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Comment*

[7590-01-P]

5/21/01

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 150, 170 and 171

RIN: 3150-AG73

Revision of Fee Schedules; Fee Recovery for FY 2001

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, which requires that the NRC recover approximately 98 percent of its budget authority in fiscal year (FY) 2001, less the amounts appropriated from the Nuclear Waste Fund (NWF) and the General Fund. The amount to be recovered for FY 2001 is approximately \$453.3 million.

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

ADDRESSES: The comments received and the agency work papers that support these final changes to 10 CFR Parts 170 and 171 are 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 Documents 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, or 301-415-4737, or by email to pdr@nrc.gov. Comments received may also be viewed via the NRC's interactive rulemaking website (<http://ruleforum.llnl.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.

For a period of 90 days after the effective date of this final rule, the work papers may also be examined at the NRC Public Document Room, Room O-1F22, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2736.
~~Carol Gallagher~~

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

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Responses to Comments
- II. Final Action

- 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

I. Background

For FYs 1991 through 2000, OBRA-90, as amended, required that the NRC recover approximately 100 percent of its budget authority, less the amount appropriated from the U.S. Department of Energy (DOE) administered Nuclear Waste Fund (NWF), by assessing fees. To address fairness and equity concerns raised by the NRC related to charging NRC license holders for agency expenses that do not provide a direct benefit to the licensee, the FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee recovery amount from 100 percent to 98 percent of the NRC's budget authority in FY 2001. The OBRA-90 amendment further decreases the fee recovery amount by an additional two percent per year beginning in FY 2002 until the fee recovery amount is 90 percent by FY 2005. In addition to the 2 percent reduction to the fee recovery amount, \$3.2 million has been appropriated from the General Fund for activities related to regulatory reviews and assistance provided to other Federal agencies and States. The FY 2001 Energy and Water Development Appropriations Act states that this \$3.2 million shall be excluded from license fee revenues. The total amount to be recovered for FY 2001 is approximately \$453.3 million.

less the sum appropriated from the NWF also to sum directly appropriated on the General Fund.

The NRC assesses two types of fees to meet the requirements of OBRA-90, as amended. 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 new licenses, the review of applications for renewal of existing licenses, and the review of requests for license amendments. Second, annual fees, established in 10 CFR Part 171 under the authority of OBRA-90, recover generic and other regulatory costs not otherwise recovered through 10 CFR Part 170 fees.

II. Responses to Comments

The NRC published a proposed rule that presented the amendments necessary to revise the licensing, inspection, and annual fees charged to its licensees and applicants for FY 2001 on March 28, 2001 (66 FR 16982). Although the comment period ended on April 27, 2001, the NRC evaluated the 13 comments which were received by the close of business on May 7, 2001. Many of the comments ^{raised similar issues} 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.

and the associated budgeted resources allocated to the various classes of licensees. The work papers show, by strategic arena, the allocation of budgeted costs for each planned accomplishment within each program of each strategic arena. In addition to the detailed budget information contained in the work papers, the NRC has made available in the Public Document Room NUREG-1100, Volume 16, "Budget Estimates and Performance Plan, Fiscal Year 2001 (February 2000)", which discusses the NRC's budget for FY 2001, including the activities to be performed in each strategic arena. The extensive information available to the public meets all legal requirements and the NRC believes it provides the public with sufficient information on which to base their comments on the proposed fee rule.

The NRC's budgets and the manner in which the NRC carries out its activities are outside the scope of this rulemaking. The purpose of this rulemaking is to establish the fees necessary to recover approximately 98 percent of the NRC's FY 2001 budget authority as required by OBRA-90, as amended. Therefore commenter's suggestions concerning public *efficiency in which NRC carries out its* comments on NRC's regulatory activities and fiscal responsibilities *are not* addressed in this final rule. *Cost NWT* ✓

C. Specific Part 170 Issues.

1. Hourly Rates.

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COMMENT. Some commenters opposed the \$144 proposed hourly rate for the materials program. Similar to comments from the uranium recovery industry on the issue in previous rulemakings, the commenters stated that the hourly rate is excessive, is more than the

Comment. Four comments were received opposing NRC's assessment of Part 170 fees to uranium recovery licensees to recover the costs for Project Managers (PM) assigned to their licenses. Commenters indicated that the PM charges have become an additional expense for the industry. These commenters raised several specific concerns with this fee recovery policy: the PM costs represent administrative charges that may or may not be directly related to the licensee's operations; the PM charges include generic efforts, such as rulemaking activities; licensees have no way to control these costs because the charges are allocated evenly among the licensees to which that PM is assigned; and the problem is exacerbated when a PM is assigned to only one, or in some cases only a few, licensee(s) who must pay all of the overhead costs associated with that PM. Several commenters supported the re-designation of PMs assigned to uranium recovery licenses as points of contact, particularly for those licensees who are not currently operating. One commenter stated that to the extent the NRC is required to recover these costs, it should do so through the annual fee to spread the costs more equitably across a range of licensees. One commenter asserts that the billing policy is an unjustified and *ultra vires* (beyond NRC's legitimate powers) implementation of its OBRA responsibilities, and that it cannot be defended, particularly as a shift of costs from Part 171 fees to Part 170 fees because there has not been a decrease in the Part 171 fees commensurate with the increase in Part 170 fees. Referring to an NRC guidance document for staff hour reporting and coding of activities for fee billable purposes, the same commenter charges that there is virtually no activity a PM performs that is excluded from fee recovery. The commenter claims that licensees are billed for generic efforts, despite statements to the contrary in the final FY 1999 fee rule, giving as an example "rulemaking oversight" which is assigned a code in RITS. The same commenter stated that nothing in the statements of consideration for the FY 1999 final rule, which provided

