assist them in their prosecutory effort. The Office of the General Counsel has advised that the work that we perform for the Department of Justice must be classified as an "independent public benefit" for which we may not legally assess Part 170 fees.

3. Approximately 70% of our investigations do not substantiate that wrongdoing occurred. It is thus unfair to charge specific licensees for the cost of investigations. In a 1997 investigation, OI expended 1350 hours of investigatory effort without substantiating possible wrongdoing. Is it fair to charge a licensee for the cost of an investigation that found no possible wrongdoing? What if only part of an allegation is sustained? Would the NRC try to apportion the cost? In view of the above percentage of investigations which do not substantiate wrongdoing, also consider that individuals or groups could cause serious financial difficulties, particularly for small entities, simply by constantly filing numerous allegations.

4. Charging for investigations under Part 170 is not consistent with the Commission's policy of stabilizing fees. In 1997 the hours devoted to individual investigations ranged from 3 hours to 2400 hours, with the average investigation taking around 210 hours. Because of this wide range, it will be difficult for a licensee to project expected NRC fee costs.

5 Our investigatory reports are not routinely made available to the licensee, except for an abbreviated synopsis It is difficult as a policy matter to send the licensee a bill without providing them a copy of the report. Thus, licensees will have no means of determining the reasonableness of the fee bill.

6. Many investigations that conclude with findings of wrongdoing, lead to imposition of civil penalties. In many of these cases, the investigatory costs will exceed the amount of the civil penalty. This raises policy and NRC resource issues that need to be fully considered.

A portion of the agency costs arising from allegations come from activities conducted by NRC employees who are not part of OI. The process of receiving and evaluating allegations, including the effort of the allegation review board, are such activities. Assessment of these costs would need to be addressed.

REGION III: Agree with the OCFO proposed action; however, only when the allegation is internal to the licensee. Some allegations come from outside sources and are not substantiated. It would be unfair to charge the licensees for the subsequent investigation or inspection of unsubstantiated external allegations. Less than 30 percent of allegations are

substantiated, not sure that a correlation to licensee performance can be made. Additionally, and perhaps more importantly, disgruntled workers, anti-nuclear individuals, and others may decide to flood the system with allegations in hopes that they can cause a licensee to go broke paying for our review of allegations

REGION IV: Totally disagree with OCFO proposal. Even though as the agency begins billing full-cost for resident inspectors some allegation follow up charges will be occurring, many employee allegations are not directly related to licensee performance. If such a policy were adopted it could be subject to abuse, put an entity out of business.

RECOMMENDATION:

Continue to recover the costs of allegations and other investigations through Part 171 annual fees, but solicit public comments in the FY 1999 fee rulemaking on including these activities in Part 170 in the FY 2000 fee rule.

BASIS FOR RECOMMENDATION:

NRC offices' opposition to the proposal to assess Part 170 fees for allegations and other investigations was almost unanimous, and the one respondent agreeing with the proposal had reservations. Most allegations are not substantiated, and investigations frequently do not result in findings of wrongdoing Soliciting public comment in the FY 1999 fee rule on the potential for including allegations and other investigations in Part 170 in the FY 2000 fee rule would provide an opportunity to evaluate public and industry input and to consider further the legal and policy issues

Currently, resources for processing allegations are not separately identified in the agency budget Therefore, there is no current mechanism for these costs to be identified in order to allocate them to all licensees rather than to individual classes of licensees as suggested by NMSS. NMSS's concerns will be addressed If allegations and investigations are included in Part 170 in the FY 2000 fee rule.

FEE INITIATIVE 7: CHARGE PART 170 FEES TO RECOVER FULL COSTS FOR PROJECT MANAGERS

A. Full cost recovery for Project Managers

Currently, a Project Manager's time is billed to the specific licensee under Part 170 only if the time is expended for a specific licensing action or inspection. (Effective with the FY 1998 fee rule, the agency is billing full-cost for resident inspectors, excluding leave time and time spent in support of another plant or facility.)

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A. Part 170 fees have not been assessed to recover the full costs for Project Managers because their work involves activities other than licensing reviews and inspection activities. In addition, Project Managers may be assigned to more than one licensee, making it difficult to determine the costs to be assessed to each.

INITIAL PROPOSED ACTION:

Recover full-cost for Project Managers through Part 170 fees assessed to the specific licensees.

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with OCFO proposal. Project Managers charge approximately 3000 hours per year of general project management work to RITS #211AA. (This does not include Gaseous Diffusion Plant Project Manager hours.) Almost all of those hours (95%) apply to fuel fabrication licensees, and very little to source or other special nuclear materials licensees. These Project Manager hours include such activities as arranging licensee meetings with NRC management, pre-licensing discussions with the licensees, maintaining casework logs, reviewing inspection reports and attending meetings related to inspections, and participating in License Performance Reviews. These hours would be applied to 25 licensees, and the hours per licensee range from less than 10 to more than 500.

It should be clear that the proposed action will apply to project management duties for storage and transportation general licensees, vendors/CoC holders, and applicants under 10 CPR Parts 71 and 72 who may not be considered specific licensees. In the Spent Fuel Project Office, most, if not all, project managers have multiple projects to manage.

In most cases, a project manager is not assigned to a materials licensee. However, for those few major materials licensees that do have PMs, we support the CFO proposal.

NRR: Fee billable activities of project managers should be limited to FSAR updates, 50.59 reviews, licensee commitment reviews, and any other efforts specifically resulting from licensee requests

REGION III: Agree with OCFO proposed action. In the materials area some licensees do require an inordinate amount of project management time to monitor and manage issues. Some project managers spend a significant amount of time on Multi-Plant Actions; this effort should not be charged to a specific licensee.

REGION IV. Disagree with OCFO proposal. A large amount of the project managers time is not spent specifically on a particular licensee

RECOMMENDATION:

Assess Part 170 fees to recover all of the project managers' time, except time spent on generic activities, such as rulemaking, and leave time, for reactor and major fuel cycle licenses. "Materials license" is defined in 10 CFR 170.5 to include certificates, approvals, registrations, or other form of permission granted under 10 CFR Part 30, 32 through 36, 39, 40, 61, 70, 71, and 72. This definition will be revised to include Part 76. Therefore, under this proposal, entities certified by the NRC, such as the Gasesous Diffusion Plants and transportation certificate of compliance holders, would be assessed Part 170 fees to recover the full costs for project managers assigned to their license or facility. These Part 170 fees would not apply to smaller materials licensees because very few of these licensees have project managers assigned and implementation would be difficult and resource intensive. In addition, as a separate action, staff is proposing that the amendment fees for these licensees be eliminated and the amendment costs recovered through their Part 171 annual fees.

