



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

*5/18/00*  
*Draft Rule*

May 22, 2000

MEMORANDUM TO: Glenda Jackson  
Office of the Chief Financial Officer

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

SUBJECT: REVIEW OF THE FINAL FY 2000 FEE RULE

The Rules and Directives Branch has reviewed the final rule that establishes the licensing, inspection, and annual fees necessary to recovery approximately 100 percent of the NRC's operating budget for FY 2000. 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

Draft  
5/18/00

Jim  
Deane  
Trip  
Steve  
Cathy  
[7590-01-P]

NUCLEAR REGULATORY COMMISSION  
10 CFR Parts 170 and 171  
RIN: 3150-AG50

Revision of Fee Schedules; 100% Fee Recovery, FY 2000

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 proposed 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) 2000, less amounts appropriated from the Nuclear Waste Fund (NWF) and the General Fund. The amount to be recovered for FY 2000 is approximately \$447.0 million.

*2 line spaces* → EFFECTIVE DATE: (Insert 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. Comments received may also be viewed via the NRC's interactive rulemaking website <http://ruleforum.nrl.gov>). This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, 301-415-5905; e-mail [CAG@nrc.gov](mailto:CAG@nrc.gov).

With the exception of restricted information, documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/NRC/ADAMS/index.html>. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 202-634-3273 or by email to [pdr@nrc.gov](mailto:pdr@nrc.gov).

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.

*2120 L Street NW  
Washington, DC 20555*

**SUPPLEMENTARY INFORMATION:**

- I. Background.
- II. Final Action.
- III. Response to Comments.
- IV. Voluntary Consensus Standards.
- V. Environmental Impact: Categorical Exclusion.
- VI. Paperwork Reduction Act Statement.
- VII. Regulatory Analysis.
- VIII. Regulatory Flexibility Analysis.
- IX. Backfit Analysis.
- X. Small Business Regulatory Enforcement Fairness Act.

~~XI.~~

**I. Background**

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). Certain NRC costs related to reviews and other assistance provided to the Department of Energy (DOE) and other Federal agencies were excluded from the fee recovery requirement for FY 2000 by the FY 2000 Energy and Water Development Appropriations Act.

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 special benefits to identifiable 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.

This final rule is based on the current 100 percent fee recovery requirement under OBRA-90. To address fairness and equity concerns related to NRC licensees paying for agency expenses which do not provide a direct benefit to them, the NRC has submitted legislation to the Congress which would reduce the fee recovery amount to 98 percent for FY 2001, and further reduce the fee recovery amount by an additional two percent per year beginning in FY 2002 until the fee recovery requirement is reduced to 90 percent by FY 2005.

58% on FY (P)

Also, in the FY 1999 final fee rule published June 10, 1999 (64 FR 31450), the NRC responded to a comment requesting that NRC designate as small entities, for reduced fee purposes, 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 Commission agreed to give further consideration to the issue raised by this commenter.

The Commission has declined to adopt the suggested approach, for the following reasons. On April 11, 1995 (60 FR 18344), the NRC promulgated a final rule, after notice and comment rulemaking, that revised its size standards. The final rule established the small entity classification applicable to small businesses as follows. Those companies providing services having no more than \$5 million in average annual gross receipts over its last three completed fiscal years, or, for manufacturing concerns, having an average of 500 or fewer employees during the preceding 12-month period would qualify as small entities (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. Unlike the NRC, the SBA's Standard Industrial Classification (SIC) System establishes size standards based on types of economic activity or industry. The NRC rule, which the SBA approved, established generic size standards for small businesses because NRC's regulatory scheme is not well suited to setting standards for each component of the regulated nuclear industry.

II. Response to Comments CR

A total of 13 comments were received on the proposed rule. Many of the comments were similar in nature. These comments have been grouped, as appropriate, and addressed as single issues in this final rule.

The comments are as follows:

A. Legal Issues.

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. 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 FY 1999 final fee rule responses to comments (64 FR 31448-50/ June 10, 1999). 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 amount of NRC's budget to be received through fees. The Senate has

*(in the June 10, 1999 final rule that*

*The NRC published a proposed rule that presented the amendments necessary to amend the licensing, inspection, and annual fees charged to its licensees, and applicants for FY 2000 on March 27, 2000 (65 FR 16250).*

NRC's

*delete space*

NRC's

90% stated?  
on p 2 1

passed legislation that would reduce the fee recovery amount by 2 percent per year, beginning in FY 2001, until the fee recovery amount was reduced to 88 percent in FY 2005 (§. 1627).

