

A. Legal Issues. OGC's Response to Lewis/NEI:

1. NRC's Interpretations of OBRA-90 and IOAA

Comment. Several commenters have again raised questions about the NRC's legal interpretations of OBRA-90 and the IOAA. For example, it is argued by some commenters that OBRA-90 prohibits exemptions from Part 170 fees, and that accordingly the NRC must charge federal agencies, state agencies, and state licensees fees under Part 170 for specific services rendered. The same commenters claim that the current fee structure denies reactor licensees due process and equal protection under the U.S. Constitution.

Response. These arguments are not new, all having been fully raised by the same commenters last year, when the fee schedules were revised for FY 1999. In the FY 1999 final fee rule, the Commission carefully set forth both these comments and the agency's responses to them. The agency's response explained how the current fee structure fully complies with all statutory and constitutional requirements. See 64 FR 31448-50 (June 10, 1999). Because last year's discussion was sufficiently detailed, and because there have been no new legal developments over that past year that would call for a different interpretation of the issues, interested parties are referred to the discussion in last year's statement of considerations for the final rule. However, there is one update to the discussion outlining actions NRC had taken over the past six years to reduce any residual inequity and unfairness in the current fee structure (64 FR 31450). Among those actions has been consistent support for legislation that would address the remaining fairness and equity issues by decreasing the Of NRC's budget to be received through fees. The Senate has passed such legislation (S. 1627).

2. Information Provided by NRC in Support of Proposed Rule.

Comment. *OGC's Response to Lewis' comments on Inadequate Information, etc.:* One commenter complained that in deriving the FY 2000 fee by simply escalating last year's annual fee by 1.4 percent, the NRC has not given "any consideration" to whether underlying costs have any rational connection to reactor regulation or any consideration whether the total assessment is as fair and equitable as is feasible." The commenter also claims that the proposed rule fails to provide "any explanation and accounting of the expenses that are covered by this charge," and thus "denies the companies a meaningful opportunity to comment."

Another commenter indicated that, under the provisions of the Administrative Procedures Act, the NRC should provide detailed cost information associated with each component of reactor regulation and other generic costs. The commenter believes this would provide for more effective feedback and comment, and would promote increased Commission efficiency because the costs of services and other agency expenses, such as overhead, would be more visible to stakeholders. The commenter also requested that NRC provide a more detailed account of major research contracts, their purpose, and costs.

Response. The NRC believes this year's 1.4% increase in fees is a nominal figure. The so-called "increase" in annual fees is yet another decrease in real resources, because supporting this certification is that over the course of FY 199 inflation, as measured by the

usual Consumer Price Index, ran 2.4%, a full percentage point higher than the percent increase in annual fees in nominal dollars. This represents an actual decrease in fees of approximately 1%. The NRC's budget, in real terms, is down once again -- to an all-time low, a 25% decrease in the last 7 years alone, with staffing levels their lowest in 20 years -- all achieved while the agency has expended large resources in extraordinary reform efforts, particularly in enforcement and power reactor oversight, efforts long sought by the power reactor industry.

Additionally, the NRC believes there is nothing obscure about the 1.4% "increase" in annual fees, or its relation to reactor regulation. The FY 2000 notice of proposed rulemaking describes clearly, the calculation that leads to a 1.4% increase (65 FR 16251, 16253-4), and the calculation is also repeated in this Federal Register notice on the final rule. The proposed rule announced the availability of the agency's workpapers that support these calculations. Furthermore, the NRC has made available in the Public Document Room NUREG-1100, Volume-15, "Budget Estimates and Performance Plan, Fiscal Year 2000 (February 1999)." This document discusses in detail the NRC's budget for FY 2000, including the activities to be performed in each strategic arena. Reactor-related research activities are described under the Nuclear Reactor Safety arena.

Finally, the fact that the agency decided to derive the FY 2000 annual fees by means of a percentage increase in no way indicates that the fee was derived without regard to the costs of reactor regulation. To the contrary, the very decision to proceed by percentage increase is based on a consideration of, among other things, whether there has been a substantial change in the magnitude of the budget allocated to a specific class of licensees. The percentage change method exists not so the agency can avoid the effort of making the best possible match between fees and services, but rather to give licensees some cost stability. Last year the NRC solicited comment on whether it should retain the percent change method or rebaseline annual fees every year (63 FR 15884; April 1, 1999). The majority of commentors favored continued use of the percent change method, because they desire some stability in fees. The Commission has therefore retained this method, with the additional caution that fees will be rebaselined at least every three years.

