



AG08-2
PDR

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**
WASHINGTON, D.C. 20555-0001

May 27, 1999

MEMORANDUM TO: Glenda Jackson
Office of the Chief Financial Officer

FROM: David L. Meyer, Chief *D.L.Meyer*
Rules and Directives Branch
Division of Administrative Services
Office of Administration

SUBJECT: CONCURRENCE ON THE FINAL FY 1999 FEE RULE

The Rules and Directives Branch concurs in the final rule that establishes the licensing, inspection, and annual fees necessary to recover approximately 100 percent of the NRC's operating budget for FY 1999. We have attached a marked copy of the package that presents our comments.

If you have any questions concerning this matter, please contact David L. Meyer, Chief, Rules and Directives Branch, ADM, at 415-1762 (DLM1) or Michael T. Lesar, ADM, at 415-7163 (MTL).

Attachment: As stated

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AG08

Revision of Fee Schedules; 100% Fee Recovery, FY 1999

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, which mandates that the NRC recover approximately 100 percent of its budget authority in Fiscal Year (FY) 1999, less amounts appropriated from the Nuclear Waste Fund (NWF) and the General Fund. The amount to be recovered for FY 1999 is approximately \$449.6 million.

EFFECTIVE DATE: (60 days after publication in the Federal Register.)

ADDRESSES: Copies of comments received and the agency work papers that support these final changes to 10 CFR Parts 170 and 171 may be examined at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC 20555-0001. Comments received may also be viewed and downloaded electronically via the interactive rulemaking website established by the NRC for this rulemaking.

FOR FURTHER INFORMATION CONTACT: Glenda Jackson, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Telephone 301-415-6057.

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Responses to Comments.
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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).

The NRC assesses two types of fees to recover its budget authority. First, license and inspection fees, established at 10 CFR Part 170 under the authority of the Independent Offices Appropriation Act of 1952 (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 these fees are assessed are the review of applications for the issuance of new licenses, approvals or renewals, 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.

*The NRC published a proposed rule
that presented the amendments to Parts
170 and 171 necessary to comply with
OBRA-90 for FY 99*

II. Responses to Comments

*on April 1, 1999
(64 FR 15876)*

A total of thirty-four comments were received on the proposed rule. Although the comment period ended on May 3, 1999, the NRC evaluated the 26 comments which were received by the close of business on May 5, 1999. The NRC was unable to consider the eight comments which were received after May 5, 1999.

Many of the comments were similar. These comments have been grouped, as appropriate, and addressed as single issues in this final rule.

The comments are as follows:

A. Legal Issues.

Several commenters raised questions about NRC's legal interpretation of OBRA-90 and the IOAA. These comments are addressed first because their resolution establishes the framework for addressing subsequent issues raised by commenters. ✓

The commenters attempted to present a balanced view of the proposed fee schedule, and even applauded the NRC's "considerable effort over the past year to reduce inefficiencies through strategic planning and reorganizations." Nonetheless, it is abundantly clear that most commenters believe that the NRC has a long way to go to reach a truly fair and equitable system of fee allocation. Several commenters asserted that the NRC lacks the legal authority to set fees in accordance with the proposed fee schedule, challenging the agency's interpretation of the statutes underpinning NRC's fee collection proposal. These same questions have been raised since the inception of the 100 percent fee collection requirement in 1991. The Commission has consistently interpreted its statutory mandate, but in the face of continuing complaints, the Commission will again address the concerns raised by commenters.

1. Comment. Comments submitted by or on behalf of commercial nuclear power reactors, the uranium recovery industry, and a materials licensee expressed serious concern over inequities caused by the statutory mandate that NRC collect an annual charge from licensees aggregating approximately 100 percent of the budget authority for the fiscal year, less fees collected under Part 170 and any amount appropriated from the Nuclear Waste Fund or the General Treasury. These commenters are particularly distressed at having to

absorb charges in their annual fees for activities that do not benefit them, including international activities, Agreement State oversight and regulatory support, activities for other federal agencies, and fee reductions or exemptions for small entities and nonprofit educational institutions. One commenter, speaking on behalf of several commercial power reactors, questioned the NRC's legal and constitutional authority to impose these charges. It did not believe the 100 percent budget recovery requirement could be reconciled with the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 ("OBRA-90"), which requires that annual fees bear a reasonable relationship to the cost of regulatory services and be fairly and equitably allocated among licensees.

Commenters consider that eventual relief for this problem lies in obtaining legislative changes to OBRA-90 to relax the 100 percent budget recovery requirement, so that certain costs can be removed from the fee base. They remain hopeful in spite of awareness that the current Administration does not support such relaxation. In some cases, however, commenters perceive that the NRC has alternatives it is not utilizing, such as charging the other Federal agencies and Agreement States for services provided. In addition, they insist that the NRC should recover these types of costs through General Treasury funds appropriated by Congress.

In their view, when all else fails, the NRC must simply discontinue the "unfunded" program, rather than pass along these costs to the licensees, particularly in today's era of utility deregulation, because reactors have reduced ability to pass through costs. Licensees find that the to its end uses has been reduced.

One commenter maintained that the NRC has the authority to charge other Federal agencies Part 170 fees. Another commenter went so far as to say that the NRC is not at liberty to relieve anyone from paying fees for associated services, i.e., to grant exemptions from user

fees, because under OBRA-90, Congress directed NRC to recover its costs by collecting fees from "any person who receives a service or thing of value." This commenter maintained that there was no exemption authority for this requirement. It then relied on the definition of "person" under the Atomic Energy Act to argue, not only that the NRC has authority to impose charges for these types of activities, but that it is compelled to charge the recipients for these. Thus, it would have the NRC recover Agreement State oversight and support costs through fees assessed on the Agreement States or their licensees. The commenter also stated that costs of international activities should be recovered through fees imposed on the Department of State. Other Federal agency licensing and inspection charges similarly should be assessed against the regulated federal agency. Moreover, small entities and nonprofit educational institutions should not be relieved of fees for the costs associated with them. Rather a general fund appropriation should be sought to recover those expenses or they should pay their own costs. Other commenters also advocated this approach.

In support of these arguments, commenters charge that OBRA-90 does not permit charges to licensees for programs not directly related to the licensees charged, that the surcharge is unlawful, unfair, arbitrary and discriminatory, and that it is unconstitutional in that it denies reactor licensees equal protection under the due process clause of the Constitution and constitutes an unfair taking of property without just compensation. They believe uniformly that the surcharge bears no relation to services or benefits to the licensees against whom it is assessed and that these costs should be recovered from the beneficiaries. Commenters cite the reduced ability of reactor licensees to pass through costs to their ultimate customers in an era of utility deregulation and reassert their view that power reactor licensees only should be assessed for programs of direct relevance to them.

Response. OBRA-90 requires that the sum total of annual charges NRC collects from its licensees equal approximately 100 percent of NRC total budget authority for each fiscal year, less fees assessed under the Independent Offices Appropriations Act of 1951, 31 USC 9701 ("IOAA") and amounts appropriated to NRC from the Nuclear Waste Fund. The NRC is expected to establish a schedule of annual charges that fairly and equitably allocates this amount among licensees and reasonably reflects the costs of providing services to licensees or classes of licensees, to the maximum extent practicable (emphasis supplied). This means *that* the NRC *annually* must promulgate a fee schedule that is as fair and equitable as can be achieved, given the other constraints with which it is faced. The NRC does not have discretion to assess less than this amount, as several commenters suggested, so the difference must be made up from the licensees, after all other eligible charges are assessed.

In fact, the Commission concluded in the Statement of Considerations for the 1991 final fee rule that the Congressional intent behind the requirement to collect "approximately 100 percent" of its budget was for the NRC to identify and allocate *fees* as close as possible to 100 percent of its budget authority to the various classes of NRC licensees, but not to authorize exclusions from the fee base, insofar as it would set out to recover something less than the full 100 percent. The NRC historically has interpreted this requirement as referring to the inherent uncertainties in estimating and collecting fees, such that additional fees would not need to be collected in case of shortfall, nor refunds necessarily made in case of over collection. (See 56 Fed. Reg. 31472 (1991))

; July 10, 1991) (1)

Moreover, the Conference Report for OBRA-90 specifically acknowledged the fact that there would be certain "expenses that cannot be attributed either to an individual licensee or a class of licensees." The NRC is expected to

fairly and equitably recover these expenses from its licensees through the annual charge even though these expenses cannot be attributable to individual licensees or classes of licensees. These expenses may be recovered from such licensees as the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.

H.R. Conf. Rep. No. 101-964, at 963, reprinted in 1990 U.S.C.C.A.N. 2374. Thus, Congress has directed that licensees, of necessity, will have to foot the bill for some of the expenses that are not generated by efforts directly on their behalf, regrettable as that may be. While every effort is made to impose such costs equitably, there is one controlling requirement which is inflexible: the NRC must set its schedule so that it can recoup 100 percent of its budget authority, less the amounts it properly may recover from other areas, such as charges for services (IOAA fees) and Nuclear Waste Fund Appropriations. *Since the inception of the 100 percent budget recovery requirement* In order to meet that mandate, the NRC has been forced to assess fees to licensees to recover the costs of certain types of activities that, while not necessarily benefitting the licensees charged, leave no other means to be recovered. This includes functions such as work for other Federal agencies, Agreement State oversight and international activities. It is understandable that licensees who absorb the impact of these charges will object to them and wish to be relieved of them. However, their arguments but it overlooks an important qualifier in the standard: namely, "to the maximum extent practicable." That is, when Congress

enacted this admittedly rigorous requirement, it was aware of the fact that there would be certain costs that would not be ^{as} ~~susceptible~~ to recovery as the others were. ~~It~~ ^{Congress} still has not relieved the NRC from the onus of the collection requirement. Certain expenses cannot be attributed to an individual licensee or class of licensees but may be recovered from licensees who can fairly, equitably and practicably contribute to payment.

With respect to the specific costs in question, the NRC can readily explain why these costs are spread to agency licensees as part of a fee "surcharge." Briefly, the NRC lacks the legal authority to assess IOAA charges against Federal agencies (other than the Tennessee Valley Authority). The IOAA states, in pertinent part, "[E]ach service or thing of value provided by an agency . . . to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible." A "person on official business of the United States Government" has been construed to mean a Federal agency. This construction indicates that the NRC requires separate Congressional authorization in order to override this provision and lawfully impose fees on other Federal agencies. ~~For example, In~~ ^X light of this language, section 161w. of the Atomic Energy Act was enacted in 1972 to allow the NRC to impose Part 170 fees on the Tennessee Valley Authority. Section 161w. was further amended in 1992 to include the United States Enrichment Corporation, prior to its privatization. Had the NRC's statutory mandate included the authority to impose fees on all Federal agencies, this legislation would have been unnecessary. The NRC submitted to Congress ^{as a} provision in its proposed FY 2000 authorization bill ^{an amendment to section 161w. which} would provide the authority to impose Part 170 fees on all Federal agencies.

~~The NRC~~ ^{Similarly} lacks the authority to impose annual fees on the Agreement States and their licensees because OBRA-90 permits the assessment of annual fees only on NRC

licensees. The Agreement States and their licensees are not "NRC licensees." The NRC also made policy decisions not to assess fees on non-profit educational institutions in order to further the public good, and to limit the fees assessed on small businesses in accordance with the Regulatory Flexibility Act. Under the circumstances it can come as no surprise that a substantial portion of these costs are recovered through annual fees imposed on power reactors. A large percentage of the NRC's budget is devoted to the regulation of power reactors and, accordingly, a large portion of the annual fee must be borne by these licensees.