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

Comment. 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 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 clearly describes the calculation that leads to the a 1.4% increase (65 FR 16251, 16253-4) and the calculation is also repeated in this Federal Register notice on the final rule. In addition, 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.

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 rebase 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.

It should be noted that the 1.4 percent increase in annual fees is not the result of a budget increase. The NRC believes this year's 1.4% increase in fees is a nominal figure.

*percent*  
*NRC*  
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 1999 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. *(and are are the)* *This has* *percent* *It has decreased*

B. Specific Part 170 Issues.

1. Project Manager Billings Issues.

*commenters*  
**Comment.** Parties commenting from the Uranium recovery industry were strongly opposed to the NRC's current billing method for Project Managers (PMs). 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. 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.. 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). *X*

*As part of this effort*

*FY 1999 the NRC attempted* *certain*  
**Response.** In an effort to shift cost recovery from Part 171 annual fees to Part 170 fees, the NRC made a conscientious decision in FY 1999 to recover through Part 170 fees the full costs for PMs, with the exception of PM activities that are generic in nature (e.g., rulemaking and preparation of generic guidance documents, etc.) and leave time. This decision 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. *burdens*

*provide cite*

With the exception of generic activities and leave time, PM activities are services which the NRC provides to specific, identifiable beneficiaries, i.e, the site or sites to which the PM is assigned. Thus, as the NRC stated in the FY 1999 final rule, 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. *(FR)* It should be noted that this change results in licensees who have ceased operations being charged for the full of costs for PMs assigned to their sites. If these costs were included in the Part 171 annual fee, only operating licensees or licensees in standby would pay the costs.

As indicated in the final FY 1999 fee rule, the NRC readily acknowledges that certain PM activities are not directly related to a specific licensing action or inspection, or even to a specific site. However, these activities are part of the costs to the agency of providing the PM services, and these costs should be recovered from the licensee benefitting from those services. <sup>at</sup> Examples of these activities were provided in the FY 1999 final rule. However, the list of examples was not intended to be all-inclusive. Day-to-day PM activities to be recovered through Part 170 fees include the general management and oversight of the particular site or sites to which they are assigned, and general activities such as training, general travel, general correspondence, staff meetings, coordination with other offices, and processing documents into the NRC's Agencywide Document Access and Management System (ADAMS). A review of the PM time reported in the first two quarters of FY 2000 indicates that approximately 10-15 percent of a PM's time is spent on general or non-site specific administrative duties. The NRC believes it is appropriate to recover the costs for this small percentage of the PM time from the assigned site or sites.

**However, in the initial implementation of the new PM billing provision, certain PM activities were incorrectly coded for fee billing purposes. Corrections are being made to those Part 170 invoices that erroneously included PM time for activities not directly related to the mission of the agency, including Union activities ~~Combined Federal Campaign activities,~~ and activities that should have been recorded as leave time, such as blood donations. However, activities that are part of the <sup>NRC</sup> agency mission, such as Equal Employment Opportunity activities, will continue to be included in the PM time for Part 170 billing purposes.**

**The NRC understands some commenters' concerns about the unequal distribution of licensee sites among PMs in the NRC's Uranium Recovery Program. In the case of PMs assigned to more than one license or site, the PM time that is not directly related to a specific site or to generic activities is prorated to each of the assigned licenses or sites. The NRC contends that a site that requires a full time PM should bear more of the PMs general and administrative costs and therefore the unequal distribution of these costs between the licensees in the class is not inappropriate. As noted above, this time is a small fraction of the total PM time.**

## 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.

*before*  
*final*

**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.

*This*

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 which went into effect January 2000. This equates to approximately a 2.1 percent increase over the previous year for professional hourly rates, while at the same time inflation, as measured by the Consumer Price Index, was approximately 2.4 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.

*that*

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 (5th 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.

Li ✓

X

in response to this type of request ✓

A licensee or applicant who does not understand the charges, or who feels they need more information to interpret 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 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.

\* that ✓

#

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 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.

; date

they did ✓

Before

## 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 (RFA) 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 RFA, 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.