B. Specific Part 170 Issues.

1. Project Manager Billings Issues.

OGC's

**Comment.** All parties commenting from the uranium recovery industry were strongly opposed to the NRC's current billing method for Project Managers (PMs). There was concern expressed by one commentator that the present billing structure for PMs could adversely affect the viability of that company, especially in light of the depressed uranium market and the industry's inability to pass these increased costs on to the consumer. Another concern voiced was the unequal distribution of licensee sites among PMs, thereby subjecting certain licensee's to a disproportionate share of PM non-direct (e.g., administrative/overhead) costs. Many comments were directed towards the unfairness of the types of PM activities being charged to licensees that had little or no apparent connection to the sites the PMs were managing. Finally, one commentator stated that non-direct PM charges should be captured under Part 171 annual fees vs Part 170 direct charge fees due to the inequities of the NRC's current billing system, thereby allowing non-direct PM charges to be evenly distributed to all uranium recovery licensees paying annual fees.

**Response.** During the FY 1999 Fee Rulemaking period, the NRC made a conscientious decision to recover the full costs for PMs assigned to licensees, with the exception of PM activities that were generic in nature (e.g., rulemaking and preparation of generic guidance documents, leave time, etc.). This decision was predicated on the Commission's intent to expand the scope of Part 170 collections which included, in part, PM costs. Expanding the scope of Part 170 is consistent with Title V of the IOAA, interpretations of that legislation by the Federal courts, and previous Commission guidance. In summary, 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, amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations. In most instances, 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 than through annual fees assessed to all of the licensees in a particular class. However, the NRC will revisit this issue in the FY 2001 Fee Rule to ensure PM costs are being assessed in the fairest manner.

The NRC acknowledges some commentators' concerns about the unequal distribution of licensee sites among PMs in the NRC's Uranium Recovery Program. In general, PMs assigned to more than one licensee or site have their non-direct costs prorated to each of the licensees or sites for which they are assigned. The distribution of PM vs technical review assignments within the program ranges from a small number of individuals who perform only technical reviews to a small number of individuals who are purely PMs with essentially no technical assignments -- with the remainder of the professional staff performing both types of work. The mix of PM vs technical assignments varies by the technical capabilities of the staff and the number and nature of licensee submittals over time. Thus, it is most practical and efficient for the staff to be organized in such fashion to provide maximum flexibility when responding to various types of submittals that are received. The NRC is currently reviewing the allocation of PM costs to specific licensees, and will address this issue further in the FY 2001 Fee Rule.

Similarly, the NRC recognizes many commentors' concerns with respect to the types of PM activities being charged to licensees. The FY 1999 Fee Rule outlines the types of PM activities that are recovered through Part 170 and Part 171 fees, and provides several examples of each type of activity. The commentors' specific issue appears to focus on certain types of non-direct PM activities that are being assessed under Part 170 fees, and that these activities do not provide a direct or indirect benefit to the assigned licensee or site. In general, the NRC has categorized the non-direct PM activities in such a manner as to create the most equitable allocation of costs among the licensees or sites most likely to benefit from a PM's activities. Because the allocation of certain non-direct PM costs is somewhat subjective in nature, there may not be a clear nexus between the PM's activity and the benefit derived by the licensee. Regardless of this issue, all PM time must be billed under either Part 170 or Part 171 fees. However, the NRC is currently reviewing the types of non-direct PM activities that are being charged to licensees, and will address this issue further in the FY 2001 Fee Rule.

## 2. Hourly Rates.

Comment. Several uranium recovery commenters stated the hourly rate of \$143 for PMs/professional staff was excessive considering that senior-level private consultants in the industry charge far less for comparable services. A reactor licensee called the \$3 per hour increase unacceptable, and suggested that NRC help the regulated community by controlling and reducing annual fees, not increasing them to "pay higher wages." Another commenter requested that prior to finalizing the FY 2000 fee rule, the NRC address the NRC's Office of the Inspector General (OIG) recommendation to evaluate the hourly rate methodology. This commenter believes no substantive justification has been given for formulating hourly rates by using budget data rather than actual data from previous year's billings.

Response. The NRC is revising the professional hourly rates to \$143 for the nuclear materials and nuclear waste program and \$144 for the reactor program. As required by OBRA-90, the NRC must recover approximately 100 percent of its budget authority, less the appropriation from the Nuclear Waste Fund, through either fees for direct services (Part 170) or annual fees (Part 171). The professional hourly rates, which are based on budgeted costs, must be established at these levels to meet the fee recovery requirement.