BASIS FOR RECOMMENDATION:

NRC offices had mixed reaction to the proposal to recover full cost for project managers through Part 170 fees. However, project manager activities support and provide a direct benefit to the licensee/site to which they are assigned. The concept of assessing Part 170 fees for all of the project managers' time, except time spent on generic activities, such as rulemaking, and leave time, is similar to the policy implemented in the FY 1998 fee rule to assess Part 170 fees for all of the resident inspectors' time, except leave and time spent in direct support of another site

FEE INITIATIVE 8: DO NOT CHARGE PART 170 FEES FOR WORK PERFORMED DURING UNCOMPENSATED OVERTIME

A Work performed during uncompensated overtime

Effective with the FY 1998 fee rule, Part 170 fees are assessed for licensing reviews and inspection activities performed during compensated overtime. Part 170 fees are not assessed for these activities if they are performed during uncompensated (voluntary) overtime.

HISTORICAL BASIS FOR NOT CHARGING PART 170 FEES:

A. Part 170 fees are not assessed for work performed during uncompensated overtime because of concerns related to supervision and authorization/certification of the voluntary overtime efforts. The voluntary overtime does not require prior supervisory approval and is not reported in the payroll system, which is used for verification in the certification of costs for fee billing. Effective with the FY 1998 fee rule, Part 170 fees are assessed for licensing reviews and inspection activities performed during compensated overtime. Compensated overtime must be approved and the hours reviewed and certified for fee billing similar to regular hours.

INITIAL PROPOSED ACTION:

No change to current policy of not assessing Part 170 fees for reviews and inspections performed during uncompensated overtime based on the supervision and authorization/certification concerns. In addition, assessing Part 170 fees for uncompensated overtime efforts would likely be contentious. However, the agency policy regarding the types of work to be performed during voluntary overtime should be reviewed.

SUMMARY OF OFFICE COMMENTS:

NMSS: Agree with OCFO proposal.

NRR: The legality of charging "voluntary" overtime for fee recoverable activities should be formally addressed. In addition, specific controls on overtime need to be addressed if it is to become fee billable.

REGION III: Agree with OCFO proposal.

REGION IV: Agree with OCFO proposal.

RECOMMENDATION:

Do not assess Part 170 fees for work performed during uncompensated overtime.

BASIS FOR RECOMMENDATION:

All NRC offices agreed that there should not be a change to the current policy of not assessing Part 170 fees for work performed during uncompensated overtime, and that the agency policies with regard to the types of work to be performed during uncompensated overtime be reviewed.

III. ADDITIONAL COMMENTS:

NMSS: OCFO should consider whether the cost to implement these initiatives is reasonable compared with the amounts that will be recovered, particularly since caps are being considered.

NMSS is heavily involved in DOE licensing, certification, and inspection-related activities. Consideration should be given to seeking approval to assess Part 170 fees for licensing, certification, and inspection-related activities associated with DOE projects related to 10 CFR Parts 71 and 72. For example, SFPO's DOE-related licensing or certification-related projects include: TMI-2 fuel debris independent spent fuel storage installation (ISFSI) licensing review; the Fort St. Vrain (FSV) ISFSI license transfer review; the dry transfer system topical safety analysis report review; high burn-up fuel topical report; the non-site-specific central interim storage facility topical safety analysis report review; and the return of foreign research reactor spent fuel transportation review activities. Parenthetically, this is related to the SRM dated June 12, 1998, regarding SECY-98-095, regarding the FSV ISFSI license transfer model.

Additionally, in accordance with a memorandum of understanding, NMSS performs work, on an as-needed basis, for DOT involving the review of foreign-certified transportation packages. Consideration should be given to assessing Part 170 fees for this activity.

RESPONSE TO ADDITIONAL COMMENTS:

The Commission paper on the FY 1999 fee policies will address the issue of cost recovery for licensing and inspection activities performed for Federal agencies.

IV. SUMMARY OF RECOMMENDATIONS:

1. Part 170 should be revised to include fees for incident investigations performed by Incident Investigation Teams (IITs), plant specific performance assessments and evaluations (Diagnostic Evaluation Team assessments, performance assessments of fuel facilities, plant performance reviews, etc.); reviews of responses to Confirmatory Action Letters, reports, and other reviews; and full cost recovery for project managers (i e., licensees would be billed for all of the project manager's time, except time spent on generic activities, such as rulemaking, and leave time).

2. Public comments should be solicited in the FY 1999 fee rulemaking on the potential for including costs associated with Orders and responses thereto, escalated enforcement actions, and allegations and investigations for inclusion in the FY 2000 fee rule. Assessing fees to the affected licensees to recover the cost of these activities raises legal and policy issues that warrant further consideration before making a recommendation to assess Part 170 fees for some or all of these activities.

3. Part 170 fees should not be assessed for reactor vendor inspections, contested hearings and responses to 10 CFR Part 2.206 petitions.

4. Part 170 fees should not be assessed for work performed during uncompensated overtime.

U.S Nuclear Regulatory Commission
Office of the Chief Financial Officer

SPENT FUEL STORAGE

AND

DECOMMISSIONING

FEE STUDY

ATTACHMENT 2

The Spent Fuel Storage/Decommissioning Study Team

October 1998

Table of Contents

Executive Summary

A Staff Requirements Memorandum (SRM) of March 9, 1998, (COMSAJ-98-001/COMEXM-98-001) directed staff to revise the FY1999 fee rule to provide for equivalent annual fee treatment for both wet (spent fuel pool) and dry (Independent Spent Fuel Storage Installation or ISFSI) storage of spent fuel. Currently, a separate annual fee is assessed to licensees that hold a Part 72 license for storage of spent fuel in an ISFSI. However, Part 50 licensees in decommissioning who store spent fuel in a spent fuel pool are not assessed an annual fee because of the current policy under which licensees in decommissioning do not pay annual fees. The NRC announced in the FY 1998 fee rule its intent to review the current annual fee policies for spent fuel storage and licensees in decommissioning.