*(See Appendix A to this document).*

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. A decrease in the number of licensees is

*NRC has developed*

*for*

*since 1991*

a contributing factor in the overall 1.4 percent increase in FY 2000 annual fees. However, 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 fee 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.

*check specs*

*has consistently*

The NRC's size standards, which are codified in 10 CFR 2.810, are outside the scope of this rulemaking and therefore commenters' suggestions that the size standards be revised are not being addressed in this final rule. 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."

*based most commonly used (types of*

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.

*add line spec*

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

*in each fiscal year fee releases prior FY 1999 (FR, et al)*

licensees with relatively low gross annual receipts or supporting populations, the NRC does not believe any additional tiers are appropriate.

### 3. Effects of Shifting Cost Recovery from Part 171 to Part 170

Comment. Some commenters 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 takes issue with the commenters' specific concern about increasing 170 fees with no corresponding drop in Part 171 fees. As required by OBRA-90, the Part 171 annual fee recovery amounts are offset by the estimated Part 170 fee collections. The estimated collections for FY 2000 include a \$2.4 million increase in estimated Part 170 fees, from \$103.5 million in FY 1999 to \$105.9 million for FY 2000. This increase 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. However, this increase is offset by other factors, as described in the proposed fee rule (FR). To reiterate, 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), a \$4.1 million carryover from additional FY 1998 collections 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 in estimated total collections for FY 2000 is the difference between the \$4.1 million carryover from additional 1998 collections and the estimated \$2.4 million increase in Part 170 collections for FY 2000 as compared to FY 1999. In addition, the FY 2000 net annual fee billing adjustment, which is for invoices that will not be paid in FY 2000, the small entity subsidy, and payments received in FY 2000 for FY 1999 invoices, is approximately \$5.7 million, compared to the FY 1999 adjustment of \$3.2 million. As a result of these changes, which are summarized in Table II of this final rule, the total Part 171 billing amount increased from \$345.1 million in FY 1999 to \$346.7 million in FY 2000. In addition, there are approximately 530 few licensees available to pay the annual fees in FY 2000, primarily because Ohio became an Agreement State in August, 1999.

### 4. Impacts of the Revised Annual Fees on Licensees.

Comment. Several commenters stated that the NRC's FY 1999 rebaselining placed a significant financial burden on the uranium recovery industry due to increased fees, and that uranium recovery licensees bore a disproportionate share of the cost burden from this process. Many uranium recovery commenters 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,

These commenters claimed

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 continuously evaluate 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 it is obligated by law to consider.

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.

##### 5. 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. 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 NRC'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. The NRC continually evaluates options to reduce costs, including costs in those areas where the licensee base is diminishing, without sacrificing its health and safety mission.

\* \*  
NRC's ✓

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, the equivalent of 2.3 fewer reactor licensees were 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. Rather, as shown in Table II, the percentage change is based on the changes to the total fee recovery amount, the estimated collections from Part 170 fees and other receipts, and billing adjustments necessary to meet the 100 percent fee recovery requirement.

The NRC supports legislative relief with respect to the NRC activities that have no direct relation to the licensees who are assessed the costs as part of their annual fee (e.g. Agreement State program oversight, international programs, etc.). As noted, in the response in \_\_\_\_\_ the Senate has passed such legislation. 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.

previously ✓  
also X  
over

## 6. Fee Stability.

Comment. Several commenters expressed 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. 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. Based on the mixed support for both fee assessment methodologies, in FY 1999, the Commission adopted the policy of rebaselining every three years while using percentage change during the interim years. *check sport*

7. Assessment of Annual Fees to Licensees in Standby or Decommissioning.

Comment. One commenter indicated <sup>that</sup> 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 commenter 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 licensees 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 commenter'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. Additionally, any reduction in

required licensing reviews and inspections for licensees in a standby mode would be reflected in reduced Part 170 fees assessed to them.

872 Relationship Between Benefits and Fees (1)

Comment. Several uranium recovery commenters 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 <sup>fee</sup> 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.

Supplementary Information for this final rule (1)

The NRC takes issue with the commenters' 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 commenters' 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 <sup>it is that</sup> 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 are intended to reduce the amount of resources expended on licensing and inspection activities. However, there are other activities that have required increased resources. For example, three uranium recovery licensees were involved in Atomic Safety Licensing Board administrative hearings over the last several years, which has consumed substantial staff resources. The resources affect the Part 171 fee base because, in response to previous proposed rules, commenters, including the uranium recovery industry, were overwhelmingly in favor of not assessing Part 170 fees for contested hearings.