The amounts included in the hourly rates encompass salaries and benefits plus contracts for non-program direct management and support activities (i.e., overhead costs). A more detailed description of the hourly rates and how they were derived is found in Section II(1) of this rulemaking. The revised professional hourly rates of \$143 and \$144 mark a \$3 per hour increase over FY 1999, which is primarily attributable to the Government-wide pay increase for FY 2000. This equates to approximately a 2.1 percent increase over the previous year for professional hourly rates; the Government-wide pay increase, which went into effect in January 2000, was slightly more than 4.0 percent.

The NRC's hourly rates are established to recover the cost of maintaining a professional employee, such as salaries and benefits and overhead, and to recover general and administrative costs, such as heat, lighting, and supplies. These budgeted costs are incurred whether a professional employee is performing work that is billable under Part 170 or work that is recovered through annual fees. The time spent by a professional employee in performing work that is subject to Part 170 fees is traced to the billable activities and charged at the professional hourly rate, to the recipient of the service. Any direct contract support costs incurred in providing the service are also traced and billed directly to the recipient. Because the hourly rate is not intended to be used only for work that is billable under Part 170, the NRC believes it is more appropriate to use budget data than to base the hourly rate calculations on historical Part 170 type billing data.

With regard to the OIG's findings and recommendations, the Commission continues to assert its fee schedules are in full compliance with the requirements of the Independent Offices Appropriation Act (IOAA) and OMB circular A-25. Further, the NRC's methodology for calculating the IOAA fees was upheld by the Court in Mississippi Power & Light v. NRC [601 F. 2d 223 (5<sup>th</sup> Cir. 1979)]. An internal NRC review of the contract costs excluded from the hourly rate concluded that there is no basis to include these costs in the hourly rates as suggested by the OIG. In addition, the NRC contracted with a professional accounting firm to review the current methodology for calculating the hourly rates and recommend alternative methods. The accounting firm's report is currently being evaluated by the NRC.

### 3. Invoice Information.

Comment. Several commentors expressed concern over the lack of appropriate invoice detail regarding quarterly billings for NRC staff services provided to licensees.

Response. The NRC believes that sufficient information is currently provided to licensees or applicants on which to base payment of invoices. The NRC has addressed this issue previously in a similar response to the American Mining Congress (60 FR 20918, April 28, 1995). The NRC's invoices for full-cost licensing actions and inspections currently contain information detailing the type of service for which the costs are being billed, the date or date range the service was performed, the number of professional staff-hours expended in providing the service, the hourly rate, and the contractual costs incurred. A licensee or applicant who does not understand the charges, or who feels they need more information to understand a bill may request additional information from the NRC regarding the specific bill in question. The NRC will provide all available data used to support the bill upon a request of the licensee or applicant. Additionally, if requested, the NRC program staff will provide a best estimate of the hours required to complete a specific licensing action, with the caveat that the actual hours expended may differ from that estimate based on certain circumstances (e.g., timeliness of submittals, quality of products being submitted for review, etc.). However, OMB Circular A-25, which establishes guidelines for Federal agencies to assess fees for Government services, provides that new cost accounting systems need not be created solely for the purpose of determining or estimating full cost. Therefore, the NRC does not currently plan to develop additional systems beyond those already described solely to provide additional cost information.

C. Specific Part 171 Issues.

1. Percentage change methodology

**Comment.** One commenter stated that although they agree that fee stability is "a reasonable goal", and rebaselining might require more resources, the "industry" believes annual fees should be rebaselined each year. The commenter believes annual rebaselining would serve to promote agency efficiency by focusing on the value of the programs and other changes that have an impact on resource requirements. The commenter referenced a recent audit by the NRC's Office of the Inspector General (OIG) which concluded that extended use of the percentage change method may result in a deviation from associating fees with the costs of services provided.

**Response.** The Commission, after evaluating all pertinent factors, has determined that the use of the percentage change method for determining FY 2000 annual fees does not result in a loss of the required "reasonable relationship" between fees and the costs of providing services. In the FY 1999 proposed fee rule (---FR---), the Commission specifically solicited public comment on the frequency for rebaselining. The majority of the comments received on this issue supported continuing the use of the percent change method, and rebaselining every several years as warranted. These commenters were concerned about fee stability and predictability, and therefore were not in favor of annual rebaselining. Prior to FY 1999, Commission policy required that annual fees be rebaselined every five years, or earlier if there was a substantial change in the total NRC budget or in the magnitude of the budget allocated to a class of licensees. In FY 1999, based on experience gained as a result of applying the criteria for rebaselining over the previous four years, the Commission implemented a revised policy requiring that future annual fees should be rebaselined every three years, or earlier if warranted. The Commission's decision on the appropriate method for establishing annual fees (i.e., rebaselining vs percentage change) is made each year after considering the criteria for rebaselining and all relevant facts.