In the February 4, 1998, SRM for SECY-97-304, Response to Staff Requirements Memorandum SECY-97-144, "Potential Policy Issues Raised By Non-Owner Operators," the Commission directed staff to make recommendations on, and obtain Commission approval for, resolution of issues related to the Fort St. Vrain (FSV) license transfer. The Commission specifically requested that the recommendations include staff's plans for the loss of licensing and inspection fees upon the transfer of the license to a Federal government licensee and recommend approaches including proposals for legislation that would allow the recovery of such fees from Federal government licensees. In a March 23, 1998, SRM for SECY-98-034, the Commission directed staff to consider alternative treatment of costs attributable to the Department of Energy (DOE) ISFSI annual fees (i.e., whether the DOE costs should be outside the fee base and funded by an appropriation from the General Treasury or whether legislation should be sought which would permit the NRC to charge DOE and other Federal agencies Part 170 fees). In the June 12, 1998, SRM for SECY-98-095, the Commission approved staff's plan to name DOE as the sole licensee for the FSV ISFSI and also approved staff's schedule for making recommendations to the Commission regarding recovery of the fees associated with Federal agencies by the end of October 1998. The Commission requested staff's views regarding recovery of fees associated with Federal agencies, particularly the DOE-Idaho Operations Office FSV's ISFSI facility.

The team determined there are four options for recovering costs for spent fuel storage and decommissioning/reclamation generic activities. They are: (1) to establish a "spent fuel storage/decommissioning" annual fee to be assessed to all power reactor licensees who hold a Part 50 license, and to Part 72 licensees who do not hold a Part 50 license to recover the agency's budgeted generic costs for these activities related to power reactors, and continue to recover the remaining generic decommissioning costs for materials licenses through the annual fee surcharge imposed on all licensees; (2) to establish a "spent fuel storage" annual fee to be assessed to operating power reactor licensees only; (3) to amend the Nuclear Waste Policy Act (NWPA) to permit the NRC to recover the agency's budgeted generic costs for independent spent fuel storage activities from the Nuclear Waste Fund (NWF); or (4) to continue with the agency's current policies for assessing annual fees for dry storage and for not imposing annual fees on licensees in decommissioning/possession-only status.

As a result of the study, the team recommends the following for the Commission's

consideration: (1) to recover the agency's generic costs for spent fuel storage and power reactor decommissioning activities, establish a "spent fuel storage/decommissioning" annual fee to be assessed to all power reactors holding Part 50 licenses, including those in decommissioning and Part 72 licensees who do not hold Part 50 licenses; (2) continue to recover the remaining generic decommissioning costs through the annual fee surcharge assessed to all classes of licensees based on their share of the budget; (3) continue the agency's current policy of recovering Site Decommissioning Management Program (SDMP) costs via the annual fee surcharge assessed to all classes of licensees based on their share of the budget; (4) over the longer term, seek legislation to expand the use of the Nuclear Waste Fund to recover the agency's spent fuel storage program costs; and (5) seek legislation to amend the Atomic Energy Act to permit the NRC to assess licensing and inspection fees to all Federal agencies.

Spent Fuel Storage/Decommissioning Study Team Participants

On April 13, 1998, a study team was established to: (1) review the Commission's current annual fee assessment policies for spent fuel storage and decommissioning activities; and (2) provide recommendations on alternative methods for assessing annual fees to licensees to recover the agency's budgeted generic costs. The appointed core team consisted of the following members:

Beverly S. Jones, Team Leader, DAF/OCFO
Earl Easton, SFPO/NMSS
James Shepherd, DWM/NMSS
Anthony Markley, PDNP/NRR
Catherine Holzle, OGC
Geraldine Fehst, OGC

The team received additional management, technical, and administrative support from staff in the Office of the Chief Financial Officer, the Office of Nuclear Material Safety and Safeguards, the Office of Nuclear Reactor Regulation, the Office of Research, and the Office of the General Counsel including, but not limited to:

<u>Office of the Chief Financial Officer</u>
Diane Dandois
Glenda Jackson
Maurice Messier
Ellen Poteat

<u>Office of Nuclear Material Safety and Safeguards</u>
Joseph Holonich
Elise Heumann
Robert Nelson
Claudia Seelig

<u>Office of Research</u>
Raymond Gustave

<u>Office of the General Counsel</u>
Trip Rothschild
Mary Tenaglia

<u>Office Nuclear Reactor Regulation</u>
Michael Case
Thomas Dietz
Richard Dudley
Melinda Malloy
Ronald Villafranco

I. BACKGROUND AND SCOPE

A. Background

The purpose of this study is to address issues raised by the Commission on current license fee policies. Specifically, a March 9, 1998, Staff Requirements Memorandum (SRM) (COMSAJ-98-001/COMEXM-98-001) directed staff to revise 10 CFR Part 171 to provide equivalent annual fee treatment to both wet storage (spent fuel pool) and dry storage (independent spent fuel storage installations or ISFSIs) of spent fuel.

The Commission stated that the current fee structure could create a disincentive for licensees to pursue dry storage because annual fees are imposed on Part 72 licensees, while no annual fee is imposed on Part 50 "possession only" licensees who forgo an ISFSI in favor of wet storage.

In SECY-98-034, the staff informed the Commission that as part of this study it would also review the current policy that exempts licensees in decommissioning/possession-only status from Part 171 annual fees. This policy is applied to all classes of licensees and is based on the principle that if a licensee chooses to voluntarily relinquish its authority to operate, it amounts to a declaration that the licensee no longer desires a benefit from the NRC. In the past, fairness seemed to suggest that assessment of an annual fee was no longer appropriate in such cases. As more licensees cease operations, however, the declining number of licensees remaining are left to bear the costs for NRC's regulatory activities, raising new concerns about the equity of current policies.