Comment. Many commenters 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 FY 1999 fee rule outlines the actions the NRC has taken to address the inequities of the annual fees. As noted in response to \_\_\_\_\_ above, the NRC supports legislation that would reduce the NRC's fee recovery amount in order to address the fairness and equity concerns. The Senate has passed such legislation.

D. X. Other Issues.

1. NRC'S Budget.

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 commenters' 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. *See o/c*

### III. Final Action

The NRC is amending its licensing, inspection, and annual fees to recover approximately 100 percent of its FY 2000 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 FY 2000, the NRC's budget authority is \$470.0 million, of which \$19.15 million has been appropriated from the NWF. In addition, \$3.85 million has been appropriated from the General Fund for activities related to regulatory reviews and other assistance provided to the DOE and other Federal agencies. The NRC's FY 2000 Appropriations Act states that this \$3.85 million appropriation shall be excluded from license fee revenues. Therefore, the NRC is required to collect approximately \$447.0 million in FY 2000 through 10 CFR Part 170 licensing and inspection fees and 10 CFR Part 171 annual fees. The total amount to be recovered in fees for FY 2000 is \$2.6 million less than the total amount estimated for recovery in the NRC's FY 1999 fee rule.

The NRC estimates that approximately \$106.0 million will be recovered in FY 2000 from Part 170 fees and other offsetting receipts. The remaining \$341.0 million would be recovered through the Part 171 annual fees.

The NRC also estimates a net adjustment for FY 2000 of approximately \$5.7 million for the small entity subsidy, for FY 2000 invoices that would not be paid in FY 2000, and for payments received in FY 2000 for FY 1999 invoices. These adjustments are approximately \$2.5 million more than in FY 1999. In addition, there are approximately 530 fewer licenses subject to 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 changes, the FY 2000 annual fees increased slightly, by approximately 1.4 percent, compared to the FY 1999 actual (prior to rounding) annual fees. As a result of rounding, the FY 2000 annual fees for several fee categories are the same as the final (rounded) FY 1999 annual fees. The change to the annual fees is described in more detail in Section B. The following examples illustrate the changes in annual fees:

<u>Class of Licensees</u>	<u>FY 1999 Annual Fee</u>	<u>FY 2000 Proposed Annual Fee</u>
Power Reactors (Including Spent Fuel Storage/Reactor Decommissioning fee)	\$2,776,000	\$2,815,000

The NRC is amending §170.12 (c)(1) to clarify that the fees assessed for a resident inspector's time exclude time spent by the resident inspector in support of activities at another site. This provision was inadvertently omitted from the revision of 10 CFR 170 in the FY 1999 fee rule.

4. Other.

*before* The NRC solicited public comment in the FY 1999 proposed fee rulemaking (April 1, 1999; 64 FR 15878) on whether to include the development of orders, evaluation of responses to orders, development of Notices of Violations (NOVs) accompanying escalated enforcement actions, and evaluation of responses to NOVs in the fees collected for identifiable services under Part 170 in the FY 2000 proposed fee rule. Those commenting on this issue presented arguments both for and against assessing Part 170 fees for these activities. The NRC stated in the final fee rulemaking (June 10, 1999; 64 FR 31452), that it would further evaluate this issue prior to promulgation of the FY 2000 fee rule.

Three of the four commenters who addressed this issue in FY 1999 did not support recovering the costs for these activities under Part 170. These commenters were concerned that assessing these costs to the specific licensees under Part 170 could be viewed as penalizing the licensee when the licensee identifies and corrects violations. One commenter supported Part 170 fee assessment for escalated enforcement actions, indicating that it is inappropriate for one licensee to subsidize oversight for another licensee. This commenter also stated that the perception that these actions serve as an industry-wide deterrent is not borne out.

In addition to concerns raised by the commenters, there are other problems with assessing Part 170 fees for these activities. These problems include the handling of escalated enforcement costs if the enforcement action is reduced to a non-escalated enforcement action or is dropped altogether. Based on the public comments received in FY 1999 and legal and policy concerns, the NRC will continue to recover costs for orders and escalated enforcement actions through Part 171 annual fees.