2. Small Entity Fee Increase

**Comment.** Several comments were received on the proposed 25 percent increase in the small entity annual fees. Some commenters indicated that a 25 percent increase would have negative economic impacts on their businesses. These commenters said it would be difficult for them to recover the increase, and it could force some small companies to give up their licenses. One commenter stated that the NRC's reason for the increase was the decrease in the number of licensees. This commenter said that businesses faced with reduced sales would not be able to increase prices, but rather would be forced to reduce their budgets, and that this would be an obvious solution for the NRC to follow. Two commenters noted that while the annual fee assessed to small entities would increase by 25 percent, the annual fee for certain other licensees, such as gauge users, would not increase.

Several commenters suggested alternatives to the current basis for the small entity annual fee. One commenter suggested that, instead of gross receipts, the fee be based on net receipts or receipts from regulated activities. Another recommended that the small entity fee be based on the number of gauges owned or leased. This commenter indicated that there are increased licensing and inspection costs associated with larger numbers of gauges, and there would be no additional expense for licensees to provide this information because they already maintain a gauge inventory. A third commenter requested that small entity size standards be established for reactor licensees based on the utility's total capacity, number of employees, customers in the rate base, or a combination of these factors.

Some commenters requested that the NRC establish more tiers or levels of fees, indicating that the spread between the current tiers is too great. One commenter said one company should not be burdened with the same fee as a company with fourteen times the gross receipts. Another commenter said the current lower tier of \$350,000 in annual gross receipts should be increased to \$1 million to reflect FY 2000 equivalent dollars.

Response. The NRC is increasing the small entity annual fee and the lower tier small entity fee by 25 percent in this final rule. While NRC recognizes the effect this increase may have on some small entities, the NRC believes this action strikes a balance between the requirement of OBRA-90 to collect approximately 100 percent of the NRC's budget authority through fees, and the Regulatory Flexibility Act requirement to consider the impact of agency actions on small entities.

The NRC has determined that assessing costs to the materials class of licensees which are attributable to that class, as indicated in the Conference report accompanying OBRA-90, results in a significant impact on a substantial number of small entities. However, the NRC is not required to reduce or eliminate the impact on small businesses, but must evaluate the impact and explain its decisions. The Regulatory Flexibility Analysis is attached to this final rule. Given the conflicting goals of OBRA-90 and the Regulatory Flexibility Act, the Commission determined that the impact on small entities should be reduced by establishing a maximum annual fee for licensees who qualify as small entities.

The 25 percent increase in the small entity annual fee is not due to a decrease in the number of licensees as one commenter believes. While a decrease in the number of licensees is a contributing factor in the overall 1.4 percent increase in FY 2000 annual fees, the 25 percent increase in the small entity annual fee results from changes that have occurred in the types of costs recovered through annual fees and increases to costs since the \$1,800 small entity fee was established. When the \$1,800 maximum small entity annual fee was established in FY 1991, small entities also paid fees for inspections, amendments, and license renewals, resulting in an average of \$3,400 in fees paid by small entities per year. Over time, however, the inspection, amendment, and renewal fees have been eliminated from Part 170 charges and have been incorporated in the annual fees assessed to the materials class of licensees. As a result of these and other changes, the average total fees paid per year by other materials licensees increased by

approximately 25 percent, from \$6,700 in FY 1991 to \$8,400 in FY 1999. For the same period, the average total fees paid per year by small entities decreased approximately 47 percent, from \$3,400 in FY 1991 to \$1,800 in FY 1999.

In order to recover approximately 100 percent of the budget as required by law, other licensees must pay for costs not recovered from small entities. With the 25 percent increase to the small entity annual fees, the FY 2000 small entity subsidy to be recovered from other licensees is approximately \$5.6 million; without the increase the subsidy would be approximately \$6.0 million. The increase will mean that small entities will pay more of the costs attributable to them, but still benefit from reduced annual fees. For most fees categories, the \$2,300 annual fee per license category for small entities is approximately 26 percent less than the \$3,400 in average total fees paid by small entities in FY 1991.

The NRC's size standards, which are codified in 10 CFR 2.810, are outside the scope of this rulemaking. The NRC's receipts-based size standard for small businesses not engaged in manufacturing is promulgated on the Small Business Administration (SBA) size standard of \$5.0 million in annual gross receipts for these businesses. The SBA defines gross receipts as those which include "revenues from sales of products or services, interest, rent, fees, commissions and/or whatever sources derived."