The commenters suggested that, in the absence of such legislation, the NRC should not perform the activities encompassed within the annual fee surcharge. The Commission is not prepared to eliminate many of its important functions that help assure the public health and safety and the common defense and security without a clear statutory directive from the Congress to do so. Thus, a legislative solution to the fee recovery requirement is required to eliminate the concerns raised by the commenters. Over the years, the NRC has had limited success in obtaining fee legislation that would reduce the burdens on its licensees by having some or all of NRC expenses in these areas obtained through appropriations from the General Treasury.

Absent legislative relief, the Commission has limited ability to remedy any inequities in its fee structure because it is required to collect approximately 100 percent of its budget in fees. The NRC has taken several actions within existing fee laws to address concerns regarding its fee structure:

- The NRC has*
- P 1. *The NRC* identified fairness and equity concern categories in the February 1994 Report to Congress on NRC Fee Policy indicating that legislation was necessary to address these concerns. The recommended legislation was not enacted.
- P 2. *The NRC* In FY 1995, *The NRC* acted under existing fee laws to help to mitigate the fairness and equity concerns by treating costs for these activities similar to overhead and distributing the costs to the broadest base of NRC licensees.
- P 3. *The NRC* Established a policy to obtain reimbursement for services provided to other federal agencies when such reimbursements are authorized by law.
- P 4. *The NRC* Obtained appropriation legislation which removed from the fee base certain costs incurred as a result of regulatory reviews and other assistance provided to the Department of Energy and other Federal agencies.
- P 5. *The NRC* Took actions to shift cost recovery for certain activities from annual fees to specific fees for services.
- P 6. *The NRC* Is seeking as part of its FY 2001 authorization bill authorization to assess fees to other Federal agencies for specific licensing and inspection activities performed for those agencies.
- P In sum, the Commission believes that the fee schedules it is promulgating today satisfy all legal requirements and do not deprive any licensee of its constitutional rights.

2. Comment. One commenter said that the basis for annual fees for operating reactors should be megawatt generation capability instead of the proposed fixed flat annual fee. This commenter argued that the proposed fee structure placed a disproportionate burden on the ratepayers of utilities with small reactors and resulted in a competitive disadvantage to those reactors.

Response. OBRA-90 requires that annual fees have a reasonable relationship to the expenditure of Commission resources. No available data demonstrates that the Commission expends fewer resources on reactors with lower generation capacity than it does on facilities with greater generation capability. Furthermore, Commission services are not allocated on the basis of megawatt generation capability. Because there is no relationship between generic costs and generation capacity, there is no legal basis for charging annual fees based on megawatt generation capability.

3. Comment. One commenter said that the NRC should designate as small entities, for reduced fee purposes, *(check is spare)* all those companies with small business certification under the U.S. Small Business Administration's (SBA) Small Disadvantaged Business program, commonly known as the 8(a) Program. The NRC should then refund the higher fees collected for the last two years from all 8(a) firms. The commenter further requested that the NRC change its definition of small entity for Environmental Remediation Service companies to conform to the SBA's revised size standards, which now categorize such companies with fewer than 500 employees as "small entities."

revised its size standards. The final rule ✓

(60 FR 18344)

Response. On April 11, 1995, the NRC promulgated a final rule after notice and comment rulemaking that established the small entity classification for those companies providing services having no more than \$5 million in average annual gross revenues over its last three completed fiscal years, or, for manufacturing concerns, an average of 500 employees during the preceding 12-month period (10 CFR 2.810). The NRC promulgated this rule pursuant to Section 3(a)(2) of the Small Business Act, which permits federal agencies to establish size standards via notice and comment rulemaking, subject to the approval of the SBA Administrator. The NRC rule, which the SBA approved, established a generic size standard for small businesses because NRC's regulatory scheme is not well suited to setting standards for each component of the regulated nuclear industry. Unlike the NRC, the SBA's Standard Industrial Classification System (SIC) establishes size standards based on types of economic activity or industry. Seven months after the NRC amended its size standards through notice and comment rulemaking, the SBA published amendments to its own SIC code standards. Among other things, these amendments added SIC Code 8744, Environmental Remediation

Services.

The Commission is currently considering the issue raised by this commenter regarding its designation of small entities for reduced fee purposes. However, because section 3 (a)(2) of the Small Business Act requires that size standards be promulgated through notice and comment rulemaking, the NRC cannot amend its size standards to conform to those of the SBA in this rulemaking. Simply put, the NRC would first need to develop a proposal and solicit public comment on it before making a decision to amend its size standards. In the meantime, however, individual licensees affected by the SBA's revised size standard may file for a partial

exemption from fees pursuant to 10 CFR 171.11. The NRC will separately address the commenter's request for a partial annual fee exemption.

4. Comment. A few commenters indicated that the NRC has not provided sufficient information on which to evaluate the fees to be assessed for FY 1999. One commenter stated that the NRC violated the Administrative Procedure Act (APA) by failing to provide an explanation of how it arrived at its final determination of the annual fees.

Response. The NRC believes it has provided sufficient information concerning its proposed fee schedule to allow effective evaluation and constructive comment on the proposed rule. In Part II of the Statement of Consideration supporting the proposed rule, the NRC provided a detailed explanation of the FY 1999 budgeted costs for the various classes of licensees being assessed fees. In addition, the NRC workpapers pertinent to the development of the fees to be assessed were placed in the Public Document Room (PDR) on April 1, 1999, the first day of the public comment period. The ^{se} workpapers provide additional information concerning the development and calculation of the fees, including NRC's FY 1999 budgeted resources at the subactivity level for the agency's major programs. The NRC has also made available in the PDR NUREG 1100, Vol. 4, "Budget Estimates for Fiscal Year 1999" (Feb. 1998), which discusses in detail NRC's budget for FY 1999. In addition, NRC staff always makes itself available either to meet with interested parties in person, or respond to telephone inquiries to explain its fee schedules.

B. Specific Comments - Part 170.

1. Expand the scope of Part 170.

Comment. The NRC received twelve comments on the proposal to expand the scope of Part 170 to include incident investigations, performance assessments and evaluations (except those for which the licensee volunteers at NRC's request and which NRC accepts), reviews of reports and other submittals, and full cost recovery for time expended by Project Managers (Pms), except leave time and time spent on generic activities such as rulemaking.

Many of those commenting on this issue opposed full cost recovery for project managers. Several uranium recovery licensees commented that coupled with the proposed increase in the hourly rate to be assessed for NRC staff review time, the proposed change could double Part 170 fee assessments, an increase that would be extremely burdensome to licensees. One commenter indicated that billing for all of a PMs time would reduce necessary communication, such as phone calls, between the NRC and the licensees. This commenter also objected to licensees being required to pay for the time a PM spends to become familiar with a site. A similar comment was received from a reactor licensee who, although not specifically indicating opposition to the proposal, stated that Part 170 fees should not be assessed for PM or resident inspector time spent in training or other administrative tasks not directly associated with the licensee. One commenter indicated that the licensees paying for the PM time has little or no input over what the PM is reviewing. A power reactor commenter supported full cost recovery for PMs only if work priorities were mutually agreed upon by NRC and the licensee.

Several of the uranium recovery commenters also questioned the amount of time spent by project managers and staff in reviewing licensee submittals, indicating that in many cases, they believe the amount of time spent on uranium recovery issues is excessive in light of what they characterize as the low level of risk posed by uranium recovery operations. One uranium recovery commenter stated that the proposal presents the potential for an open-ended escalation of fees that do not directly benefit the licensees.

Other commenters partially or fully supported the proposed expansion of Part 170. The Nuclear Energy Institute (NEI), which primarily represents the commercial nuclear reactor industry, urged the NRC to continue to separate out fees related to a given licensee and assess those fees to the licensee under Part 170. NEI stated that it is inappropriate for one licensee to subsidize through annual fees additional agency oversight incurred by another licensee because it is not performing well. Another commenter who supported the proposal recommended that the NRC demonstrate how the expanded Part 170 costs are removed from the Part 171 fee schedule. One power reactor commenter agreed in part with shifting cost recovery from annual fees to fees for services; however, the commenter stated that as more services are billed by the hour, the opportunity for inefficiencies in reviews and billing abuse becomes greater. This commenter suggested that hourly fees be capped to allow licensees to make budget forecasts.

Another commenter supported the assessment of Part 170 fees for all inspections, stating that the change is expected to lower the costs of inspections for good performers. This commenter opposed, However, the proposal to expand Part 170 to include reviews of documents that do not require formal approval. This commenter stated that these documents

are submitted in compliance with regulations without an expectation of NRC assistance in assuring compliance, and licensees should have control over Part 170 charges.

A materials licensee questioned how the proposed additional Part 170 fees would be billed, indicating that if NRC has truly downsized, the expanded scope of Part 170 is not justified.

Response. The NRC is expanding the scope of Part 170 to include incident investigations, performance assessments and evaluations (except those for which the licensee volunteers at NRC's request and which NRC accepts), reviews of reports and other submittals such as responses to Confirmatory Action Letters, and full cost recovery for Project Manager time, except leave time and time spent on generic activities such as rulemaking. Expanding the scope of Part 170 is consistent with Title V of the IOAA, interpretations of that legislation by the federal courts, and Commission guidance. These guidelines provide that Part 170 fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. These special benefits include services rendered at the request of a recipient and all services necessary to the issuance of a required permit, license, certificate, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations. Incident investigations, performance assessments and evaluations, reviews of reports and other documents, and PM activities are services which the NRC provides to specific, identifiable recipients. Thus, it is more appropriate that the costs of these activities be recovered through Part 170 fees assessed to the recipient of the service rather than through annual fees assessed to all of the licensees in the class.

Based on the requirement of OBRA-90 that the NRC recover approximately 100 percent of its budget authority through fees, the costs of these services must be paid either by applicants and licensees under Part 170 as fees for services rendered to them, or by licensees under Part 171 as annual fees. To calculate the total amount to be assessed in Part 171 annual fees, the estimated amount to be recovered through Part 170 fees in a given fiscal year is subtracted from the total budget authority for that fiscal year. Therefore, if all other things remain equal, increasing the costs to be recovered under Part 170 would shift costs away from Part 171 annual fees. Although this change may result in increased Part 170 fees assessed to the individual licensees receiving the specific services, the overall fee burden for licensees in that fee class is not increased. It should be noted that because this final rule will become effective after the last quarterly Part 170 billing in FY 1999, the changes will not have an effect on the estimated Part 170 collections for FY 1999 and thus do not affect the amounts of the FY 1999 annual fees.