In summary, the NRC is amending 10 CFR Part 170 to:

1. Revise the two hourly rates;
2. Revise the licensing fees to be assessed to reflect the revised hourly rates; and
3. Make an administrative amendment to §170.12(c) to clarify that the site to which a resident inspector is assigned will not be assessed Part 170 fees for time spent by the resident inspector in support of activities at another site.

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Licenses, and 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.

Estimated Payments from Prior Year Invoices	-5.50	-3.20
Subtotal	<u>3.20</u>	<u>5.70</u>
Total Part 171 Billing	\$345.10	\$346.70

2. Small Entity Annual Fees.

The current maximum small entity annual fee and the lower tier small entity annual fee are increased by 25 percent. The maximum small entity annual fee increased from \$1,800 to \$2,300, and the lower tier small entity fee increased from \$400 to \$500. The current maximum small entity annual fee was established in FY 1991; the current lower tier small entity annual fee was established in FY 1992. The 25 percent increase is consistent with the increase in NRC fees for other NRC materials licensees since FY 1991. The increase is less than the increase in the average fees paid by small entity licensees in Agreement States during this time.

Between 1991 and 1999, changes in both the external and internal environment have affected NRC's costs and those of its licensees. Increases in the NRC materials license fees, Agreement States' materials license fees, and the Consumer Price Index all indicate that the NRC small entity fee established in 1991 should be revised. In addition, the structure of the fees that NRC charges to its materials licensees changed during the period between 1991 and 1999. In the past, costs for materials license inspections, renewals, and amendments were recovered through Part 170 fees for services. The costs of these activities are now included in the Part 171 annual fees assessed to materials licensees.

While the annual fees increased for most materials licensees as a result of these changes, the NRC's annual fees assessed to small entities have not been adjusted to include the additional costs. As a result, small entities are currently paying a smaller percentage of the total NRC regulatory costs related to them than they did in FY 1991 and FY 1992 when the small entity fees were established.

Based on the changes that have occurred since FY 1991, the NRC has reanalyzed its maximum small entity annual fee. As part of the reanalysis, the NRC considered the 1999 fees assessed by Agreement States, the NRC's FY 1999 fee structure, and the increase in the Consumer Price Index between FY 1991 and FY 1999. The reanalysis and alternatives considered by the NRC for revising the small entity annual fees are described in the Regulatory Flexibility Analysis, which is Appendix A to this proposed rule.

*(final)*



<sup>1</sup>These adjustments are necessary to ensure that the "billed" amount results in the required collections. Positive amounts indicate amounts billed that will not be collected in FY 2000.

Certificates of Compliance, registrations of sealed source and devices and QA program approvals, and Government agencies. OBRA-90, consistent with the accompanying Conference Committee Report, and the amendments to OBRA-90, provide that<sup>2</sup>-

(1) The annual fees be based on the Commission's FY 2000 budget of \$470.0 million less the amounts collected from Part 170 fees and the funds directly appropriated from the NWF to cover the NRC's high level waste program;

(2) The annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and

(3) The annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.

In addition, the NRC's FY 2000 appropriations language provides that \$3.85 million appropriated from the General Fund for activities related to regulatory reviews and other assistance provided to the Department of Energy and other Federal agencies be excluded from fee recovery.

10 CFR Part 171, which established annual fees for operating power reactors effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in Florida Power and Light Company v. United States, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989). Further, the NRC's FY 1991 annual fee rule methodology was upheld by the D.C. Circuit Court of Appeals in Allied Signal v. NRC, 988 F.2d 146 (D.C. Cir. 1993).

#### VIII. Regulatory Flexibility Analysis

The NRC is required by the Omnibus Budget Reconciliation Act of 1990 to recover approximately 100 percent of its budget authority through the assessment of user fees. OBRA-90 further requires that the NRC establish a schedule of charges that fairly and equitably allocates the aggregate amount of these charges among licensees.

This final rule establishes the schedules of fees that are necessary to implement the Congressional mandate for FY 2000. The final rule will result in increases in the annual fees charged to licensees and holders of certificates, registrations, and approvals, including those that qualify as a small entity under NRC's size standards in 10 CFR 2.810. The Regulatory Flexibility Analysis, prepared in accordance with 5 U.S.C. 604, is included as Appendix A to this proposed rule.