The NRC has previously considered comments that the fees for small businesses be based on such factors as the number of gauges used, the volume of patients administered to, or receipts from the use of regulated activities (   FR  ,   FR  ,   FR  , ). The NRC rejected these alternatives because they would not necessarily meet the goal of the RFA to minimize the impact of agency actions on small entities. For example, if the NRC based the reduced annual fee on the number of gauges owned, a large firm with only one gauge would get a reduced fee, while a small business with more than one gauge would pay a larger fee. Similarly, a large medical establishment would pay a reduced fee if only a small part of its business involved nuclear procedures, whereas a small medical facility whose entire business was involved nuclear procedures would pay a larger fee. Basing the fees on the small entity size standards ensures that benefits of the reduced fees apply only to small entities.

In FY 1999, approximately 43 percent of the licensees qualifying as small entities for purposes of reduced annual fees qualified for the lower-tier small entity fee. Therefore, because the current lower tier fee significantly reduces the impact of the annual fee for licensees with relatively low gross annual receipts or supporting populations, the NRC does not believe any additional tiers are appropriate.

*Comment.* Some commentors indicated that the NRC's attempt to shift fees from Part 171 category to Part 170 category is illusionary at best, and represents no real savings to the licensee. They further expounded that shifting these costs to Part 170 fees has not resulted in an offsetting decrease in Part 171 fees, thereby exacerbating an already unfair and inequitable situation.

**Response.** The NRC believes it provides sufficient information concerning its proposed fee schedules each year to allow effective evaluation and constructive comment by the public. For example, each proposed fee rule provides detailed explanations of the budgeted costs for the various classes of licensees being assessed fees, as well as a detailed accounting of its Part 170 and 171 fee structure. In addition, the NRC work papers pertinent to the development of the fees to be assessed are placed in the NRC's Public Document Room on the first day of the public comment period. These work papers provide additional information concerning the development and calculation of fees, including NRC's FY budgeted resources at the activity and subactivity level for the agency's major programs. The NRC staff is also available to meet with interested parties in person, respond to written inquires, or respond to telephonic inquires to explain its fee schedules.

The NRC takes issue with the commentors' specific concern about increasing 170 fees with no corresponding drop in Part 171 fees. Overall, the \$447 million to be recovered through Part 170 and 171 fees for FY 2000 is \$2.6 million less than the total amount estimated for recovery in the NRC's FY 1999 fee rule. Additionally, the NRC estimates that approximately \$106 million will be recovered in FY 2000 from Part 170 fees and other offsetting receipts, compared to \$107.7 million in FY 1999, which marks a \$1.7 million decrease. As the NRC explained in the FY 1999 proposed and final fee rules (64 FR 15876, dated April 1, 1999; and 64 FR 31458, dated June 10, 1999), the amount for FY 1999 included a \$4.1 million carryover from additional FY 1998 collections, which in turn was applied to FY 1999 collections, thereby reducing the total fee recovery amount for FY 1999. However, this carryover does not exist for FY 2000. The \$1.7 million decrease for FY 2000 is the difference between the \$4.1 million carryover from additional 1998 collections and an estimated \$2.4 million increase in Part 170 collections for FY 2000 as compared to FY 1999. This increase in estimated Part 170 collections, from \$103.5 million in FY 1999 to \$105.9 million for FY 2000, is largely attributable to changes in Commission policy included in the FY 1999 final fee rule, such as billing full cost under Part 170 for PMs, performance assessments, incident investigations, and reviews of reports and other documents that do not require formal or legal approval. The remaining \$341 million (\$447 million total FY 2000 fee recovery amount less \$106 million for estimated Part 170 collections and other receipts) will be recovered through Part 171 annual fees. This \$341 million annual fee recovery amount for FY 2000 is approximately \$1 million less than in FY 1999. However, the NRC estimates a net annual fee billing adjustment of approximately \$5.7 million for FY 2000 resulting from bills that will not be paid in FY 2000, the small entity subsidy, and payments received in FY 2000 for FY 1999 invoices. In addition to these fee adjustments, there are approximately 530 fewer licenses subject to NRC annual fees in FY 2000 than in FY 1999 due primarily to Ohio becoming an Agreement State in August 1999. As a result of these adjustments, the proposed FY 2000 annual fees would increase slightly by approximately 1.4 percent over FY 1999 despite the annual fee recovery amount for FY 2000 actually decreasing by approximately \$1 million from the previous year.