As described in the proposed rule, this change will result in the assessment of Part 170 fees to individual licensees to recover the full costs for PMs assigned to their sites, except PM activities that are of a generic nature, such as rulemaking and preparation of generic guidance documents, and leave time. In those cases where a PM is assigned multiple sites, the PM's time that is not site-specific site will be prorated to all of the sites to which he or she is assigned. The NRC acknowledges some commenters' concerns about individual licensees being charged for the time a PM is in training or performing administrative tasks, and time for a newly-appointed PM to become familiar with a particular site. These types of activities, however, are necessary in order for the PMs to effectively provide oversight for the operation of an assigned site or sites. Therefore, the cost of these activities should be borne by those licensees requiring

PM services, whether the services are specific licensing and inspection actions, or other duties associated with serving as the agency focal point for oversight of a site or sites. Examples of PM activities that will be billed to the specific site or sites are discussions with NRC regional employees on specific plant issues; visits to the site(s); scheduling, planning and coordinating work with the technical staff; and answering technical questions. Time spent by PMs in reviewing licensee submittals, participating in performance assessments, evaluations, and incident investigations, and conducting inspections will be billed to those specific activities ~~and~~
~~The remainder of the PM time subject to Part 170 cost recovery will be billed as PM activities.~~
PM time not subject to Part 170 cost recovery will be recovered through Part 171 annual fees.

The NRC disagrees with the suggestion that PM time should be billed only if the work priorities are mutually agreed upon by NRC and the licensee. It would be inappropriate to have entities regulated by the NRC make recommendations on how the agency carries out its regulatory functions related to that specific entity. The agency's work priorities, including those of PMs, are carefully reviewed by management to assure that the appropriate resources are spent to accomplish the agency's health and safety mission. Assessing Part 170 fees to recover the cost of a particular service provided to an individual applicant or licensee does not diminish the requirement for NRC management to carefully balance workload and assigned resources in an efficient and effective manner. This also applies to the suggestions that staff spends excessive time on reviews, and that increasing the scope of Part 170 as proposed, would open the door for inefficiencies in reviews and billing abuses. ^{the NRC} The NRC is committed to performing all of its activities as expeditiously and efficiently as possible. This commitment is evidenced by the streamlining and downsizing the agency has accomplished, and the resulting budget reductions. In addition, billing for activities under Part 170 provides licensees a greater

opportunity to review and challenge specific costs because the charges are individually itemized on the Part 170 bills.

Part 170 fees for these additional activities will be applicable only to those applicants and licensees subject to full cost billing under Part 170. Those materials licensees who hold licenses for which amendment and inspection fees have been eliminated from Part 170 will not be subject to Part 170 fees for these additional activities.

2. Including Orders and Escalated Enforcement Actions in Part 170 in FY

2000.

Comment. The NRC solicited public comment on whether to include the development of orders, evaluation of responses to orders, development of Notices of Violation (NOVs) accompanying escalated enforcement actions, and evaluation of responses to NOVs in next year's proposed fee rule. Four comments were received on this issue. Two commenters opposed adding these activities to Part 170, and one commenter supported their inclusion. The fourth commenter indicated that the direct allocation of these costs to those who receive the services warrants further evaluation, ^{that} and it would welcome the opportunity to comment on a definitive proposal in the FY 2000 fee rule. This commenter stated that, in addition to being viewed as a penalty upon licensees who exercise their rights to challenge the NRC action, there are additional implications in situations where the licensee is successful in such a challenge. Another commenter stated that the assessment of Part 170 fees for these actions would result in a "de facto additional civil penalty, and further challenge the economics of operation for that facility." NEI, on the other hand, urged the NRC to continue to assess fees under Part 170 for

Response. The NRC is amending 10 CFR 170.31 in this final rule to eliminate the flat amendment fees for materials licensees. As stated in the proposed rule, this change will streamline the NRC process and eliminate any delays in processing these amendments due to incorrect payments. The NRC believes that, as the commenter indicated, this change will also be more efficient for licensees. This change will result in an estimated \$900,000 being added to the annual fees assessed to approximately 5700 materials licensees.

4. Hourly Rates.

Comment. The NRC received eight comments that specifically addressed the proposed increases in the professional hourly rates. Those commenting indicated that the increases would create a substantial financial burden for the licensees, particularly when added to the proposal to expand the scope of Part 170. Several commenters stated that the proposed hourly rates exceed the hourly charges of senior consultants or principals at major consulting firms, and exceed the generally accepted rate for similar work in private industry. Some commenters stated that the rate is unjustifiably high and does not reflect the actual cost of providing regulatory services to licensees. One commenter said that the increase does not coincide with actual cost of living increases. This commenter stated that the increases cannot be justified based on inflation indicators over the period which have increased on the order of 3 percent or less per year. Uranium recovery commenters stated that the hourly charges should be predictable to permit licensees to budget and plan accordingly. An individual uranium recovery licensee and The National Mining Association, whose members include owners and operators of uranium mills, mill tailings sites and in situ uranium production facilities, added that, to the extent such hourly rates are a result of the 100 percent budget recovery requirement

of OBRA-90, the NRC should work with Congress to make the fee system more equitable. One commenter suggested that support staff be reduced parallel with FTE reductions and questioned whether materials program support staff could be shared with other programs to lessen what the commenter termed the "support imbalance and consequent licensee load."

Response. As stated in the proposed rule, due to a coding error that occurred in FY 1998, the FY 1999 hourly rates are more appropriately compared to the FY 1997 hourly rates plus salary and benefit increases since that time. The FY 1997 hourly rate for the reactor program was \$131, and the FY 1997 hourly rate for the nuclear materials and nuclear waste program was \$125. The NRC salaries and benefits increased 4.4 percent from FY 1997 to FY 1998, and 3.68 percent from FY 1998 to FY 1999. Considering only these increases, the FY 1999 hourly rates would be \$142 for the reactor program and \$136 for the materials program. ~~In addition~~^{also} However, there has been a shift in the proportion of direct resources from the reactor program to the materials program. As a result, the materials program now has a larger share of the direct resources and consequently must absorb more of the overhead and management and support costs. The professional hourly rates are based on budgeted costs. Because overhead resources are budgeted separately for the materials and reactor programs, they cannot be "shared" for purposes of the hourly rate calculations as suggested by one commenter. Agency management and support costs, on the other hand, are not budgeted separately for the reactor and materials programs. Instead, these costs are allocated to the programs based on their share of the budgeted direct resources. Because the materials program now has a larger share of the direct resources than in the past, more of the management and support costs have been allocated to the materials program.

As indicated in previous final rules, the NRC professional hourly rates must be established at levels to meet the statutory requirement of OBRA-90 to recover through fees approximately 100 percent of the budget authority, less the appropriation from the Nuclear Waste Fund. The NRC is not able to use inflation or other indices in the development of the hourly rates charged under 10 CFR 170 and 171 because these factors may not allow the NRC to meet the 100 percent fee recovery requirement.

Given the budgeted costs that must be recovered through the hourly rates, it is necessary to increase the FY 1999 hourly rates to \$141 for the reactor program and \$140 for the materials program. The method and budgeted costs used in the calculation of the hourly rates are discussed in Section III of this final rule. In addition, the agency workpapers supporting each proposed and final rule include details of the hourly rate calculations. These workpapers also contain details of the agency's budget used in the development of the FY 1999 hourly rates and fees. As previously stated, the workpapers supporting the fee rules are available for inspection in the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington DC 20555-001. The specific details regarding the NRC's FY 1999 budget are documented in the NRC's publication [NUREG-1100, Vol. 14 (Feb. 1998)] "Budget Estimates, Reproduction and Distribution Fiscal Year 1999". Copies of NUREG-1100 may be purchased from the Superintendent of Services Section, OCE, U.S. Nuclear Regulatory Commission, Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20402-9328, 20555-001① and from the National Technical Information Service, Springfield, VA 22161-0002. A copy is also available for inspection, and copying for a fee, in the NRC Public Document Room.

5. Fee Adjustments.

Comment. Five comments were received on the proposed fee adjustments to the fee schedules for specific classes of licensees set forth in §§170.21 and 170.31. NEI specifically commented on the NRC's proposal to revise §§170.21 and 170.31 to reflect the increased hourly rates and the results of the biennial review of Part 170 fees required by the Chief Financial Officers (CFO) Act. NEI questioned the statement in the proposed rule that the average number of professional hours required to conduct inspections and to review and approve new license applications increased for 20 of 33 fee categories. NEI stated that license applications have become more uniform and inspection frequency is expected to decline as a result of implementation of the NRC's new risk-informed, performance-based regulatory philosophy. Four other commenters expressed opposition to the increased fees for materials licensees, which include increases in Part 170 fees for certain categories. These commenters indicated that the proposed changes would have adverse affects on licensees. A manufacturer of portable density and moisture testing gauges stated that economic hardship on licensees will lead to the sale and disposal or abandonment of gauges and subsequent license termination. The commenter stated that use of a valuable tool will be diminished, and referred to the low cost of regulating this category of radioactive materials devices, the low activity of material in the devices, and the safety record of these devices. Other commenters indicated that the increases were unjustified, pointing to the safety record of devices covered by fee category 3P (all other byproduct material), and the time span between inspections for these types of licenses. Another commenter stated that in light of NRC's efforts to streamline its licensing, inspection and enforcement programs, costs should be reduced commensurate with a reduction in resources and activity.

Response. The results of the biennial review of fees were based on actual staff hours reported for the various license categories over a 5-year period. During the 5-year period, almost 700 new license applications and almost 4000 amendment requests were processed for fee Category 3P, "All other byproduct material", and approximately 2300 inspections were conducted. Similar numbers of actions were reported for nuclear medicine licenses. Although fewer actions were reported for certain other categories, the volume of data is sufficient to support the increases in the average time spent on these categories. Based on the volume analyzed in the biennial review, the NRC has no basis to modify the average time results for processing these applications and inspections. Fee category 3P covers all types of byproduct material licenses that are not specifically identified in another fee category. For example, in addition to gauge licenses, fee category 3P includes licenses for in-vitro studies, instrument calibration and leak testing services, and possession only. Thus, the average time for licenses in fee Category 3P is based on the average time for all of these types of licenses, not just gauge licenses. Although the time reported for all fee categories over the 5-year period was analyzed, in certain fee categories there were very few licensing actions completed during this time. In those cases where there were few licensing actions completed, any fee increases were limited to plus or minus 50 percent. The NRC is streamlining its licensing and inspection efforts and is working on a series of guidance documents related to about 20 categories of materials licenses. Because these initiatives are still under development, the full efficiencies have yet to be realized. Based on the requirement for NRC to recover approximately 100 percent of its budget authority through fees each fiscal year and the requirement to biennially review and revise charges to recover the costs of providing the services, the NRC is unable to establish fees based on changes that may occur in future fiscal years. Part 170 fees must approximate current costs. The NRC is adopting the results of the biennial review in this final

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rule for those fee categories subject to flat fees based on the average professional time to complete the actions. These revised flat fees also reflect the increased hourly rates for FY 1999.

C. Specific Comments - Part 171.

1. Rebaseline with a 50 percent cap.

Comment Nine commenters specifically addressed the two options presented by the NRC for rebaselining the FY 1999 annual fees: Option A, rebaseline without a cap, or Option B, rebaseline with a 50 percent cap on FY 1999 annual fee increases. Five of the commenters preferred the 50 percent cap, "if forced to choose." These commenters are uranium recovery licensees, or represent the uranium recovery class. These commenters indicated that the cap would at least spread the annual fee increases for uranium recovery licensees over two years so that there would not be such a drastic impact to their budgets in a given year. One uranium recovery commenter indicated that even the 50 percent increase is excessive when governmental inflation indexes indicate an inflation rate of 3 percent or less.