The staff was instructed to include in the "Statements of Consideration" for the FY 1998 fee rule NRC's intention to revise the FY 1999 fee rule to reflect the Commission's new policy. The statement of considerations accompanying the proposed FY 1998 fee rule stated:

> The NRC is also announcing here that it plans to reexamine the current annual fee exemption policy for licensees in decommissioning or holding possession only licenses and the annual fee policy for reactors' storage of spent fuel. Any changes to the current fee policies will be included in the FY 1999 fee rulemaking. One purpose of the study is to assure consistent fee treatment for both wet storage (i.e., spent fuel pool) and dry storage (i.e., independent spent fuel storage installations, or ISFSIs) of spent fuel. The Commission has previously determined that both storage options are considered safe and acceptable forms of storage for spent fuel. Under current fee regulations, Part 50 licensees in decommissioning who store spent fuel in an ISFSI under Part 72 are assessed an annual fee. The NRC will review this policy as part of the overall study of the issues related to annual fees for licensees in decommissioning.

In the March 23, 1998, SRM for SECY-98-034, FY1998 Proposed Fee Rule, the Commission directed the staff to consider alternative treatment of costs attributable to DOE that affect an

ISFSI annual fee (i.e., whether DOE costs should be outside the fee base or whether legislation should be sought to allow charging DOE and other Federal agencies Part 170 fees). In the June 12, 1998, SRM for SECY 98-095, "Licensing Model for Transfer of FSV Independent Spent Fuel Storage Installation License to the U.S. Department of Energy (DOE)," the Commission approved staff's plan to name DOE as the sole licensee for Fort St. Vrain's (FSV) ISFSI upon completion of staff review. The Commission requested staff's views regarding recovery of fees associated with Federal agencies in general and the DOE-Idaho Operations Office FSV ISFSI in particular.

B. Scope

The alternatives in this report address the assessment of Part 171 annual fees to recover the costs for generic spent fuel storage and decommissioning activities. The classes of licensees that are the primary focus of the report are power reactors and Part 72 spent fuel storage (ISFSI) licensees. Classes of licensees that are minimally affected by the alternatives discussed in this report are: nonpower reactors, fuel cycle, small materials, and uranium recovery.

II. NUCLEAR WASTE POLICY ACT (NWPA)

In 1982, Congress passed the Nuclear Waste Policy Act (NWPA) to address spent fuel storage issues and gave the Department of Energy (DOE) responsibility for providing a permanent, long-term solution for disposing of spent fuel and high-level waste.

The NWPA also charged DOE with administering the Nuclear Waste Fund (NWF) for the purpose of radioactive waste disposal activities under certain provisions of the NWPA The funds are derived from quarterly fees paid to DOE by the nuclear utilities for the disposal of their spent nuclear fuel. The NWF is restricted to DOE's administrative costs for its radioactive waste disposal program; costs incurred by DOE for transportation, treating, or packaging of spent nuclear fuel to be disposed, stored, or retrieved in a monitored storage site; costs for developing a repository site; and provisions made for assistance to state and local governments

The NRC developed regulations governing interim storage of spent fuel and high-level waste through the promulgation of 10 CFR Part 72. The Commission's regulations originally were designed to provide specific licenses for storage of spent nuclear fuel in an independent fuel storage installation (ISFSI). Later, these regulations were amended to include the storage of high-level waste at a monitored retrieval storage installation. In 1990, Part 72 was further amended to include a process for certifying spent fuel casks and for granting a general license to power reactor licensees using NRC-certified casks for storage of spent nuclear fuel. The provisions of a general license are binding on any licensee using the pre-approved dry storage cask at a licensed nuclear reactor. The NRC's FY 1998 NWF appropriation was $15 million.

Current legislative language explicitly states, "No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation." The annual fees for specific and general Part 72 licenses have been established by the NRC to recover the generic

budgeted costs necessary to regulate independent spent fuel storage facilities. The agency's interpretation of the NWF legislative language is that it precludes the NRC from recovering from the NWF the budgeted costs for spent fuel storage activities and furthermore, licensees cannot be reimbursed from the NWF for costs incurred for obtaining a general or site-specific ISFSI license.

In March 1995, the Chairman of the Energy and Water Development Subcommittee of the House Appropriations Committee asked why the NRC hadn't included ISFSI costs in the budget request to be derived from the Nuclear Waste Fund since DOE had been unable to take possession of spent fuel and utilities were being forced to build ISFSI facilities. In response, the former NRC Chairman, Ivan Selin, described the restriction in the use of the funds and explained that DOE indicated it would examine the possible use of the NWF to offset the financial burden incurred by utilities for ISFSI storage after 1998. In response to a similar comment on the proposed FY 1991 fee rule, NRC concluded that its generic costs were not recoverable from the NWF.

III. CURRENT LICENSE FEE POLICY

Spent fuel storage and decommissioning licensing and inspection costs are recovered from licensees through Part 170 fees for services. Spent fuel storage costs not recovered through Part 170 assessments are included in the Part 171 annual fees assessed to licensees that hold Part 72 general or specific license. Under the existing policy, no annual fee is assessed for decommissioning or possession-only licenses.

A basic premise of the current annual fee policy is that the benefit the NRC provides a licensee is the authority to use licensed facilities or material. Historically, annual fees have been assessed on a per license basis and licensees who have indicated they no longer want an NRC license and have permanently ceased operations are not assessed an annual fee. It is recognized that power reactor licensees that are no longer operating derive some benefit from generic decommissioning activities However, the preponderance of the activities that are covered by an operating reactors' annual fee are not applicable to decommissioning reactors. Therefore, no annual fee currently is assessed to power reactor licensees in decommissioning or possession-only status.

A. Spent Fuel Storage

Only the power reactor class of licensees benefit from generic activities associated with spent fuel storage. The current base annual fees assessed to Part 50 operating power reactor licensees include the generic costs for spent fuel pool (wet storage) activities. Spent fuel pools are covered by Part 50 licenses and are addressed as part of the operational aspects of a reactor facility. Unlike dry storage, the costs associated with the generic activities for wet storage are not separately identified in NRC's budget or Part 171 annual fee schedule. Once a licensee certifies it has permanently removed fuel from the reactor vessel, an annual fee is no longer assessed for the Part 50 license.