1. Impacts of the Revised Annual Fees on Licensees

Comment. Several uranium recovery commentors mentioned stated that the NRC's FY 1999 rebaselining placed a significant financial burden on them and the uranium recovery industry in general due to increased fees, and that uranium recovery licensees bore a disproportionate share of the cost burden from this process. Many uranium recovery commentors asserted the uranium market is depressed and at a historical low, and that the NRC's current fee structure is excessive and unfair to the uranium recovery industry class of licensee. Furthermore, they indicated that licensees do not have the capability of passing through these additional costs to the consumer, thereby adversely affecting the viability of some companies. A reactor licensee who referred to the challenge of the competitive, unregulated market place for utilities, commented that the cost of regulating the industry is passed on to the consumer. This commenter indicated that businesses do not locate in the company's area, or end up leaving the area, because the electric rates there are among the highest in the State.

Response. The NRC acknowledges the commentors' concern about the depressed state of the uranium industry, and that any increase in fees to uranium recovery licensees poses a significant financial hardship. However, without legislative relief, the NRC is mandated by OBRA-90 to collect approximately 100 percent of its budget authority. As stated in response to similar comments on this issue in the FY 1993 fee rule (58 FR 38667; dated July 20, 1993), 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 evaluate continuously purely business factors. 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 or market conditions, and has only considered the fee impacts obligated by law.

The Commission established its policy regarding rebaselining frequency in the FY 1999 final fee rule (64 FR 31448; dated June 10, 1999). Therein the Commission determined that future annual fees should be rebaselined every three years, or earlier if warranted. This decision was based on the experience gained as a result of applying the criteria from rebaselining over the previous four years. The Commission's decision on the appropriate method for establishing annual fees (e.g., rebaselining vs percentage change) is made each year after considering all relevant factors. Rebaselining years, as opposed to percentage change years, can result in wide fluctuations of costs for certain classes of licensees due to substantial changes in the NRC's total budget or the magnitude of the budget allocated to a specific class of licensee, decreasing numbers of licensees in a particular class, etc. However, rebaselining on a systematic basis ensures that costs are allocated equitably among the various classes of licensees based on the fee assessment methodology set forth in the NRC's annual fee rule.

#### 4. Effects of Decreasing Numbers of Licensees.

Comment. Several commenters broached the issue of annual fee increases that result from a decreasing number of licensees available to pay the fees. Some commenters questioned why NRC's budget did not decrease commensurate with the decrease in licensees. One commenter, representing commercial nuclear reactor licensees, stated that a decrease in the number of materials licensees was the only reason given for the 1.4 percent increase in power reactor licensee's annual fees, which in the commenter's view, suggests that the increase is solely attributable to the costs of regulating materials licensees and therefore these costs have no relation to nuclear power reactors. The uranium recovery industry expressed apprehension about the decreasing number of licensees in the uranium recovery industry, thereby creating the effect of the last licensee subsidizing the NRC's entire Uranium Recovery Branch.

Response. The NRC acknowledges the commenters' concern regarding the effects a declining licensee base has on the Part 171 fees assessed to the remaining licensees. costs. Given the requirements of OBRA-90, the NRC has no option but to assess annual fees to NRC licensees to recover the budgeted costs not recovered through Part 170 fees and other receipts.

The agency's fee-based budget for FY 2000 did in fact decrease by \$2.6 million from FY 1999, as shown in Table II of the proposed rule and this final rule. However, the need for generic efforts and other activities of the agency may not necessarily decrease at the same rate as the decrease in the number of licensees. For example, the agency's cost to establish a risk-informed, performance-based regulatory framework are not reduced by a decrease in the number of licensees. Similarly, the costs to maintain the Emergency Response Center are not affected by the number of licensees. However, the NRC continually ~~is evaluating~~ evaluates options to reduce NRC staff efforts and costs, including costs in those areas where the licensee base is diminishing, without sacrificing its health and safety mission.

In the years that annual fees have been based on the percent change method (FYs 1996, 1997, 1998, and 2000), there have been decreases in both materials licenses and reactor licenses. For example, in FY 1998, there were 2.3 fewer reactor licensees available to pay the annual fees compared to FY 1997. This represented a reduction of approximately 20 percent of the total operating reactors. In FY 2000, there are approximately 530 fewer materials licensees compared to FY 1999, a reduction of approximately 10 percent. Under the percent change method, which has been endorsed by most of those commenting on the methodology since it was introduced in FY 1995, the number of licensees is only one factor in the determination of the percentage change to the annual fees needed to assure 100 percent fee recovery. This does not mean that the percentage change to the previous year's annual fees is related to a change in the costs of regulating the class of licensees that experienced the decrease in licensees.