The National Mining Association^{11/1A} stated that the uranium recovery licensees had no warning of how significant the increase in fees would be for FY 1999. Another commenter, a materials licensee, supported the cap, but stated that 50 percent was too high. This commenter recommended that all fee increases be capped at a level commensurate with the inflation rate. Three commenters, NEI, a reactor licensee, and a materials licensee, supported rebaselining without a cap. These commenters stated that rebaselining without a cap is more fair because it allows NRC to determine the amount of resources devoted to regulation of certain licensees

and allocate the costs to those licensees. One commenter stated that the cap could result in an unfair allocation to licensees of costs over the cap amount incurred for other licensees. NEI stated that it is inappropriate given the developing competitive environment in which nuclear licensees will operate or are already operating, to require all licensees to subsidize any licensee who received services costing more than the cap amount.

Response. The major purpose for the option to establish the FY 1999 rebaselined annual fees with a 50 percent cap was to provide more fee stability than would be provided by rebaselining without a cap, and to provide more advance notice to licensees of the full annual fees for their future budget planning purposes. *(There was, however, a lack of overwhelming support for the cap. Some commenters who chose the cap were in fact reluctant to support either option. Capping fee increases for a class or classes of licensees necessarily results in additional fees being assessed to other classes of licensees in order to recover approximately 100 percent of the budget as required by statute. A cap on FY 1999 fee increases has the potential to exacerbate concerns about the fairness and equity of licensees being charged for activities that do not benefit them. Based on these concerns and the lack of overwhelming support from commenters for the cap, the Commission has decided against the option of a cap on fee increases for FY 1999. The Commission is establishing rebaselined FY 1999 annual fees without a cap. This is consistent with the Commission's policy described in the statements of consideration accompanying the FY 1995 fee rule (60 FR 32225) that base annual fees would be reestablished if there is a substantial change in the total NRC budget or the magnitude of the budget allocated to a specific class of licensees. Although the NRC is sensitive to the effects the rebaselined fees will have on those licensees with significant fee*

increases, establishing new baseline annual fees without a cap results in a fair and equitable allocation of costs among licensees.

2. Rebaselining frequency.

Comment. Eight comments were received in response to the NRC's solicitation of public comment on whether the NRC should, in future years, continue to use the percent change method and rebaseline fees every several years as established in the FY 1995 fee rule statements of consideration, or return to a policy of rebaselining annual fees every year. Five commenters were in favor of rebaselining every several years, three were in favor of rebaselining annually. In support of annual rebaselining, NEI stated that the percentage change method does not promote the in-depth review, revision and streamlining of programs it believes is necessary to ensure maximum agency efficiency. In a similar comment, Duke Energy Corporation (Duke) stated it believes annual rebaselining would enable the NRC to better monitor its programs and ensure that costs are accurately assessed to licensees who benefit from the associated services, and would ensure that licensees would not unjustly subsidize the costs of services provided to other licensees. The National Mining Association (NMA) and several uranium recovery licensees commented that the fees should only be rebaselined every several years so that the fees remain reasonably predictable from year to year. These commenters stated that a reasonable degree of predictability of the fees is needed to enable licensees to plan, forecast, and budget accurately. The United States Enrichment Corporation (USEC) also supported rebaselining every several years as appropriate, such as when there is significant downsizing, agency reorganization, or additions of new fee classes. USEC stated that although rebaselining provides for a more in-depth review of the NRC's programmatic

efforts, it also has the potential to reintroduce into the fee process an instability that the percentage change method was created to address. USEC referred to the methodology for stabilizing fees described by the NRC in the FY 1996 fee rule, stating that consistent and appropriate application of that methodology should result in rebaselining when warranted, but not necessarily annually. USEC stated that the methodology will result in a fair allocation of fees while maintaining some stabilization and fee predictability.

Response. The majority of those commenting on the frequency for rebaselining annual fees supported rebaselining every several years as warranted. The current policy of adjusting the annual fees only by the percent change in NRC's total budget unless there is a substantial change in the total NRC budget or the magnitude of the budget allocated to a specific class of licensees provides for fee stabilization, ^(which is) a continuing issue of concern for licensees as evidenced by the comments received. The commenters did not provide overwhelming support for reversing the current policy. Therefore the Commission is continuing the policy as described in the statements of consideration for the FY 1995 final fee rule (~~--FR--~~) to stabilize fees by adjusting the annual fees only by the percent change in NRC's total budget, with additional adjustments for the numbers of licensees paying fees, changes in Part 170 fees, and other adjustments that may be required, unless there is a substantial change in the total NRC budget or the magnitude of the budget allocated to a specific class of licensees, in which case the annual fee base would be reestablished. The Commission stated in the FY 1995 rule that the percent change method would be used for a maximum of four years. The criteria has been successfully applied for the last four fiscal years. As a result, FYs 1996, 1997 and 1998 annual fees were established based on the percent change in the budget. The Commission determined that is appropriate to establish new baseline fees for FY 1999 based on the

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60 FR 32218; June 20, 1995

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program changes that have taken place since FY 1995, the addition of a new fee class for spent fuel storage/reactor decommissioning, and the fee policy changes since FY 1995. Based on the experience gained as a result of applying the criteria for rebaselining over the past four years, the Commission has determined that annual fees should be rebaselined every three years, or earlier if warranted. The decision on the appropriate method for establishing annual fees for the intervening two years will be made during the annual fee rulemaking process.

3. Spent fuel storage/reactor decommissioning annual fee.

Comment. Four comments were received on NRC's proposal to establish a spent fuel/storage decommissioning annual fee to be assessed to all reactors licensees, regardless of their operating status, and to Part 72 licensees who do not hold a Part 50 license. Duke supported the proposed change, stating that the current fee regulation would impose duplicative fees on licensees for use of a Part 72 general license if they already perform the same activities under a specific Part 72 license. Duke contends that imposition of such substantial and duplicative fees is inconsistent with Congress' direction in the Nuclear Waste Policy Act of 1982, as amended, that NRC eliminate, *to the maximum extent practicable*, the need for specific NRC authorization for onsite storage of spent fuel. Duke stated that the duplicate annual fees for both types of licenses would deny licensees the reasonable opportunity to use the general licenses, and supports the removal of such disincentive by revising the fee regulations as proposed. One reactor licensee objected to the proposed fee because it does not maintain an Independent Spent Fuel Storage Facility (ISFSF), *have* *has* adequate storage capacity in its Spent Fuel Pool (SFP), and does not plan to build an ISFSF for at least 15 years. The commenter stated that under the proposal it would pay fees for

continuing to store spent fuel in the SFP until an ISFSF is needed, but would not realize services or benefits for those fees. The commenter stated ^{that} it is not appropriate for its customers to pay the ISFSF fees of other licensees, and had DOE honored its obligation to take possession of spent fuel by January, 1998, the fee would not be an issue. Two other commenters, reactor licensees who have permanently ceased operations, opposed the imposition of the proposed fee for their licenses because they have no fuel on- site. These commenters argued that because they have no fuel on site they derive no benefit from NRC activities related to spent fuel storage. GE Nuclear stated that its Vallecitos Boiling Water Reactor (VBWR) derives no comparable benefit from the NRC's decommissioning activities because essentially all of the facilities, structures, and systems, external to the containment vessel associated with VBWR operations have been removed, leaving a very small containment structure and internal components subject to future decommissioning. PECO Energy Company (PECO) stated that the Peach Bottom Atomic Power Station Unit 1 (PBAPS) fuel pool has been drained and decontaminated. PECO stated that it plans to keep PBAPS Unit 1 in a SAFSTOR status with the only activity being performance of required Technical Specifications Surveillance Requirements through December 2015.

Response. The NRC is establishing in this final rule a spent fuel storage/reactor decommissioning annual fee. However, the new annual fee will not be assessed to those reactors that have permanently ceased operations and have no spent fuel on-site. The NRC agrees with commenters that NRC's generic spent fuel storage activities do not relate to reactors that have ceased operations and have removed all fuel from the site. The new fee will be assessed, however, to all reactors who have fuel on-site regardless of the storage option the licensee elects to use. The NRC recognizes that sites will be required to continue to store

spent fuel until a permanent offsite storage facility becomes available. The fact that DOE has not taken possession of the spent fuel does not relieve NRC of the OBRA-90 requirement to recover approximately 100 percent of the budget authority through fees, including those costs associated with generic spent fuel storage activities. The NRC believes that assessing a spent fuel storage/reactor decommissioning annual fee to all reactor licensees who have spent fuel on-site and all Part 72 licensees who do not hold a Part 50 license is a reasonable approach for recovering NRC costs for generic spent fuel storage and reactor decommissioning activities.

~~As stated in the proposed rule, the current policy has raised concerns that the fee structure could create a disincentive for licensees to pursue dry storage. The spent fuel storage/reactor decommissioning annual fee will give equivalent fee treatment to both storage options. The annual fee will also address concerns about the fairness of assessing multiple annual fees if a licensee holds multiple Part 72 licenses for different designs, and will result in most reactor licensees being assessed the costs of NRC's generic reactor decommissioning activities. This annual fee includes the costs of NRC's generic and other research activities directly related to reactor decommissioning and spent fuel storage (both storage options), and other safety, environmental, and safeguards activities related to reactor decommissioning and spent fuel storage, except those activities which are subject Part 170 fees. The final FY 1999 spent fuel storage/reactor decommissioning annual fee is \$205,000. This reflects that an annual fee will not be imposed on those six reactors which have permanently ceased operations and have no fuel on-site. This also takes into account the prorated FY 1999 annual fee to be assessed to DOE for the Part 72 license issued on March 19, 1999 for the storage of fuel and fuel debris resulting from the Three Mile Island Unit 2 accident.~~

4. Revised Fuel Cycle Matrix.

Comment. USEC, although supportive of the decreased FY 1999 annual fees for the Paducah, Kentucky and Portsmouth, Ohio Gaseous Diffusion Plants (GDP's), requested that the NRC revise the fee rule to recognize that the GDP's are the operational equivalent of a single plant and assess a single fee for the complex. USEC argued that a double assessment against the two certificates of compliance results in a significantly disproportionate allocation of costs to USEC. USEC also requested that NRC revise the Effort Factor rating in the fuel facility matrix used by NRC to assess relative effort for a facility. Specifically USEC took issue with NRC's matrix evaluation of the relative weight and hence NRC's regulatory effort for GDP activities. USEC stated that NRC counted the risk for UF6 twice, once as solid and once as liquid. USEC argues that the risk is less, and that the Effort Factor for UF6 should be reduced from 10 to 5 for the GDPs.

Response. The NRC has rejected previous requests from USEC that a single fee be assessed for the two GDPs. For the reasons stated in response to USEC's comments on the proposed FYs 1997 and 1998 fee rules (62 FR 29197 and 63 FR 31843), and in NRC's March 23, 1998, denial of USEC's annual fee exemption request, the NRC believes that USEC must pay a full annual fee for each of its enrichment facilities. USEC has recently appealed the FY 1998 annual fee assessments for the two GDPs. Because USEC raised these same specific issues in their current exemption request, we will address those issues in our response to the exemption request. In the fuel facility matrix the NRC assessed the risk based on the total relative amounts of UF6. The amount of both liquid and solid UF6 merits weighting the value as 10 for the GDP's when compared to other fuel cycle facilities.