Licensees who store spent fuel in an ISFSI are issued a Part 72 license. There are two types of licenses for dry storage under Part 72--a general license and a specific license. A Part 72

general license is granted by the regulations and is contingent upon the licensee possessing a Part 50 license. Thus, licensees who terminate their Part 50 license but continue to store fuel in an ISFSI must convert their general license into a specific license. A Part 72 specific license is not contingent upon the licensee holding a Part 50 license, and therefore, can be held by licensees who have terminated their Part 50 licenses (e.g , Fort St. Vrain). Power reactor licensees that hold a Part 72 general or specific license are assessed the Part 72 annual fee in addition to the Part 50 annual fee.

The annual fee is only one of several financial considerations that licensees must address when choosing a storage option. While it appears that the current fee schedule provides a monetary incentive to choose wet storage over dry storage, despite the high costs of maintaining wet storage, NRC fees may not be a major factor in a licensee's decision. Licensees frequently seek dry storage due to the lack of storage capacity remaining in the spent fuel pool. With the continued delay in DOE taking possession of spent fuel, some utilities must then resort to dry storage for more storage capacity. In some cases, licensees have successfully reracked the fuel pool or utilized available capacity in other units at the same site operated by the same utility and do not need dry storage. Other licensees have elected a third alternative i.e., to ship the cask to an off-site ISFSI owned by the licensee or other entity. Finally, other plants have prematurely shut down before reaching storage capacity. A decision by the licensee to forego dry storage would likely result from the high cost to license, construct, and maintain storage in an ISFSI, and not merely the annual fee imposed by the NRC.

It is likely that, in the absence of a high-level waste repository, all licensees will need dry storage capacity eventually. It is estimated that as many as 50 reactors will reach storage capacity during the next 10 years. According to industry representatives, building another spent fuel pool is not an option because it is too costly and cannot be easily integrated within a plant's configuration For some licensees, the need for dry storage is so critical that an exemption to current Part 72 regulations has been requested to allow the construction of dry storage casks before the design has been certified by the NRC.

Presently, there are eight reactors with specific ISFSI licenses and seven more specific licenses likely to be submitted for NRC review. There are also five generally-licensed ISFSIs in use by power reactor licensees, with fourteen potential general licenses to be used. The annual fees assessed to these Part 72 licensees have ranged from a high of $375,000 in FY1991 to a low of $43,000 in FY1992 with the current fee of $283,000 in FY1998[1]. The variation in annual fees reflects the cost of promulgating regulations regarding generic safety concerns and the costs of providing regulatory oversight.

B. Decommissioning

As discussed above, the Commission's current policy exempts licensees in decommissioning/possession-only status from Part 171 annual fees. However, licensees in decommissioning/possession-only status are subject to Part 170 licensing and inspection fees.

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[1] The FY1998 annual fees were calculated based on the percentage change in NRC's FY1998 budget of 0 01% Had the Commission rebaselined its fees in FY1998, the annual fee for Part 72 license holders could have increased significantly.

The current fee policy raises fairness and equity concerns because generic decommissioning and reclamation activities support both licenses authorizing operations and those limited to decommissioning or possession only; however, only licensees with an operating license are asked to bear these costs. This becomes a larger problem for operating licensees because as the number of operating licensees declines, the financial burden on the remaining active licensees increases.

While the Commission previously decided against charging annual fees to licensees that ceased operations, the NRC continues to acknowledge that these licensees derive a benefit from NRC regulatory and oversight activities. For example, on July 15, 1994, the Timeliness in Decommissioning of Materials Facilities rule was published in the *Federal Register* (FR 36026) to encourage licensees to decommission in a timely fashion. These activities include the safe removal of a facility from service and the reduction in residual radioactivity to a level that permits the property to be released for unrestricted use; an action required by a licensee before termination of the NRC license.

The existing fee policy has been reconsidered on several occasions, and in each instance the Commission has reaffirmed its decision to continue the policy of assessing annual fees only for licenses which authorize operation of a facility. In a February 4, 1993, petition, the American Mining Congress (AMC) requested that the NRC amend 10 CFR 170 and 171 to alleviate what the petitioner claimed were inequitable NRC fees assessed against its members. The major issue raised by AMC was whether annual fees should be assessed to any licensed facility in a standby status and not currently generating revenue from use of licensed material or that cannot relinquish its license because it cannot dispose of the materials. The AMC believed that facilities not generating revenue should not pay annual fees. On April 28, 1995, the NRC denied the AMC petition for rulemaking, noting that the Commission would continue its current policy of charging an annual fee to licensees both actively operating and in standby status (60 FR 20918). If a licensee wanted to avoid paying the fee, the Commission concluded it should terminate its license. The Commission emphasized that it would not assess an annual fee to licensees required to retain a possession-only license.

In SECY-95-017, Reinventing Fee Policies, staff also discussed alternatives to the policy, but recommended continuation of the existing policy, primarily because assessing annual fees to licensees in decommissioning and possession-only status would create significant concerns about fairness and equity since these licensees have voluntarily relinquished their authority to operate, often to avoid annual fees. This includes licensees who are required to retain a possession-only license until the site is decommissioned or reclaimed. In some cases, licensees must continue to hold licenses to possess materials because there is no place to dispose of the waste. For example, power reactor licensees must continue to possess high-level waste until a place is available to dispose of the waste, and certain materials licensees must possess greater-than-Class-C waste or mixed waste until a disposal site is available.

The current method for recovering generic decommissioning and reclamation costs is through an annual fee surcharge assessed to operating licensees. The surcharge also includes the budgeted costs related to the fee exemptions for Federal agencies, and nonprofit educational institutions, the small entity subsidy, regulatory support to Agreement States, and the Site Decommissioning Management Program (SDMP). Each class of licensees is assessed the

surcharge based on their total share of NRC's budget. Thus, operating power reactors are currently assessed 89% of these costs

Exhibit 1 illustrates the distribution of the estimated FY 1998 generic decommissioning or reclamation costs shared by each class of licensees.

Exhibit 1

Estimated FY1998 Surcharge for Generic Decommissioning/Reclamation Activities[2]			
	Percent (%) of Surcharge	*Total Share Per Class*	*Total Share Per Licensee*
Power Reactors	89.0	$5,073,000	$47,858
Nonpower Reactors	0.0	0	0
Fuel Facilities	3.0	171,000	15,545
Spent Fuel Storage	1.0	57,000	5,182
Materials	5.0	285,000	51
Uranium Recovery	1.0	57,000	4,385
Rare Earth Facilities	0.0	0	0
Transportation	1.0	57,000	496
Total:	100	$5,700,000	--

IV. ALTERNATIVES AND RECOMMENDATIONS

As a result of the team's review of the issues, the following alternatives to the current agency license fee policies for spent fuel storage and decommissioning were identified.