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) was signed into law on March 29, 1996. The SBREFA requires all Federal agencies to prepare a written compliance guide for each rule for which the agency is required by 5 U.S.C. 604 to prepare a regulatory flexibility analysis. Therefore, in compliance with the law, Attachment 1 to the Regulatory Flexibility Analysis is the small entity compliance guide for FY 2000.

#### IX. Backfit Analysis

**PART 170 – FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED**

1. The authority citation for Part 170 continues to read as follows:

Authority: 31 U.S.C. 9701, 96 Stat. 1051; sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201w); sec. 201, Pub. L. 93-4381, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205, Pub. L. 101-576, 104 Stat. 2842, (31 U.S.C. 901).

2. In §170.12, paragraph (c)(1) is revised to read as follows:

§170.12 Payment of Fees.

\*\*\*\*\*

(c) *Inspection fees.* (1) Inspection fees will be assessed to recover full cost for each resident inspector (including the senior resident inspector), assigned to a specific plant or facility. The fees assessed will be based on the number of hours that each inspector assigned to the plant or facility is in an official duty status (i.e., all time in a non-leave status), excluding time spent by a resident inspector in support of activities at another site. The hours will be billed at the appropriate hourly rate established in 10 CFR 170.20. Resident inspectors' time related to a specific inspection will be included in the fee assessed for the specific inspection in accordance with paragraph (c)(2) of this section.

\*\*\*\*\*

3. Section 170.20 is revised to read as follows:

§170.20 Average cost per professional staff-hour.

Fees for permits, licenses, amendments, renewals, special projects, Part 55 requalification and replacement examinations and tests, other required reviews, approvals, and inspections under §§170.21 and 170.31 will be calculated using the following applicable professional staff-hour rates:

Reactor Program (\$170.21 Activities)	\$144 per hour
Nuclear Materials and Nuclear Waste Program (\$170.31 Activities)	\$143 per hour

- Licensing ..... Full Cost
- B. Inspections related to spent fuel storage cask Certificate of Compliance ..... Full Cost
- C. Inspections related to storage of spent fuel under §72.210 of this chapter ..... Full Cost

- 14. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities under Parts 30, 40, 70, 72, and 76 of this chapter:
  - Licensing and inspection ..... Full Cost

- 15. Import and Export licenses:
  - Licenses issued under ~~10 CFR~~ Part 110 of this chapter for the import and export only of special nuclear material, source material, tritium and other byproduct material, heavy water, or nuclear grade graphite. ✓

- A. Application for export or import of high enriched uranium and other materials, including radioactive waste, which must be reviewed by the Commissioners and the Executive Branch, for example, those actions under 10 CFR 110.40(b). This category includes application for export or import of radioactive wastes in multiple forms from multiple generators or brokers in the exporting country and/or going to multiple treatment, storage or disposal facilities in one or more receiving countries.

- Application - new license ..... \$9,300
- Amendment ..... \$9,300

- B. Application for export or import of special nuclear material, source material, tritium and other byproduct material, heavy water, or nuclear grade graphite, including radioactive waste, requiring Executive Branch review but not Commissioner review. This category includes application for the export or import of radioactive waste involving a single form of waste from a single class of generator in the exporting country to a single treatment, storage and/or disposal facility in the receiving country.

- Application-new license ..... \$5,700
- Amendment ..... \$5,700

- C. Application for export of routine reloads of low enriched uranium reactor fuel and exports of source material requiring only foreign government assurances under the Atomic Energy Act.

\$350,000 to \$5 million .....	\$2,300
Less than \$350,000 .....	\$500

close  
sparr

Manufacturing entities that  
have an average of 500  
employees or less

35 to 500 employees .....	\$2,300
Less than 35 employees .....	\$500

Small Governmental Jurisdictions  
(Including publicly supported  
educational institutions)  
(Population)

20,000 to 50,000 .....	\$2,300
Less than 20,000 .....	\$500

Educational Institutions that  
are not State or Publicly  
Supported, and have 500 Employees  
or Less.

35 to 500 employees .....	\$2,300
Less than 35 employees .....	\$500

(1) A licensee qualifies as a small entity if it meets the size standards established by the NRC (See 10 CFR 2.810).