D. Other Comments.

licensees, the remaining licensees are required to pay a greater share of NRC's costs, with no increase in benefits. Some commenters stated that NRC's budget should be reduced consistent with the reduction in the number of licensees. Others specifically requested that the NRC consider options to address the effects of increased license fees and a declining number of licensees. Commenters also indicated that there should be lower NRC costs, translating to lower fees, as the agency moves towards a performance-based regulatory structure. Although some commenters recognized NRC's efforts to downsize and streamline its programs, they indicated that the NRC should find ways to further streamline and operate more efficiently. Some commenters requested that the increased fees be reconsidered based on the low risk and safety records associated with the licensed activities. NEI cited several reasons why the NRC should consider decreasing its future budget requests, such as NRC's revised oversight process which should result in decreased inspection hours, a declining number of industry events that should lead to fewer reactive and initiative inspections, and the NRC's revised enforcement process which should require fewer agency resources. NEI also suggested that the NRC consider additional changes to its organizational structure, such as eliminating the regions, and reduce the resources related to research activities.

Response. The NRC's budget, which is carefully scrutinized and reviewed by OMB and Congress prior to approval, reflects the minimum resources necessary to carry out its health and safety mission. The NRC is continuing its streamlining efforts and constantly looks for ways to further improve its operations. However, some of the NRC's streamlining initiatives and the activities required to transition to performance-based licensing require an initial expenditure of resources before the results of those actions are realized. The rebaselined annual fees, which increased for some classes and decreased for other classes, reflect the budgeted costs

for each class of licensee. The NRC recognizes that there will be adverse economic impacts on those classes of licensees with fee increases for FY 1999. However, as the NRC has stated in response to similar comments received on previous fee rules, because OBRA-90, as amended, requires the NRC to recover approximately 100 percent of its budget authority through fees, the NRC cannot mitigate the adverse economic impacts by eliminating or reducing the fee increases for one class of licensee without increasing the fees, and thus creating adverse economic impacts, for another class of licensees. Therefore the NRC has considered only the impacts it is required to consider by law. As required by the Regulatory Flexibility Act of 1980, the NRC has considered the impact of its fee regulations on small entities and evaluated alternatives to minimize those impacts. This evaluation is included in the Regulatory Flexibility Analysis which is Appendix A to this final rule. As a result of this analysis, the NRC is continuing the maximum annual fee of \$1,800 established in FY 1991 for certain small entities, and the lower-tier small entity fee of \$400 established in FY 1992 for small entities with relatively low gross annual receipts and for manufacturing concerns with relatively few employees. ^PAs explained in the proposed rule, the rebaselined FY 1999 annual fees reflect program changes that have occurred since the last rebaselining in FY 1995. These changes include the NRC's successful downsizing and streamlining efforts. The NRC's budget to be recovered through fees has decreased from approximately \$504.0 million in FY 1995 to approximately \$449.6 million in FY 1999, a reduction of more than 10 percent. In constant 1993 dollars, the NRC's budget has decreased by \$127.5 million, or approximately 24 percent, since FY 1993, as shown in the following table:

Fiscal Year (FY)	1993	1994	1995	1996	1997	1998	1999
Budget (\$ millions)	540.0	522.4	498.7	439.7	434.1	427.0	412.5
Difference from FY1993 (\$ millions)		17.6	41.3	100.3	105.9	113.0	127.5

P The rebaselined FY 1999 annual fees reflect the budgeted costs for each class of licensee, less the estimated Part 170 collections for that class for FY 1999. The FY 1999 annual fees for materials licenses subject to "flat" Part 170 fees also reflect the results of the biennial review of fees as required by the Chief Financial Officer's Act, and the inclusion of the budgeted costs for license amendments, renewals, and inspections. The FY 1999 annual fees increased for certain categories of these materials licensees. However, these licensees are no longer required to pay Part 170 fees for amendments, renewals, and inspections. Although fewer resources may be needed to complete licensing reviews and conduct inspections for a particular class of licensees as the number of licensees in the class declines, there is not necessarily a correlation between the number of licensees and the agency's regulatory oversight mission. For instance, the need for rulemaking is not diminished as the number of licensees decrease. However, a portion of the costs associated with certain rulemaking and other generic activities is allocated to the annual fee surcharge based on the ratio of Agreement States licenses to NRC licensees in the affected class of licensees. The surcharge costs are then assessed to all classes of licensees based on their share of the budget. As a result, the full economic impact of additional Agreement States and the resulting loss of NRC licensees is not borne entirely by the affected class. The NRC's budgets are outside the scope of this rulemaking and therefore commenters' suggestions regarding future NRC budgets are not

being addressed in this final rule. The NRC is establishing the rebaselined FY 1999 annual fees at the levels necessary to recover the budgeted costs for each class of licensee from that class to the extent practicable, and to recover the surcharge costs from all classes of licensees based on their share of the budget.

3) 2. Uranium Recovery Issues.

Comment. Several comments relating to specific uranium recovery issues were received from uranium recovery licensees and their representatives. The commenters claimed that the uranium recovery industry has been targeted for especially large fee increases and gave several reasons why they believe their treatment under the proposed rule is especially harsh and unfair. The commenters stated that the increases in hourly rates and license fees place an undue burden on the uranium recovery industry, which is suffering from a depressed market. The commenters argued that they cannot "pass through" such costs, and the fee increases directly affect the profitability and viability of an operation. The commenters also indicated that the imposition of such high fees and hourly rates on the uranium recovery industry discourages current uranium production and discourages companies from maintaining facilities in a standby status until market conditions improve. This, commenters claimed, is against the national interest of preserving domestic energy production infrastructure.

Commenters stated that NRC efforts to promote performance-based licenses for uranium recovery licensees should result in lower, not higher, license fees for the uranium recovery class. Commenters pointed to areas where they believe NRC engages in excessive regulatory oversight of the uranium recovery licensees: conducting two inspections each year of uranium in-situ leach operations compared to the one inspection conducted per year prior to NRC

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closure of the Uranium Recovery Field Office, and requiring excessively detailed studies and analysis of surface water drainage issues at sites with uranium mill tailings impoundments. The commenters also questioned the need for increased NRC efforts related to ground water concerns for in-situ facilities when it is questionable if NRC should be regulating in-situ leach wellfields and associated ground water concerns.

Response. The NRC does not select, or "target", any class of licensees for fee increases or decreases. Instead, rebaselined annual fees are established to recover the budgeted costs of NRC's regulatory programs for each class of licensee, plus a percentage of the surcharge costs allocated to that class based on their share of the budget. The NRC has addressed similar comments in previous fee rules concerning the market condition of the uranium recovery industry and the national interest of preserving energy production infrastructure. The Commission continues to conclude that it cannot set fees based on passthrough considerations. As stated in response to comments on this issue in the FY 1993 fee rule (58 FR 38667), the Commission lacks the expertise or information needed to determine whether in a market economy particular licensees can or cannot recapture the costs of annual fees from their customers. The Commission is not a financial regulatory agency, and does not have the resources necessary to continuously evaluate purely business factors. The NRC is sensitive to licensee's concerns on the passthrough issue. However, the annual fees must have, to the maximum extent practicable, a reasonable relationship to the cost of providing regulatory services in order to meet the requirements of OBRA-90. Therefore, the Commission is not changing its previous decisions against basing fees on licensees' economic status.

; July 20, 1993

The NRC has examined ways to reduce or eliminate inspections. In establishing inspection frequencies, the NRC considers the risk to public health and safety and the environment. Sites under reclamation are to be inspected once every three years, unless a specific request is received from a licensee for the ^{NRC} staff to review elements of construction. Sites on standby status are to be inspected every two to three years. Facilities that are currently in operational status are to be inspected twice a year, with the option for a reduction to once a year, depending on the inspection record. If an operating uranium recovery licensee has a good inspection record and the inspector sees justification for eliminating the second inspection, we will do so.

The NRC agrees that performance-based licensing should result in reduced Part 170 fees for uranium recovery licensees. Under a performance-based license a licensee is allowed flexibility to make certain changes at the site without the need for a license amendment. This streamlined form of license, when implemented properly by the licensee, should result in less hours spent on staff reviews of licensee submittals.

Experience has shown that erosion protection is an area where impacts to the impoundment are greater. To provide additional guidance for the licensees in this and other technical areas, the NRC developed a Standard Review Plan for Reclamation of Title II Sites and an erosion report that discusses acceptable design methods and analyses for erosion control. These two documents were released for public comment in February 1999. The ^{NRC} staff is reviewing and will be responding to the comments received. The final versions of these documents should provide more clearly the types of design methods and analyses that would serve as acceptable bases for the NRC's staff's conclusions about the stability of the site.

In late 1997 the NRC began examining its role in the regulation of in-situ leach wellfields and the associated groundwater. In addition, in April 1998 the NMA provided the Commission with a White Paper in which it cited four major concerns related to NRC regulation of the uranium industry. Based on the NRC staff's and NMA's concerns, the ^{NRC} staff prepared a paper for the Commission's review which outlines options for NRC regulation of groundwater and wastes at ^{in-situ leach} ISL facilities. NRC's involvement in the regulation of ISLs in the future will be impacted by the Commission's decision on which option is acceptable. (in-situ leach facilities)

4. NRC'S fee billing systems and practices.

Comment. Two commenters requested that NRC modify its billing systems and practices. NEI requested that NRC allocate the costs of services to individual units at multi-unit sites. NEI complained that under current practice the agency "arbitrarily" allocates site-wide inspection fees to one unit. NEI stated that due to varying ownership percentages in each unit, it is critically important in a competitive environment for site-wide fees to be allocated to the individual units. The NMA requested that NRC continue its efforts to provide bills that contain more meaningful descriptions of the work done. The NMA stated that in the private sector, adequate explanations are provided for clients to fully understand what was done, when it was done, and how much time was spent on each discreet activity. The NMA indicated that such a system could help identify problems, such as excessive time spent on reviews of licensee submittals.

Response. Effective with the FY 1998 fee rule (August 10, 1998), the NRC is assessing Part 170 fees to recover all of the resident inspector's time, except leave time and time spent in

support of another facility. For resident inspectors, all non-inspection time is charged to the docket to which they are assigned. A senior resident inspector, however, may be assigned to the site rather than to a specific unit at a multi-unit site. In these cases, the senior resident inspector's non-inspection time is currently billed to the lowest docket number for the site. Due to billing system limitations we are not able at this time to provide separate billings for each unit for the non-inspection senior resident inspector time. We will pursue modification of our billing system in the future to allocate this senior resident time to each docket on a prorated basis, e.g., if there are three dockets and one senior resident inspector at the site, each docket will be billed for one-third of the senior resident inspectors' time that is not related to a specific inspection.

The NRC converted to a new billing format in October 1998 for materials licensing actions subject to full cost recovery. These Part 170 bills now provide more detailed information on the charges to support the licensing costs. In addition, a supporting document is included with these bills which provides information on the date of the application, the control number for the application, the name of the NRC reviewer and/or contractor, the number of regular and non-regular hours expended by the reviewer, and the NRC reviewer's title. In the very near future, the NRC will convert to a new inspection fee billing system for materials licensees that will provide more detailed information for inspections.