A. Alternative 1 - Establish a Spent Fuel Storage and Decommissioning Annual Fee

In Alternative 1, the regulatory costs for generic spent fuel storage and reactor decommissioning activities would be recovered through a separate annual fee assessed to all power reactor licensees, including those that have elected to shut down and Part 72 licensees who do not hold a Part 50 license. This separate "Spent Fuel Storage/Decommissioning" (SFS/D) annual fee would be assessed to all power reactor licensees regardless of whether they use wet or dry storage. The establishment of a separate SFS/D annual fee: (1) provides equivalent fee treatment for both wet and dry storage of spent fuel, (2) provides a fair and equitable method for recovering costs from power reactor licensees in decommissioning/possession-only status that directly benefit from regulatory services of the agency; (3) reduces the financial impact of these costs on the operating power reactor

[2] Because annual fees were not rebaselined in FY1998, the decommissioning/reclamation surcharge amounts have been estimated using the FY1995 amounts, adjusted for the FY1996 through FY1998 percent changes to the annual fees

licensees because more power reactor licensees would pay for these costs; (4) reduces the annual fee for each licensee needing to resort to dry storage; and (5) provides a financial incentive for licensees to complete the decommissioning process in a timely manner. The existing annual fee for Part 72 licenses held by power reactor licensees would be eliminated.

Power Reactor Class of Licensees

All power reactors benefit from some or all of the generic activities related to spent fuel storage and decommissioning. Indeed, about half the licensees include the cost of storing spent fuel in their cost estimate for decommissioning. For example, Fort St. Vrain has completed decommissioning, but stores fuel in an ISFSI. Peach Bottom 1 has no fuel on-site, but is undergoing decommissioning. GE Morris holds a Part 72 site-specific license but does not hold a Part 50 license. In each case, one SFS/D annual fee would be assessed for each Part 50 license held, and for each Part 72 license issued to licensees who do not hold a Part 50 license. As an example, Duke Energy Corporation (Duke) holds three Part 50 licenses and a Part 72 specific license and is also exploring the use of the Part 72 general license for the Oconee Nuclear Station. Under Alternative 1, Duke would be assessed three annual fees for Oconee, one for each Part 50 license. Under the existing policy, Duke would be assessed five annual fees, one for each Part 50 license, one for the Part 72 specific license, and one for the Part 72 general license once it is used. For the specific concerns raised by Duke, see Section V.B.

While this alternative would result in a reduction in the share of costs for operating power reactors, power reactors in decommissioning may plead that they should not pay annual fees based on the principles underlying the current exemption. These licensees likely would argue their reliance on current policy and claim that it is unfair to charge them an annual fee. Operating power reactors may contend that Alternative 1 is the fairest approach as permanently shutdown power reactors should bear part of NRC's generic decommissioning costs in that they, too, benefit from the expenditures.

The additional annual fee proposed in Alternative 1 for SFS/D represents only a small fraction of the total costs that are estimated to decommission a power reactor. For example, Connecticut Yankee has estimated it will cost $427 million to decommission, including $90 million for the storage and maintenance of spent fuel[3]. The estimated SFS/D annual fee of approximately $90,000 to $100,000 would represent only a very small part of the spent fuel portion of their total costs allocated for decommissioning.

All Other Classes of Licensees

Under this option, the generic decommissioning/reclamation costs for nonpower reactors, fuel facilities, materials, and uranium recovery licensees remain in the surcharge assessed to operating licensees, including power reactors. The team recommends continuing the current annual fee exemption for nonpower reactor, fuel facility, uranium recovery, and small materials licensees that hold licenses limited to decommissioning, reclamation, or possession-only. This means that each class of licensee, including the operating power reactors, would pay a portion

[3] Source Connecticut Yankee website http //www connyankee com/decom/cost html

of the non-reactor generic decommissioning costs.

Some reasons for continuing with the current method for assessing the surcharge to operating licensees only are: (1) unlike power reactor licensees who have up to 60 years to decommission, the timeliness in decommissioning rule requires that decommissioning of fuel facilities, uranium recovery, and materials license sites be completed within 24 months, unless the Commission approves an alternative schedule; (2) many fuel facility, uranium recovery and small materials licensees relinquished their authority to operate in order to avoid the annual fee; (3) charging annual fees to small materials licensees in decommissioning would be complicated because many have multiple fee categories and are assessed an annual fee for each category authorizing operations--this is not the case for power reactor licensees; (4) because many materials licensees qualify for the reduced annual fee for small entities, assessing an annual fee for small materials licensees in decommissioning or possession-only status would likely increase the small entity subsidy paid by other licensees; and (5) the majority of nonpower reactor licensees are educational institutions that are currently exempt from paying annual fees.

The comparative annual fees for Alternative 1 are illustrated in Exhibit 2.

Exhibit 2

COMPARATIVE ANNUAL FEE

WARNING: The fees provided below are to illustrate the affects of Alternative 1 using the assumptions as footnoted below Final & Projected FY1999 annual fees will be determined based on Commission decisions on key policy issues and NRC's final budget FY1999

	Operating Power Reactors	*Decommissioning Power Reactors*	*Spent Fuel Storage (ISFSI)*[4]	*Fuel Facilities*	*Uranium Recovery*	*Materials*
BACKGROUND						
• **No. of Licenses Projected in FY1999:**						
Operating	104	N/A	2	11	13	5600
POL/Decom/Reclamation	–	21	N/A	7	15	100
• **Estimated Percent (%) of budget**	89	0	1	3	1	5
• **Estimated FY1999 Generic Decommissioning Costs**	$7.2M	–	–	$2 4M	$0 4M	$0.7M
FY1998 Annual Fee	$2,976,000	N/A	N/A[5]	$ 345,000-2,604,000	$ 22,300-61,700	$490-23,500
Less Estimated 1998 Decommissioning Surcharge[6]	(49,000)	N/A	N/A	(15,500)	(4,400)	(50)
Less additional Part 170 Collections Based on FY 1998 Rule Changes	(183,000)	N/A	N/A	(15,400)	(1,000)	0 0
Estimated Spent Fuel Storage/Decommissioning Fee[7]	94,000	94,000	94,000	N/A	N/A	N/A
Comparative Share of Decommissioning/Reclamation[8] Surcharge (per operating license)	30,243	N/A	N/A	9,545	2,690	32
FY1999 Comparative Annual Fee[9]	**$2,868,243**	**$94,000**	**$94,000**	**$ 323,645-2,582,645**	**$19,590-58,990**	**$472-23,482**