~~As previously noted, the NRC is mandated by OBRA-90 to collect 100 percent of its adjusted budget authority in the form of Part 170 and 171 fees. Notwithstanding, The NRC continues to seek legislative relief with respect to the NRC activities Part 171 fees that have no direct relation to the licensees connection to licensing activities but are still assessed to licensees who are assessed the costs as part of their annual fee (e.g., Agreement State program oversight, international programs, etc.). Additionally, the NRC is seeking an amendment to the Atomic Energy Act to provide it the authority to impose fees on all other Federal agencies. Passage of these bills should result in a reduced budget authority for fee collection purposes.~~

## 5. Fee Stability

Comment. Several commentors expressed their concern over the instability of fees from year to year. As a result, it becomes increasingly difficult for licensees to accurately budget for NRC's annual costs.

Response. ~~The Commission believes its annual charges meet the statutory criteria that they be fairly and equitably allocated among licensees and, to the maximum extent practicable, have a reasonable relationship to the cost of providing regulatory services. To address licensee concerns about fee stability and predictability, the Commission adopted the policy of adjusting the annual fees by the percentage change in the total NRC budget, with adjustments for numbers of licensees in particular fee classes and other necessary adjustments to meet the requirement of recovering approximately 100 percent of the budget through fees. This percentage change method is used only if there has not been 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 fees will be rebaselined. As of FY 1999, the maximum interval for rebaselining is three years; however, the Commission has stated that it will rebaseline earlier if warranted. Although the Uranium Recovery Industry has been generally supportive of the percentage change methodology for fee assessment purposes, there are other classes of licensees who prefer rebaselining on an annual basis. Based on the mixed support for both fee assessment methodologies, the NRC supports its current practice of rebaselining every three years while using percentage change during the interim years.~~

## 6. Assessment of Annual Fees to Licensees in Standby or Decommissioning

Comment. One commentor indicated it was inappropriate for the NRC to charge licensees in 'standby' mode the same annual fees as licensees who are actively operating a facility, especially in light of the fact that regulatory review and inspection efforts by the NRC are minimal for these dormant sites. Similarly, another commentor remarked that the NRC should lessen or discontinue its assessment of annual licensing fees on decommissioned facilities that are simply awaiting NRC approval of reclamation plans.

Response. In the FY 1991 fee rule the Commission made a determination to recover NRC costs attributable to uranium recovery licensees either in operation or standby. Therein the Commission stated that this method was practical, equitable, and a

fair way to recover NRC costs given the limited number of operating mills, and is consistent with the approach taken for other classes of licensees. The Commission further elaborated on this issue in response to a similar comment from the American Mining Congress in 1995 (60 FR 20918, dated April 28, 1995). Here the Commission asserted it will continue to assess annual fees based on whether a licensee holds a valid license with the NRC that authorizes possession and use of radioactive material, regardless of whether the facility is actively operating or in a standby status. The basic premise for this policy is that the benefit the NRC provides a licensee is the authority to use licensed material. The choice of whether or not to exercise that authority is a business decision of the licensee. Because of the mandate that the NRC recover approximately 100 percent of its budget through fees, to refrain from charging annual fees to mills in a standby mode would increase the annual fees for other licensees in the class because the number of licensees assessed annual fees would decrease. Such an approach would raise fairness and equity concerns. However, licensees who voluntarily relinquish the authority to operate and have ceased operations will have their annual fee waived by the NRC, to include sites with reclamation or decommissioning plans pending NRC review. Thus, the commentor's remark about the NRC assessing annual fees to sites in decommissioning is incorrect, and therefore moot.

It should be noted that licensees in standby status receive benefit from NRC's generic guidance and rules applicable to their class of licensee. ~~uranium recovery industry.~~ Additionally, any reduction in required licensing reviews and inspections would be reflected in reduced Part 170 fees assessed to licensees in a standby mode.

## 7. Relationship Between Benefits and Fees

Comment. Several uranium recovery commentors espoused a lack of relationship between NRC's regulatory program and the benefits derived by industry, such as a disparity in Part 171 fees vs Part 170 fees and excessive levels of oversight/inspections for operating licensees for what amounts to a relatively benign industry from a health and safety standpoint.

Response. In the FY 1999 rulemaking the NRC looked at ways to recover more of its fees through Part 170 related activities. Therein the Commission decided to expand the scope of Part 170 fees to include incident investigations, certain performance assessments and evaluations, reviews of reports and other submittals such as responses to Confirmatory Action Letters, and full cost recovery for time expended by PMs (except time spent on generic activities such as rulemaking, leave, etc.). Further discussion concerning Part 170 and 171 percentages and assessment is discussed in Section \_\_\_\_\_ of the rulemaking.