(2) A licensee who seeks to establish status as a small entity for the purpose of paying the annual fees required under this section must file a certification statement with the NRC. The licensee must file the required certification on NRC Form 526 for each license under which it is billed. The NRC will include a copy of NRC Form 526 with each annual fee invoice sent to a licensee. A licensee who seeks to qualify as a small entity must submit the completed NRC Form 526 with the reduced annual fee payment.

(3) For purposes of this section, the licensee must submit a new certification with its annual fee payment each year.

license.....\$3,800

E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units)..... \$3,500



F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes..... \$5,800

G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes.....\$15,000

H. Licenses issued under Subpart A of Part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of Part 30 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of Part 30 of this chapter..... \$3,300

I. Licenses issued under Subpart A of Part 32 of this chapter to distribute

items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of Part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of Part 30 of this chapter..... \$4,700,

close space

- J. Licenses issued under Subpart B of Part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under Part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under Part 31 of this chapter..... \$2,100
- K. Licenses issued under Subpart B of Part 31 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under Part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under Part 31 of this chapter..... \$1,800
- L. Licenses of broad scope for possession and use of byproduct material issued under Parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution.....\$11,300
- M. Other licenses for possession and use of

waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material..... N/A<sup>5</sup>

B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.....\$11,500

close space

C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.....\$8,500

5. Well logging:

A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies.....\$10,100

B. Licenses for possession and use of byproduct material for field flooding tracer studies..... N/A<sup>5</sup>

6. Nuclear laundries:

A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material.....\$19,200

7. Medical licenses:

A. Licenses issued under Parts 30, 35, 40, and 70 of this chapter for human

NOTE: THIS APPENDIX WILL NOT APPEAR IN THE CODE OF FEDERAL REGULATIONS.

*FINAL*  
APPENDIX A TO THIS PROPOSED 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 proposed rule are based on the NRC's size standards.

*final*

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

1. Base fees on some measure of the amount of radioactivity possessed by the licensee (e.g., number of sources).

2. Base fees on the frequency of use of the licensed radioactive material (e.g., volume of patients).

3. Base fees on the NRC size standards for small entities.

The NRC has <sup>again</sup> reexamined its previous evaluations of these alternatives and continues

to believe that establishment of a maximum fee for small entities is the most appropriate and effective option for reducing the impact of its fees on small entities.

*particularly in light of the 25 percent increase in the maximum small entity fees. The NRC*

III. Maximum Fee.

The RFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity. Therefore, the NRC has no benchmark to assist it in determining the amount or the percent of gross receipts that should be charged to a small entity. In developing the maximum small entity annual fee in FY 1991, the NRC examined its 10 CFR Part 170 licensing and inspection fees and Agreement State fees for those fee categories which were expected to have a substantial number of small entities. Six Agreement States; Washington, Texas, Illinois, Nebraska, New York, and Utah were used as benchmarks in the establishment of the maximum small entity annual fee in 1991. Because small entities in those Agreement States were paying the fees, the NRC concluded that these fees did not have a significant impact on a substantial number of small entities. Therefore,

those fees were considered a useful benchmark in establishing the NRC maximum small entity annual fee.

The NRC maximum small entity fee was established as an annual fee only. In addition to the annual fee, NRC small entity licensees were required to pay amendment, renewal and inspection fees. In setting the small entity annual fee, NRC ensured that the total amount small entities paid annually would not exceed the maximum paid in the six benchmark Agreement States. \* ✓

Of the six benchmark states, the maximum Agreement State fee of \$3,800 in Washington was used as the ceiling for the total fees. Thus the NRC's small entity fee was developed to ensure that the total fees paid by NRC small entities would not exceed \$3,800. Given the NRC's 1991 fee structure for inspections, amendments, and renewals, a small entity annual fee established at \$1,800 allowed the total fee (small entity annual fee plus yearly average for inspections, amendments and renewal fees) for all categories to fall under the \$3,800 ceiling. \* ✓

In 1992, the NRC introduced a second, lower tier to the small entity fee in response to concerns that the \$1,800 fee, when added to the license and inspection fees, still imposed a significant impact on small entities with relatively low gross annual receipts. For purposes of the annual fee, each small entity size standard was divided into an upper and lower tier. Small entity licensees in the upper tier continued to pay an annual fee of \$1,800 while those in the lower tier paid an annual fee of \$400.