[4] Two licensees do not hold a Part 50 license, Fort St. Vrain and GE Morris The remaining 11 Part 72 general and specific licensees hold Part 50 licenses

[5] The FY1998 ISFSI annual fee was $283,000, and this annual fee would be eliminated under Alternative 1

[6] Estimated FY1998 decommissioning surcharge determined using FY1995 amounts, adjusted for the FY1996 through FY1998 percent changes, divided by the number of licensees paying the FY1998 annual fee

[7] Estimated generic spent fuel storage/decommissioning costs based on an average FY1998 FTE rate of $217K plus program support dollars

[8] Estimated generic decommissioning/reclamation costs for classes of licenses other than power reactors that will remain in surcharge.

[9] Comparative annual fee assumes all else remains the same.

Other Decommissioning Costs - Site Decommissioning and Management Program (SDMP)

Under current Commission policy, 10 CFR Part 170 licensing and inspection fees are assessed to those sites identified in the Site Decommissioning Management Plan (SDMP) with an NRC license. Many licensees identified in the SDMP program are former NRC licensees or non-licensees and thus, cannot be assessed fees. Under the Omnibus Budget Reconciliation Act of 1990, the NRC is prohibited from assessing annual fees to these former licensees. The generic costs incurred for the SDMP program and the costs for NRC's review and inspection of non-licensed sites are included in the annual fee surcharge assessed to all classes of licensees. Although the costs for the SDMP program are related to the materials and fuel facility classes of licensees, they are not necessary to regulate existing licenses, but rather are regulatory liabilities created by past licensees.

In the February 1994 Report to Congress, the NRC recommended that costs which have raised fairness and equity concerns, such as those incurred for the SDMP program, be removed from the fee base. Therefore, until legislative relief is provided, the team recommends continuing the Commission's current policy of recovering these costs through the surcharge assessed to all classes of existing NRC licensees based on their share of the budget.

B. Alternative 2 - Establish a "Spent Fuel Storage" Annual Fee

Alternative 2 is a variation of Alternative 1. In this alternative a "Spent Fuel Storage" (SFS) annual fee would be established that would include generic wet and dry storage costs as discussed in Alternative 1, but would exclude generic decommissioning costs. The SFS annual fee would be assessed to each operating power reactor and to each Part 72 licensee who does not hold a Part 50 license authorizing operations. The SFS annual fee would not be assessed to those licensees in decommissioning/possession-only status. Although this alternative would provide equivalent fee treatment for both storage options and would address the concerns identified by Duke, it would result in operating power reactors being assessed additional annual fees. Moreover, this alternative would not address the concern of operating power reactors bearing additional costs for licensees that cease operations but continue to benefit from the generic regulatory and oversight activities of the agency. For these reasons, the team did not consider this to be a viable alternative.

C. Alternative 3 - Recover Spent Fuel Storage Costs from the Nuclear Waste Fund

Under this alternative, NRC's dry spent fuel storage activities would be funded using the NWF. Since the NWF is off the fee base, activities related to spent fuel storage (dry storage) would no longer be recovered through Parts 170 license and 171 annual fees and licensees would be provided an immediate benefit from the contributions they are making to the NWF. A fair and equitable approach would be achieved with no new burden on taxpayers or utility customers.

This alternative approach requires legislative changes to the Nuclear Waste Policy Act (NWPA) which likely would be difficult to obtain in a timely manner.

As a practical matter, there are also obstacles to overcome in obtaining legislative approval for use of NWFs to fund spent fuel storage activities. Contributions to the NWF are used to balance the national budget, so Congress is reticent about granting expenditures from this source of funds. Legislative relief may be hindered further by the prospect of reducing funds readily available for the DOE repository by diverting them to cover NRC needs. Nonetheless, because of the delay in the DOE high-level waste repository program, the team recommends that legislation be sought, so that the generic costs associated with NRC's spent fuel storage activities can be derived from the Nuclear Waste Fund.

D. Alternative 4 - Status Quo

Under this alternative, the NRC would continue to assess annual fees to Part 72 general and specific license holders to recover the costs for generic dry spent fuel storage activities, and would continue to exempt all licensees in decommissioning/possession-only status from annual fees. This alternative, of course, does nothing to address the concerns that annual fee policies may create incentives for licensees to choose one storage option over another or the concern that as the number operating power reactors decrease, the annual fees will increase for the remaining operating power reactor licensees. Although maintaining the current fee recovery policies would not provide equivalent fee treatment for wet and dry storage it would continue the long-standing policy that licensees who have voluntarily relinquished their authority to operate should not be assessed an annual fee. Furthermore, it would not address the specific concerns relating to multiple annual fees for multiple ISFSI licenses as discussed in Duke's exemption request for Oconee (see Section V.B). The team does not recommend this alternative.

V. OTHER ISSUES

A. Department of Energy--Fort St. Vrain (FSV)

In the February 4, 1998, SRM for SECY-97-304 "Response to Staff Requirements Memorandum SECY-97-144, "Potential Policy Issues Raised By Non-Owner Operators," the Commission directed the staff to make recommendations on, and obtain Commission approval for, resolution of issues related to the transfer of the Fort St. Vrain license to the Department of Energy (DOE). The Commission specifically requested that the recommendations include staff's plans for the loss of licensing and inspection fees upon the transfer of the license to a Federal agency. In the March 23, 1998, SRM for SECY-98-034, "FY 1998 Proposed Fee Rule," the Commission also directed the staff to consider alternative treatment of costs attributable to the Department of Energy that affect independent spent fuel storage facilities. In the June 12, 1998, SRM for SECY-98-095, "Licensing Model for Transfer of Fort St. Vrain Independent Spent Fuel Storage Installation License to the U. S. Department of Energy (DOE)," the Commission approved staff's proposal to address this fee recovery issue in the context of the reexamination of the current annual fee policies for spent fuel storage and for licensees in decommissioning. As the Commission requested, the staff has considered whether the DOE costs should be outside the fee base (not subject to fee recovery) or whether legislation is needed to allow NRC to charge DOE and other Federal agencies Part 170 fees.