The NRC takes issue with the commentors' remark about the uranium recovery industry being subjected to excessive regulatory oversight by the NRC for a relatively low risk operation. The NRC is charged with the responsibility of regulating the nation's civilian radioactive source material supply in a manner that is safe to public health and the environment. As such, uranium mining is one of the activities that the NRC regulates under its mandate. The commentors' suggestion that uranium mining presents a relatively low health and safety risk does not obviate the NRC's responsibility

to regulate the industry, nor does it address the potential health, safety, and environmental issues associated with groundwater clean-up, tailings impoundments, facility decommissioning, yellowcake processing and handling, etc. When developing its annual budget, the NRC's Uranium Recovery Branch looks at the level of regulatory effort needed to fulfill its mission and bases its inspections and review efforts accordingly. This budget is closely scrutinized by the NRC's Office for Nuclear Material Safety and Safeguards, the Commission, and the U.S. Congress before it's approved to ensure proper resources are allocated to sufficiently protect public health and safety, and the environment at the most efficient staffing level.

Additionally, the NRC has examined ways to reduce or eliminate inspections associated with uranium recovery facilities. 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 on an earlier basis. Generally, 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 made by the NRC based on the site's previous inspection record. Thus, if an operating uranium recovery licensee has a good inspection record and the NRC determines that a reduced number of inspections is warranted, it will eliminate one biannual inspection. Furthermore, the NRC has instituted performance-based licensing for uranium recovery licensees to help streamline licensing and oversight activities, and when implemented properly by the licensee, should result in reduced review efforts by the staff.

The aforementioned programmatic efficiencies were intended to reduce the amount of resources expended on direct charges to licensees. However, compounding the escalating fees issue is the fact that three Uranium Recovery Licensees were involved in Atomic Safety Licensing Board administrative hearings over the last several years which have consumed substantial staff resources. These resources were factored into the Part 171 fee base because commentors and the Uranium Recovery Industry were overwhelmingly in favor of not assessing these hearing expenditures as direct billable costs to a particular licensee in previous years' fee rules. Additional factors contributing to the increase in FY 2000 fees are no FY 1999 carry-over, the small entity surcharge, and a declining licensee base.

Comment. Many commentors voiced their displeasure with the inequities of OBRA-90, and encouraged the NRC to continue its efforts in pursuing legislative action to obtain fee relief for the uranium recovery industry.

Response. The NRC plans to continue its pursuit of legislative action to gain fee relief regarding those costs that are currently being assessed to licensees under Part 171 whereby the licensee receives no direct or indirect benefit from the NRC's activity. The FY 1999 fee rule outlines the previous and current actions the NRC is taking in this regard, to include fairness and equity concerns, reimbursement of services provided to other Federal agencies, and removal of certain costs from the fee base.

D. Other Issues.

1. NRC'S Budget. (NEI)

Comment. One commenter, referring to the NRC's FY 2001-2005 Five Year Plan, indicated that NRC's overall budget does not reflect the agency's stated objectives to become more effective and efficient. The commenter believes that changes in NRC's regulatory approach, the industry's good performance, and decreases in licensing actions, generic communications, inspection requirements, and time spent on allegations, should lead to a reduction in FTE, not an increase as projected in the budget plan.

Response. The NRC's budgets, current or future, are not within the scope of this rulemaking. The purpose of this rulemaking is to establish the fees necessary to recover approximately 100 percent of the agency's FY 2000 budget authority as required by OBRA-90. The agency's budget requests undergo extensive internal examination before they are submitted to the Office of Management and Budget (OMB). After OMB review, the budget requests are submitted to Congress, where they undergo additional scrutiny. This review process assures that the budgets reflect the resources necessary for the NRC to carry out its health and safety mission.

2. NRC's Jurisdiction for In-Situ Leach

Comment. Uranium recovery commentors urged the NRC to relinquish its jurisdiction of in-situ leach (ISL) uranium mining wellfield regulation as outlined in the National Mining Association's (NMA's) 1998 White Paper to the Commission.

Response. The NRC recognizes the commentors' concern regarding NRC's role in ISL wellfield regulation as discussed in the FY 1999 fee rule. In summary, the NRC began examining its role in the regulation of ISL wellfields and the associated groundwater in 1997. The NMA provided its White Paper outlining four major concerns, including one related to in-situ facility regulation. Based on the NRC staff's and NMA's concerns, the NRC staff prepared a paper which is now before the Commission that outlines various options for NRC regulation of groundwater and wastes at ISL facilities. The Commission has not made a decision with respect to the NRC staff's recommendations. Based on the Commission's decision, the NRC staff will shape its future ISL regulatory program accordingly.