III. Final Action

P The NRC is amending its licensing, inspection, and annual fees to recover approximately 100 percent of its FY 1999 budget authority, including the budget authority for its Office of the Inspector General, less the appropriations received from the NWF and the General Fund. For

The NRC is amending 10 CFR Parts 170 and 171 as discussed in Sections A. and B. below:

A. Amendments to 10 CFR Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services Under the Atomic Energy Act of 1954, As Amended.

Four major amendments have been made to 10 CFR Part 170, ^{as we // as} and several administrative amendments to update information in certain sections and to accommodate the major changes. These amendments further the underlying basis for the regulation -- that fees be assessed to applicants, persons, and licensees for specific identifiable services rendered. The amendments also comply with the guidance in the Conference Committee Report on OBRA-90 that fees assessed under the IOAA recover the full cost to the NRC of identifiable regulatory services that each applicant or licensee receives.

The major changes to 10 CFR Part 170 are:

1. Expanded Part 170 Cost Recovery.

The NRC is expanding the scope of Part 170 to include incident investigations, performance assessments and evaluations (except those for which the licensee volunteers at NRC's request and which NRC accepts), reviews of reports and other submittals such as responses to Confirmatory Action Letters, and full cost recovery for time expended by Project Managers.

Part 170 fees are based on Title V of the IOAA, interpretations of that legislation by the Federal courts, and Commission guidance. These guidelines provide that Part 170 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, certificate, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations.

In the NRC's FY 1998 fee rulemaking, steps were taken to more appropriately recover costs for certain activities through Part 170 fees rather than through Part 171 fees. This further expansion of the scope of Part 170 for FY 1999 will result in cost recovery for additional activities through Part 170 fees rather than through Part 171 fees.

a. Inspections.

Part 170 fees will be assessed for all inspections, including licensee-specific performance reviews, assessments, evaluations and incident investigations. Examples of activities that will be billable under Part 170 are performance assessments of fuel facilities, Diagnostic Evaluation Team assessments, and Incident Investigation Team investigations. Licensees who volunteer to participate in a performance review or assessment at NRC's request and which the NRC accepts will be exempted from these Part 170 fees. The inspections that are being included in Part 170 are "special benefits" provided to identifiable recipients, whether or not an inspection report is issued. For example, incident investigations are investigations of significant operational events involving power reactors and other facilities.

Causes of the events are determined and corrective actions taken. Incident Investigation Teams investigate events of potentially major significance. Although the investigations may result in some generic lessons, the investigations are primarily a direct service provided to the specific licensee and assist the licensee in complying with NRC regulations. The costs of any generic efforts that may result from the investigations, such as the development of new regulatory requirements and guidance, will continue to be recovered through Part 171 annual fees, not through Part 170 fees assessed to the licensee. In addition, any time expended by our Office of Investigations on these activities will be recovered through Part 171 fees. These Part 170 fees will not apply to materials licenses for which no inspection fee is specified in Part 170 because the inspection costs are included in the Part 171 annual fee for those fee categories.

b. Additional Document Reviews.

Part 170 is also expanded to include reviews of documents submitted to the NRC that do not require formal or legal approvals or amendments to the technical specifications or license. Examples are certain financial assurance reviews, reviews of responses to Confirmatory Action Letters, reviews of uranium recovery licensees' land-use survey reports, and reviews of 10 CFR 50.71(e) final safety analysis reports (FSARs).¹ Although no specific approval is issued, reviews of these submittals are services provided by the NRC to identifiable recipients that assist them in complying with NRC regulations.

c. Project Manager Time.

~~Additionally, all project managers time, excluding leave and time spent on generic~~
activities such as rulemaking, will be recovered through Part 170 fees assessed to the specific applicant or licensee to which the project manager is assigned. This change is applicable to all licensees subject to full cost fees under Part 170 and to which project managers are assigned.

Examples of project manager activities which will be subject to Part 170 cost recovery are those associated with oversight of the assigned license or plant (e.g., setting work priorities, planning and scheduling review efforts, preparation and presentations of briefings for visits to NRC by utility officials, interfacing with other NRC offices, the public, and other Federal and state and local government agencies, and visits to the assigned site for purposes other than a specific inspection), and training. Examples of project manager generic activities that will not be subject to fee recovery under Part 170 are rulemaking and the development of regulatory guides, generic licensing guides, standard review plans, and generic letters and bulletins. If a project manager is assigned to more than one license or site, costs for activities other than licensee-specific licensing or inspection activities will be prorated to each of the licenses or sites to which the project manager is assigned. The concept of full cost recovery for project managers is similar to the concept of full cost recovery for resident inspectors, which was added to Part 170 in the FY 1998 final fee rule (June 10, 1998; 63 FR 31840).

d. Other.

The NRC also solicited public comment in the proposed rule on whether to include the development of orders, evaluation of responses to orders, development of Notices of Violation (NOVs) accompanying escalated enforcement actions, and evaluation of responses to NOVs in

next year's proposed fee rule. The costs of these activities are currently recovered through Part 171 annual fees. The Commission will further evaluate this issue prior to promulgating the FY 2000 fee rule.

2. Amendment Fees Based on Average Costs.

The NRC is revising 10 CFR 170.31 to eliminate the amendment fees for small materials licensees that are based on the average time to complete the reviews ("flat" fees) and include the amendment processing costs in the Part 171 annual fees assessed to the small materials licensees. This change continues the NRC's initiatives to streamline its fee program. In a similar action, the inspection and renewal fees for these licensees were eliminated in the FY 1995 and FY 1996 fee rulemakings, respectively, and the costs included in the annual fees for these categories of licensees.

Although not all materials licensees request amendments during a given fiscal year, approximately 80 percent request at least one amendment over a five-year period, and approximately 40 percent of these licensees request multiple amendments during a five-year period.

In addition to streamlining the NRC process, this change eliminates the steps licensees currently take to submit the payments for their amendment requests. It also eliminates any delays in approving proposed amendments due to incorrect payments and provides an efficient means of recovering these costs. The NRC believes that the efficiencies to be gained outweigh any inequities that may result because not all materials licenses are amended each fiscal year.

§

f. The NRC is adding 170.11(a)(12) to provide an exemption from Part 170 fees for those licensee-specific performance assessments or evaluations for which the licensee volunteers at NRC's request. This change accommodates action in this final rule to include performance assessments and evaluations in Part 170, except those for which the licensee volunteers at NRC's request and which are accepted by the NRC.

g. The NRC is revising §170.12, Payment of Fees, to reflect the revision to Part 170 to include performance assessments, evaluations, and incident investigations, reviews of reports and other documents, and full cost recovery for project managers. This section is also revised to delete references to amendment fees that are not based on full cost to reflect the elimination of in this final rule. The costs for these activities will be included in the Part 171 annual fee for these materials licensees.

§

Section 170.12(h), Method of Payment, is redesignated as 170.12(f) and revised to specify the information the NRC needs to issue refunds. This change is necessitated by new Treasury requirements that were effective January 1, 1999.

In summary, the NRC has:

1. Revised Part 170 to include full cost recovery for all plant or licensee-specific inspections, including performance reviews, assessments, evaluations, and incident investigations, reviews of reports and other documents, and all of the project managers' time excluding time spent on generic activities and leave time;

P 2. Eliminated Part 170 "flat" amendment fees for materials licenses. The amendment costs will be recovered through Part 171 annual fees assessed to materials licensees;

P 3. Revised the two 10 CFR Part 170 hourly rates; and

P 4. Revised the licensing fees assessed under 10 CFR Part 170 to comply with the CFO Act's requirement that fees be revised to reflect the cost to the agency, and to reflect the revised hourly rates.

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Licenses, Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals, and Government Agencies Licensed by the NRC.

The NRC has made three major amendments to 10 CFR Part 171 and several administrative amendments to update information in certain sections and to incorporate the major changes. These major changes result in annual fees being assessed to licensees previously exempted from annual fees, increased annual fees for some licensees, and decreased annual fees for other licensees.

The changes are consistent with our statutory mandate; that is, charging a class of licensees for NRC costs attributable to that class of licensees. The changes are consistent with the Congressional guidance in the Conference Committee Report on OBRA-90, which states that the "conferees contemplate that the NRC will continue to allocate generic costs that are

attributable to a given class of licensees to such class" and the "conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual fee" (136 Cong. Rec. at H12692-93). Costs not attributable to a class of licensees are allocated following the conferees' guidance that "the Commission should assess the charges for these costs as broadly as practicable in order to minimize the burden for these costs on any licensee or class of licensees so as to establish as fair and equitable a system as is feasible." (136 Cong. Rec. at H12692-3). The Conference Report guidance also provides that: "These expenses may be recovered from such licensees as the Commission, in its discretion, determines can fairly, equitably and practicably contribute to their payment." As in the past, these costs are allocated to the entire population of NRC licensees that pay annual fees, based on the amount of the budget directly attributable to a class of licensees. This results in a higher percentage of these costs being allocated to operating power reactor licensees as opposed to other classes of licensees.

The major changes to Part 171 are in the following areas.

1. Reactor Decommissioning/spent Fuel Storage.

The NRC is revising 10 CFR Part 171.15 to establish a spent fuel storage/reactor decommissioning annual fee. This annual fee will be assessed to all operating and non-operating Part 50 power reactor licensees, except those power reactor licensees who have permanently ceased operations and have no fuel ~~on-site~~, and to those Part 72 licensees who do not hold a Part 50 license. The full amount of the FY 1999 annual fee will be billed to those

the NWF and the General Fund. The total amount to be recovered through annual fees for FY 1999 is \$339.8 million, compared to \$360.2 million for FY 1998.

In the FY 1995 final fee rule (June 20, 1995; 60 FR 32218), the NRC stated that it would stabilize annual fees as follows:

For FY 1996 through FY 1999, the NRC would adjust the annual fees only by the percentage change (plus or minus) in NRC's total budget authority unless there was a substantial change in the total NRC budget authority or the magnitude of the budget allocated to a specific class of licensees. If either condition occurred, the annual fee base would be recalculated. The percentage change would be adjusted based on changes in 10 CFR Part 170 fees and other adjustments as well as on the number of licensees paying the fees.

This method of determining annual fees is the "percent change" method. The FY 1996, FY 1997, and FY 1998 annual fees were based on the percent change method.

New baseline fees are established for FY 1999 based on the program changes that have taken place since the baseline fees were established in FY 1995, including those resulting from the agency's strategic planning efforts, downsizing, reorganization of agency resources, and the proposed addition of a new annual fee class (spent fuel storage/reactor decommissioning) as previously described. In addition, there have been several fee policy changes since FY 1995. Fee policy changes include the elimination of renewal fees in FY 1996 for most materials licensees, the elimination of amendment fees for these licensees in FY 1999, and the inclusion of these costs in the materials licensees' annual fees.

Well loggers	9,900
Gauge users	2,600
Broad scope medical	27,800
Broad scope manufacturers	26,000 24,800

The annual fees assessed to each class of licensees include a surcharge to recover those NRC budgeted costs that are not directly or solely attributable to the classes of licensees but must be recovered from the licensees to comply with the requirements of OBRA-90. The FY 1999 budgeted costs that will be recovered in the surcharge from all licensees are shown in Table IV.