The NRC is prohibited under the IOAA from assessing Part 170 fees to DOE, and most other Federal agencies, for reviews and inspections. Thus, the cost of activities associated with reviewing applications submitted by DOE to transfer the license and any related inspections are not recovered through fees assessed to DOE. Rather, these costs are recovered through annual fees assessed to all licensees. For FY 1998, the costs for these DOE activities were approximately $120,000. The Spent Fuel Project Office (SFPO) is currently completing activities related to the transfer of the Fort St. Vrain Part 72 license to DOE. Under the current fee regulations, at the time of the transfer, DOE, as the holder of the Part 72 license, will become subject to annual fees.

Once the license transfer is complete, it is expected that licensing and inspection costs related to the DOE Part 72 license will be similar to those for other Part 72 licenses. On average, each ISFSI licensee was billed approximately $55,000 for licensing and inspection activities in FY 1998.

Although the loss of these licensing and inspection costs for the DOE ISFSI for Fort St. Vrain would not significantly impact annual fees in FY 1999 as costs for completing the staff review are not expected to exceed $50,000, the total costs for all licensing activities related to DOE could have a significant impact. For example, SFPO is currently reviewing DOE's application for a new Part 72 license for the TMI-2 fuel. It is expected that more than $200,000 will be expended in this effort in FY 1999. The total FY 1999 budgeted resources for SFPO's reviews for the Department of Energy is 1.6 FTE and $225,000 for program support, or approximately $570,000 total.

We estimate that the statutory Federal agency exemption from fees for services is about 1 percent of the total agency budget. Budgeted costs related to the Federal agency fee exemption are currently included in the annual fee surcharge assessed to all operating licensees, including Federal agencies. The surcharge costs are allocated to the various classes of licensees based on their share of the budget. Power reactors currently pay about 89 percent of the surcharge. The staff believes that there is no compelling reason for requiring other NRC licensees to pay for NRC licensing of Federal agencies.

The Commission's FY 2000 budget request submitted to OMB on September 29, 1998, proposes that further extensions of the 100 percent fee recovery requirement be based on collecting 90 percent of the NRC's new budget authority, less the appropriations from the Nuclear Waste Fund and from the General Fund for assistance provided to DOE and other Federal agencies, rather than 100 percent. The staff recommends that legislation also be submitted for FY 2000 to revise the Atomic Energy Act to give NRC authority to assess IOAA fees under Part 170 to all Federal agencies.

If the Commission adopts Alternative 1 or 2 of this report, Fort St. Vrain would be assessed the proposed annual fee.

B. Duke Energy Corporation (Oconee) Spent Fuel Storage Licenses

In a December 18, 1997, letter, Duke Energy Corporation (Duke), requested an exemption from the annual fee requirements for the Oconee Nuclear Station's Part 72 license on the basis that

the annual fee would impose a duplication of the annual fee for their Part 72 specific license. Duke argued that imposition of the additional annual fee would be a "significantly disproportionate allocation of NRC costs to Duke." On May 8, 1998, the NRC denied Duke's request challenging NRC's fundamental principle that a separate fee be assessed for each license held, regardless of the similarity of the licenses On July 9, 1998, Duke requested that NRC reconsider the denial of its exemption request. Final action on the exemption has been deferred pending the establishment of the fee policy for FY1999 as stated in a September 17, 1998, letter from Chairman Jackson to Duke.

The NRC's current annual fee regulations in Part 171.16(a), provide that persons who conduct activities under Parts 30, 40, 70, 71, and 72:

> ...shall pay an annual fee for each license, certificate, approval or registration the person(s) holds on the date the annual fee is due. If a person holds more than one license, certificate, registration, or approval, the annual fee will be the cumulative total of the annual fees applicable to the licenses, certificates, registrations, or approvals held by that person.

Under Alternatives 1, 2, and 3 of this, power reactor licensees would no longer be assessed annual fees for their Part 72 licenses and the issues raised by Duke would no longer be applicable. Oconee, like all power reactors, would be assessed a "Spent Fuel Storage/Decommissioning" annual fee for each Part 50 license held. Under Alternative 4 - Status Quo, Oconee would be assessed an annual fee for both its general and specific Part 72 licenses, in addition to the annual fees assessed for each Part 50 license.

VI. SUMMARY OF RECOMMENDATIONS

For the reasons discussed in this report, the team recommends the following:

- To recover the agency's generic costs for spent fuel storage and power reactor decommissioning activities, establish a "spent fuel storage/decommissioning" annual fee and assess the fee to all power reactors holding Part 50 licenses, including those in decommissioning, and to Part 72 licensees who do not hold Part 50 licenses;

- Continue to recover the remaining generic decommissioning costs through the annual fee surcharge assessed to all classes of licensees based on their share of the budget;

- Continue the agency's current policy of recovering Site Decommissioning Management Program (SDMP) costs via the annual fee surcharge assessed to all classes of licensees based on their share of the budget;

- In the longer term, seek legislation to expand the use of the Nuclear Waste Fund to recover the agency's spent fuel storage program costs; and

- Seek legislation to amend the Atomic Energy Act to permit the NRC to assess IOAA fees to all Federal agencies.

ESTIMATED SCHEDULE
FY 1999 FEE RULE

12/15/98	Commission decisions on FY 1999 Fee Rulemaking paper
TBD[1]	Provide hourly rates and annual fee amounts by category to the Commission
2/19/99	Publish proposed fee rule
3/11/99	Public meeting to answer questions on proposed rule
4/5/99	45-day comment period ends
5/17/99	Publish final rule
7/16/99	Rule effective (60 days from publication under SBREFA)

[1]To be provided in time for Commission review prior to publishing the FY 1999 proposed fee rule.

ATTACHMENT 3