To revise the small entity fee using this method, a category must be selected as the 1991 base. The total annual cost for this category, as presented in Table 3, will then be increased by the NRC average of 25 percent. Five possible approaches to selecting the 1991 base were explored.

*Method 3A - Maximum Fee Category in the Benchmark States*

Method 3A uses the Industrial Radiography category as the base. This category had the maximum fee in the Agreement States benchmarked in 1991. The total NRC fee assessed to the Industrial Radiography category in 1991 was \$3,400. Increasing this fee by 25 percent gives a new small entity fee of \$4,300.

*Method 3B-Highest Number of Small Entities Present*

Method 3B uses the fee category with the highest number of small entities. In FY1999, <sup>#</sup> Category 3P, Gauges and Other Industrial Uses, had 30 percent of all NRC small entity licensees. This was the highest number of small entities present in a single category. In 1991, the total fees for Category 3P was \$2,100. A 25 percent increase in this fee would set the small entity fee at \$2,600. ✓

*Method 3C-Highest Number of Upper Tier Small Entities Present*

Method 3C uses Category 7C, Nuclear Medicine as the base. This category has the highest number of upper tier small entities and is considered a viable base because the small

**Method 3E- Average of the total fees for the seven categories**

Method 3E uses the average total fee for the categories reviewed as the base fee. The average total fee of \$2,800 is then increased by 25 percent to give a new small entity fee of \$3,500.

Both Methods 3D and 3E use averages to determine the base fee and this reduces the risks associated with Methods 3A, 3B and 3C. Both methods yield the same recovery rate of 37 percent and can be considered equally acceptable from a monetary perspective.

Because Method 3D uses a weighted average, the number of small entities in each of the seven categories are factored into the selection process while smoothing the impact of the highest and lowest fee categories.

While Methods 3D and 3E would consider the total fees paid by small entities in FY 1991 and would increase the amounts recovered from small entities thereby reducing the small entity subsidy paid by other licensees, the percentage increase under either of these methods would be larger than the average percentage increase in the total fees assessed to other NRC materials licensees since FY 1991.

**IV Conclusion.**

Based on the results of the reanalysis, the NRC is proposing to increase the maximum small entity annual fee by 25 percent, based on the percentage increase since FY 1991 in the <sup>(in)</sup> <sub>1</sub>

average total fees paid per year by other NRC materials licensees. As a result, the maximum small entity annual fee would increase from \$1,800 to \$2,300. By increasing the maximum annual fee for small entities from \$1,800 to \$2,300, the annual fee for many small entities is reduced while at the same time materials licensees, including small entities, would pay for most of the costs attributable to them. The costs not recovered from small entities are allocated to other materials licensees and to power reactors.

While reducing the impact on many small entities, the proposed maximum annual fee of \$2,300 for small entities may continue to have a significant impact on materials licensees with annual gross receipts in the thousands of dollars. Therefore, the NRC would continue to provide a lower-tier small entity annual fee for small entities with relatively low gross annual receipts. The lower-tier small entity fee also applies to manufacturing concerns, and educational institutions not State or publicly supported, with less than 35 employees. The NRC is proposing to increase the lower tier small entity fee by the same percentage increase to the maximum small entity annual fee. This 25 percent increase would result in the lower tier small entity fee increasing from \$400 to \$500.

In the future, the NRC plans to re-examine the small entity fees each year that annual fees are rebaselined. As part of the re-examination, the NRC will consider the percentage increase in fees paid by other NRC materials licensees since the last rebaselining to determine if the maximum small entity annual fees should be revised.

Please see Section III, C, 2 of the Supplementary Information section of this final rule for a discussion of the comments received on the increase in small entity fees, including the suggestion that the NRC establish additional tiers or levels of fees.

**ATTACHMENT 1 TO APPENDIX A**

**U. S. Nuclear Regulatory Commission**

**Small Entity Compliance Guide**

**Fiscal Year 2000**

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. The NRC is proposing to increase these fees by 25 percent. The proposed fees are as follows:

*FY 2000 - small entity*

<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	\$2,300
Less than \$350,000	\$500

Manufacturing entities that  
have an average of 500  
employees or less

35 to 500 employees	\$2,300
Less than 35 employees	\$500

---

educational programs are available to the public.