TABLE IV - Surcharge

Category of Costs	FY 1999 Budgeted Costs (\$, M)
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1. Activities not attributable to an existing NRC licensee or class of licensee:

- | | |
|------------------------------|-----|
| a. International activities | 6.3 |
| b. Agreement State oversight | 6.4 |

The FY 1999 budgeted costs of approximately \$16.3 million to be recovered in annual fees assessed to the fuel facility class is allocated to the individual fuel facility licensees based on the revised matrix. The revisions to the matrix take into account changes in process operations at certain fuel facilities. The revised matrix also explicitly recognizes the addition of the uranium enrichment plants to the fee base and a reduction of three licensees (B&W Parks Township, B&W Research and General Atomic) as the result of the termination of licensed activities. In the revised matrix (which is included in our workpapers that we are making public), licensees are grouped into five categories according to their licensed activities (i.e., nuclear material enrichment, processing operations and material form) and according to the level, scope, depth of coverage and rigor of generic regulatory programmatic effort applicable to each category from safety and safeguards perspectives. This methodology can be applied to determine fees for new licensees, current licensees, licensees in unique license situations, and certificate holders.

The methodology is amenable to changes in the number of licensees or certificate holders, licensed-certified material/activities, and total programmatic resources to be recovered through annual fees. When a license or certificate is modified, given that NRC recovers approximately 100 percent of its generic regulatory program costs through fee recovery, this fuel facility fee methodology may result in a change in fee category and may have an effect on the fees assessed to other licensees and certificate holders. For example, if a fuel facility licensee amended its license/certificate in such a way that it resulted in them not being subject to Part 171 fees applicable to fuel facilities, the budget for the safety and/or safeguards component would be spread among those remaining licensees/certificate holders, resulting in a higher fee for those remaining in the fee category.

This would

The methodology is applied as follows. First, a fee category is assigned based on the nuclear material and activity authorized by license or certificate. Although a licensee/certificate holder may elect not to fully utilize a license/certificate, the license/certificate is still used as the source for determining authorized nuclear material possession and use/activity. Next, the category and license/certificate information are used to determine where the licensee/certificate holder fits into the matrix. The matrix depicts the categorization of licensees/certificate holders by authorized material types and use/activities and the relative programmatic effort associated with each category. The programmatic effort (expressed as a value in the matrix) reflects the safety and safeguards risk significance associated with the nuclear material and use/activity, and the commensurate generic regulatory program (i.e., scope, depth and rigor).

The effort factors for the various subclasses of fuel facility licensees are as follows:

	No. of	<u>Effort Factors</u>	
		<u>Facilities</u>	<u>Safety</u>
High Enriched Uranium Fuel	2	91 (33.1%)	76 (54.7%)
Enrichment	2	70 (25.5%)	34 (24.5%)
Low Enriched Uranium Fuel	4	88 (32.0%)	24 (17.3%)
UF6 Conversion	1	12 (4.4%)	0 (0%)
Limited Operations Facility	1	8 (2.9%)	3 (2.2%)
Others	1	6 (2.2%)	2 (1.4%)

The approximately \$267.3 million in budgeted costs to be recovered through annual fees assessed to operating power reactors is divided equally among the 104 operating reactors.

This results in a FY 1999 annual fee of \$2,570,000 per reactor. In addition, each operating reactor would be assessed the spent fuel storage/reactor decommissioning annual fee, which for FY 1999 is \$206,000 for each power reactor. This results in a total FY 1999 annual fee of \$2,776,000 for each operating power reactor.

see paragraph 4. b. j

b. Spent Fuel Storage/Reactor Decommissioning.

For FY 1999, budgeted costs of approximately \$24.8 million are to be recovered through annual fees assessed to Part 50 power reactors, except those Part 50 licensees who have permanently ceased operations and have no spent fuel on-site, and to Part 72 licensees who do not hold a Part 50 license. The costs are divided equally among the licensees, resulting in a FY 1999 annual fee of \$206,000 for each licensee.

c. Nonpower Reactors.

Budgeted costs for FY 1999 of approximately \$343,400 are to be recovered from four nonpower reactors subject to annual fees. This results in a FY 1999 annual fee of \$85,900.

d. Rare Earth Facilities.

category of licensees. For FY 1999, unique cost of approximately \$955,400 were identified for the medical development program which is attributable to medical licensees. The annual fees for each fee category are shown in §171.16(d).

f. Transportation.

Of the approximately \$3.6 million in FY 1999 budgeted costs to be recovered through annual fees assessed to the transportation class of licensees, approximately \$870,000 will be recovered from annual fees assessed to DOE based on the number of Part 71 Certificates of Compliance DOE holds. Of the remaining \$2.7 million, approximately 10 percent is allocated to holders of approved quality assurance plans authorizing use, and approximately 90 percent will be allocated to holders of approved quality assurance plans authorizing design, fabrication, and use. This results in FY 1999 annual fees of \$2,200 for holders of approved quality assurance plans for use only. The FY 1999 annual fees for holders of approved quality assurance plans for design, fabrication, and use is \$66,700.

5. Administrative Amendments.

a. Section 171.13 is amended to establish an annual fee for power reactors in a decommissioning or possession only status.

b. Section 171.15 is revised to read as follows:

fees at the FY 1998 rate in FY 1999. Those materials licensees with license anniversary dates falling on or after the effective date of the FY 1999 final rule will be billed at the FY 1999 revised rates during the anniversary month of their license. Payment will be due on the date of the invoice.

The NRC reemphasizes that the annual fee will be assessed based on whether a licensee holds a valid NRC license that authorizes possession and use of radioactive material.

In summary, the NRC has:

- P 1. Established a new spent fuel storage/reactor decommissioning annual fee in 10 CFR 171.15, and eliminated the current annual fee in 10 CFR 171.16 for independent spent fuel storage licenses. The annual fee will be assessed to all Part 50 power reactor licensees, except those that have permanently ceased operations and have no spent fuel on-site, and to those Part 72 licensees who do not hold a Part 50 license;
- P 2. Established new baseline annual fees for FY 1999.
- P 3. Used revised matrixes for allocating the fuel facility and uranium recovery budgeted costs to licensees in those fee classes.

IV. Plain Language

Insert
82A

INSERT 82A

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that agencies use technical standards that are developed or adopted by voluntary consensus standard bodies unless the use of such a ~~standard~~ is inconsistent with applicable law or otherwise impractical. In this final rule, the NRC is establishing the licensing, inspection, and annual fees necessary to recover approximately 100 percent of its budgetary authority less amounts appropriated from the Nuclear Waste Fund and the General Fund as required by the Omnibus Budget Reconciliation Act of 1990. This action does not constitute the establishment of a standard that establishes generally-applicable requirements.

The Presidential Memorandum dated June 1, 1998, entitled, "Plain Language in Government Writing," directed that the Federal government's writing be in plain language (63 FR 31883; June 10, 1998). The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments on the language used should be sent to the NRC as indicated under the ADDRESSES heading.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental impact assessment has been prepared for the proposed regulation. By its very nature, this regulatory action does not affect the environment, and therefore, no environmental justice issues are raised.

VI. Paperwork Reduction Act Statement

This final rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

VII. Regulatory Analysis

With respect to 10 CFR Part 170, this final rule was developed pursuant to Title V of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines the Commission took into account guidance

(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;

(5) The NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and

(6) The NRC's fees were not arbitrary or capricious.

With respect to 10 CFR Part 171, on November 5, 1990, the Congress passed Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) which required that for FYs 1991 through 1995, approximately 100 percent of the NRC budget authority be recovered through the assessment of fees. OBRA-90 was amended in 1998 to extend the 100 percent fee recovery requirement for NRC through FY 1999. To accomplish this statutory requirement, the NRC, in accordance with §171.13, is publishing the proposed amount of the FY 1999 annual fees for operating reactor licensees, fuel cycle licensees, materials licensees, and holders of Certificates of Compliance, registrations of sealed source and devices and QA

What about 1996 + 1997?

3. In §170.3, the definition of the terms Inspections, Materials license, and Special projects are revised to read as follows:

§170.3 Definitions.

* * * * *

Inspection means:

(1) Routine inspections designed to evaluate the licensee's activities within the context of the licensee having primary responsibility for protection of the public and environment;

(2) Non-routine inspections in response or reaction to an incident, allegation, followup to inspection deficiencies or inspections to determine implementation of safety issues. A non-routine or reactive inspection has the same purpose as the routine inspection;

(3) Reviews and assessments of licensee performance;

(4) Evaluations, such as those performed by Diagnostic Evaluation Teams; or

(5) Incident investigations.

* * * * *

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Materials license means a license, certificate, approval, registration, or other form of permission issued by the NRC under the regulations in 10 CFR parts 30, 32 through 36, 39, 40, 61, 70, 71, 72 and 76.

jta!

Special projects means those requests submitted to the Commission for review for which fees are not otherwise specified in this chapter. Examples of special projects include, but are not limited to, topical reports reviews, early site reviews, waste solidification facilities, route approvals for shipment of radioactive materials, services provided to certify licensee, vendor, or other private industry personnel as instructors for Part 55 reactor operators, reviews of financial assurance submittals that do not require a license amendment, reviews of responses to Confirmatory Action Letters, reviews of uranium recovery licensees' land-use survey reports, and reviews of 10 CFR 50.71 final safety analysis reports. As used in this part, special projects does not include requests/reports submitted to the NRC:

- (1) In response to a Generic Letter or NRC Bulletin which does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;
- (2) In response to an NRC request (at the Associate Office Director level or above) to resolve an identified safety, safeguards or environmental issue, or to assist the NRC in developing a rule, regulatory guide, policy statement, generic letter, or bulletin; or
- (3) As a means of exchanging information between industry organizations and the NRC for the purpose of supporting generic regulatory improvements or efforts.

4. Section 170.5 is revised to read as follows:

§170.5 Communications.

All communications concerning the regulations in this part should be addressed to the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Communications may be delivered in person at the Commission's offices at 11555 Rockville Pike, Rockville, MD.

5. In §170.11, paragraph (a)(11) is removed and reserved and paragraph (a)(12) is added to read as follows:

§170.11 Exemptions.

(a) ***

(11) [Reserved].

(12) A performance assessment or evaluation for which the licensee volunteers at the NRC's request and which is selected by the NRC.

6. Section 170.12 is revised to read as follows:

(3) The NRC intends to bill for resident inspectors' time and for specific inspections subject to full cost recovery on a quarterly basis. The fees are payable upon notification by the Commission.

(d) *Special Project Fees.* (1) Fees for special projects are based on the full cost of the review. Special projects includes activities such as--

i h
(i) Topical reports;

(ii) Financial assurance submittals that do not require a license amendment;

(iii) Responses to Confirmatory Action Letters;

(iv) Uranium recovery licensees' land-use survey reports; and

(v) 10 CFR 50.71 final safety analysis reports.

(2) The NRC intends to bill each applicant or licensee at quarterly intervals until the review is completed. Each bill will identify the documents submitted for review and the costs related to each. The fees are payable upon notification by the Commission.

(e) *Part 55 review fees.* Fees for Part 55 review services are based on NRC time spent in administering the examinations and tests and any related contractual costs. The fees assessed will also include related activities such as preparing, reviewing, and grading of the

- A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material:

Application \$11,200

7. Medical licenses:

- A. Licenses issued under Parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:

Application \$6,100

- B. Licenses of broad scope issued to medical institutions or two or more physicians under Parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:

Application \$4,400

- C. Other licenses issued under Parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:

Application \$2,400

paragraph (d)(1) of this section. The activities comprising the FY 1999 spent fuel storage/reactor decommissioning base annual fee are:

- (i) Generic and other research activities directly related to reactor decommissioning and spent fuel storage; and
- (ii) Other safety, environmental, and safeguards activities related to reactor decommissioning and spent fuel storage, except costs for licensing and inspection activities that are recovered under part 170 of this chapter.

(d)(1) The activities comprising the FY 1999 surcharge are as follows:

- (i) Low level waste disposal generic activities;
- (ii) Activities not attributable to an existing NRC licensee or class of licensees (e.g., international cooperative safety program and international safeguards activities; support for the Agreement State program, and site decommissioning management plan (SDMP) activities); and
- (iii) Activities not currently subject to 10 CFR Part 170 licensing and inspection fees based on existing law or Commission policy, e.g., reviews and inspections conducted of nonprofit educational institutions and licensing actions for Federal agencies, and costs that would not be collected from small entities based on Commission policy in accordance with the Regulatory Flexibility Act.

14. Section §171.16 is revised to read as follows:

§171.16 Annual Fees: Materials Licensees, Holders of Certificates of Compliance, Holders of Sealed Source and Device Registrations, Holders of Quality Assurance Program Approvals and Government Agencies Licensed by the NRC.

(a)(1) The provisions of this section apply to person(s) who are authorized to conduct activities under--

- i) 10 CFR part 30 for byproduct material;
ii) 10 CFR part 40 for source material;
iii) 10 CFR part 70 for special nuclear material;
iv) 10 CFR part 71 for packaging and transportation of radioactive material; and
v) 10 CFR part 76 for uranium enrichment.

(2) Each person identified in paragraph (a)(1) of this section shall pay an annual fee for each license the person holds at any time during the first six months of the Federal fiscal year (October 1 through March 31). Annual fees will be prorated for new licenses issued and for licenses for which termination is requested and activities permanently ceased during the period October 1 through March 31 of the fiscal year as provided in §171.17 of this section. If a single license authorizes more than one activity (e.g., human use and irradiator

	reactor fuel, for commercial distribution.....	\$1,800
D.	Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel.....	\$600
10.	Transportation of radioactive material:	
A.	Certificates of Compliance or other package approvals issued for design of casks, packages, and shipping containers.	
	Spent Fuel, High-Level Waste, and plutonium air packages.....	N/A ⁶
	Other Casks.....	N/A ⁶
B.	Quality assurance program approvals issued under 10 CFR Part 71	
	Users and Fabricators.....	\$66,700
	Users.....	\$2,200

*Note: This appendix will not appear in
the Code of Federal Regulations.*

APPENDIX A TO THIS FINAL RULE --
DRAFT REGULATORY FLEXIBILITY ANALYSIS FOR THE
AMENDMENTS TO 10 CFR PART 170 (LICENSE FEES) AND
10 CFR PART 171 (ANNUAL FEES)

I. Background.

The Regulatory Flexibility Act (RFA), as amended, (5 U.S.C. 601 et seq.) requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The NRC has established standards for determining which NRC licensees qualify as small entities (10 CFR 2.801). These size standards reflect the Small Business Administration's most common receipts-based size standards and include a size standard for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in §171.16(c) of this final rule are based on the NRC's size standards

The Omnibus Budget Reconciliation Act (OBRA-90), as amended, requires that the NRC recover approximately 100 percent of its budget authority, less appropriations from the

and the General Fund X

Nuclear Waste Fund by assessing license and annual fees. OBRA-90 requires that the schedule of charges established by rule should fairly and equitably allocate the total amount to recovered from NRC's licensees and be assessed under the principle that licensees who require the greatest expenditure of agency resources pay the greatest annual charges. The amount to be collected for FY 1999 is approximately \$449.6 million.

Since 1991, the NRC has complied with OBRA-90 by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by NRC in identifying and determining the fees to be assessed and collected in any given fiscal year.

Because the NRC is establishing a new annual fee class for FY 1999 and based on program changes that have occurred, the NRC is establishing new baseline annual fees this fiscal year. This rebaselining results in an increase in the annual fees charged to some categories of materials licensees.

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) is intended to reduce regulatory burdens imposed by Federal agencies on small businesses, nonprofit organizations, and governmental jurisdictions. SBREFA also provides Congress with the opportunity to review agency rules before they go into effect. Under this legislation, the NRC annual fee rule is considered a "major" rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective. SBREFA also requires that an agency prepare a guide to assist small entities in complying with each rule for which final regulatory flexibility analysis is prepared. This Regulatory Flexibility Analysis and the small entity

ATTACHMENT 1 TO APPENDIX A

U. S. Nuclear Regulatory Commission

Small Entity Compliance Guide

Fiscal Year 1999

160 ✓

For ERN: pages must
be numbered
consecutively

Contents

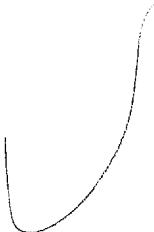
Introduction

NRC Definition of Small Entity

NRC Small Entity Fees

Instructions for Completing NRC Form 526

+161



Introduction

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires all Federal agencies to prepare a written guide for each "major" final rule as defined by the Act. The NRC's fee rule, published annually to comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) which requires the NRC to collect approximately 100 percent of its budget authority each year through fees, is considered a "major" rule under this law. This compliance guide has been prepared to assist NRC material licensees in complying with the FY 1999 fee rule.

Licensees may use this guide to determine whether they qualify as a small entity under NRC regulations and are eligible to pay reduced FY 1999 annual fees assessed under 10 CFR Part 171. The NRC has established two tiers of separate annual fees for those materials licensees who qualify as small entities under NRC's size standards.

Licensees who meet NRC's size standards for a small entity must complete NRC Form 526 to qualify for the reduced annual fee. This form accompanies each annual fee invoice mailed to materials licensees. The completed form, the appropriate small entity fee, and the payment copy of the invoice, should be mailed to the U.S. Nuclear Regulatory Commission, License Fee and Accounts Receivable Branch, to the address indicated on the invoice. Failure to file a small entity certification in a timely manner may result in the denial of any refund that might otherwise be due.

NRC Definition of Small Entity

The NRC has defined a small entity for purposes of compliance with its regulations (10 CFR 2.810) as follows:

1. **Small business** - a for-profit concern that provides a service or a concern not engaged in manufacturing with average gross receipts of \$5 million or less over its last 3 completed fiscal years;
2. **Manufacturing industry** - a manufacturing concern with an average number of 500 or fewer employees based upon employment during each pay period for the preceding 12 calendar months;
3. **Small organization** - a not-for-profit organization which is independently owned and operated and has annual gross receipts of \$5 million or less;
4. **Small governmental jurisdiction** - a government of a city, county, town, township, village, school district or special district with a population of less than 50,000;
5. **Small educational institution** - an educational institution supported by a qualifying small governmental jurisdiction, or one that is not state or publicly supported and has 500 or fewer employees²

² An educational institution referred to in the size standards is an entity whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

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NRC Small Entity Fees

In 10 CFR 171.16 (c), the NRC has established two tiers of small-entity fees for licensees that qualify under the NRC's size standards. Currently, these fees are as follows:

<u>Small Business Not Engaged in Manufacturing and Small Not-For Profit Organizations (Gross Annual Receipts)</u>	<u>Maximum Annual Fee Per Licensed Category</u>
\$350,000 to \$5 million	\$1,800
Less than \$350,000	\$400
<u>Manufacturing entities that have an average of 500 employees or less</u>	
35 to 500 employees	\$1,800
Less than 35 employees	\$400
<u>Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population)</u>	
20,000 to 50,000	\$1,800
Less than 20,000	\$400
<u>Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Less</u>	
35 to 500 employees	\$1,800
Less than 35 employees	\$400

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To pay a reduced annual fee, a licensee must use NRC Form 526, enclosed with the annual fee invoice, to certify that it meets NRC's size standards for a small entity. Failure to file NRC Form 526 in a timely manner may result in the denial of any refund that might otherwise be due.

Instructions for Completing NRC Form 526

1. File a separate NRC Form 526 for each annual fee invoice received.
2. Complete all items on NRC Form 526 as follows:
 - a. The license number and invoice number must be entered exactly as they appear on the annual fee invoice.
 - b. The Standard Industrial Classification (SIC) Code should be entered if it is known.
 - c. The licensee's name and address must be entered as they appear on the invoice. Name and/or address changes for billing purposes must be annotated on the invoice. Correcting the name and/or address on NRC Form 526 or on the invoice does not constitute a request to amend the license. Any request to amend a license is to be submitted to the respective licensing staffs in the NRC Regional or Headquarters Offices.
 - d. Check the appropriate size standard under which the licensee qualifies as a small entity. Check one box only. Note the following:
 - (1) The size standards apply to the licensee, not the individual authorized users listed in the license.

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- (2) Gross annual receipts as used in the size standards includes all revenue in whatever form received or accrued from whatever sources, not solely receipts from licensed activities. There are limited exceptions as set forth at 13 CFR 121.104. These are: the term receipts excludes net capital gains or losses, taxes collected for and remitted to a taxing authority if included in gross or total income, proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS), and amounts collected for another by a travel agent, real estate agent, advertising agent, or conference management service provider.
- (3) A licensee who is a subsidiary of a large entity does not qualify as a small entity.
- (4) The owner of the entity, or an official empowered to act on behalf of the entity, must sign and date the small entity certification.

The NRC sends invoices to its licensees for the full annual fee, even though some entities qualify for reduced fees as a small entity. Licensees who qualify as a small entity and file NRC Form 526, which certifies eligibility for small entity fees, may pay the reduced fee, which for a full year is either \$1,800 or \$400 depending on the size of the entity, for each fee category shown on the invoice. Licensees granted a license during the first six months of the fiscal year and licensees who file for termination or for a possession only license and permanently cease licensed activities during the first six months of the fiscal year pay only 50 percent of the annual fee for that year. Such an invoice states the "Amount Billed Represents 50% Proration." This means the amount due from a small entity is not the prorated amount

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shown on the invoice but rather one-half of the maximum annual fee shown on NRC Form 526 for the size standard under which the licensee qualifies, resulting in a fee of either \$900 or \$200 for each fee category billed instead of the full small entity annual fee of \$1,800 or \$400.

A new small entity form (NRC Form 526) must be filed with the NRC each fiscal year to qualify for reduced fees for that fiscal year. Because a licensee's "size," or the size standards, may change from year to year, the invoice reflects the full fee and a new Form must be completed and returned for the fee to be reduced to the small entity fee. LICENSEES WILL NOT BE ISSUED A NEW INVOICE FOR THE REDUCED AMOUNT. The completed NRC Form 526, the payment of the appropriate small entity fee, and the "Payment Copy " of the invoice should be mailed to the U. S. Nuclear Regulatory Commission, License Fee and Accounts Receivable Branch at the address indicated on the invoice.

If you have questions about the NRC's annual fees, please call the license fee staff at 301-415-7554, e-mail the fee staff at fees@nrc.gov, or write to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Office of the Chief Financial Officer.

False certification of small entity status could result in civil sanctions being imposed by the NRC under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801 et. seq. NRC's implementing regulations are found at 10 CFR Part 13.