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Although on the surface it may appear to be more fair to recover the PM costs through annual fees, the end result would not necessarily be equitable to those licensees paying the annual fees. If, for example, the NRC were to discontinue assessing Part 170 fees to uranium recovery licensees for PM activities, and everything else remained the same, uranium recovery licensees subject to annual fees would pay more in total costs because those licensees in decommissioning would no longer pay for the PMs assigned to their site. Instead, the licensees authorized to operate or in a standby status would pay those PM costs through annual fees. To illustrate this point, the estimated average total PM Part 170 fees paid per year by uranium recovery licensees in decommissioning or possession only status is \$322,000. If the NRC eliminated PM activities from Part 170 fees for the uranium recovery class, the 11 licensees authorized to operate would be assessed an additional \$322,000 in annual fees.

The NRC finds no basis to change its policy of recovering the costs for PMs through Part 170 fees, to change the manner in which the costs are spread among those licensees assigned to one PM, or to change the policy with regard to assessing one licensee for all of the PM's activities when the PM is assigned to that one site only. The NRC believes this is a fair and equitable method of recovering these costs. However, the Office of Nuclear Materials-Safety and Safeguards has recently determined that PMs will no longer be required for certain uranium recovery licenses unless there is a major action ongoing with that license. While this revised policy may, at times, reduce the Part 170 fees for some individual licensees, the costs for these staff members previously recovered through Part 170 fees will, of necessity, be recovered through annual fees. The impact of this revised policy for assigning PMs on the FY 2001 annual fees for the uranium recovery class is minimal because it occurred late in the fiscal year.

which ones?

meet the criteria because, due to the passage of time, they may not be familiar with the intent of the fee waiver provisions.

As the statements of consideration for the 1994 fee rule clearly indicate, the fee waiver provisions of criterion 3 of Footnote 4 to §170.21 and criterion c of Footnote 5 to §170.31 apply to reports submitted for the purpose of supporting NRC's generic regulatory improvements, such as development of generic guidance and regulations and resolution of safety issues applicable to a class of licensees. The NRC has denied fee waiver requests for reports/requests that were not submitted for the purpose of NRC's regulatory improvements, such as those submitted for the purpose of ^{furthering} the industry's generic actions. Although the NRC may realize some benefits from the review and approval of reports/requests that are submitted for purposes other than NRC's generic regulatory improvements, the primary beneficiary of the review and approval of such reports is the organization that submitted the report. Assessing Part 170 fees for these special services rendered to identifiable recipients is consistent with the provisions of the IOAA. Contrary to one commenter's view, reports of this type do not represent NRC generic activities, and therefore the NRC is not shifting cost recovery for generic activities out of Part 171 to Part 170.

To assist licensees in determining in advance whether their submissions meet the criteria for the fee waiver, the NRC is, in this final rule, re-stating the original statements of consideration for the FY 1994 rule related to the fee waivers, and is adding clarifying language to the Footnotes that the reports/requests must be submitted for the purpose of NRC's regulatory improvements for the fee to be waived. This is not a change in policy, is consistent with how

\$350,000 and \$5,000,000 range; for example, a tier of \$350,000 to \$1,500,000 in gross annual receipts with an annual fee of \$1,000, and a tier of \$1,500,000 to \$5,000,000 with an annual fee of \$1,500.

Response. The Commission believes that the two tiers of reduced annual fees currently in place provide substantial fee relief for small entities, including those with relatively low annual gross receipts. Reductions in fees for small entities must be paid by other NRC licensees in order to meet the requirements of OBRA-90, as amended, to recover most of the NRC's budget through fees. While establishing more tiers would provide additional fee relief for some small entities, it would result in an increase in the small entity subsidy other licensees pay. The Commission believes that in order to maintain a reasonable balance between the objectives of OBRA-90 and the Regulatory Flexibility Act of 1980 (RFA) requirement that the NRC examine ways to minimize significant impacts its rules may have on a substantial number of small entities, no further reductions to the fees should be made.

The NRC established reduced annual fees for small entities based on the RFA requirement that if an agency cannot certify that a rule will not significantly impact a substantial number of small entities, then a regulatory flexibility analysis is required to examine the impacts on small entities and the alternatives to minimize these impacts. The NRC has performed a regulatory flexibility analysis as part of its fee rulemaking each year since annual fees were first established in FY 1991 under OBRA-90, based on the Commission's conclusion that the annual fees for materials licensees result in substantial fees being assessed to a significant number of small entities.

*Applicant applicants
want we are going to do
this year?*

The NRC is adopting the proposed change. However, in order to minimize the impact on NRC licensees and NRC staff resources, implementation of the revised policy of not mailing NRC Form 526 with each annual fee invoice will be phased in. ~~Because of the potential burdens to NRC licensees and the resulting impact on NRC staff resources to respond to inquiries and supply the forms on an individual basis, the NRC is not adopting the proposed policy of eliminating the form from the packet of information included with the materials licensees' annual fee invoices. The NRC will, however, continue to consider alternatives to minimize the number of improperly filed Forms. One alternative the NRC will evaluate, for example, is sending the forms only to those licensees who qualified as a small entity for the previous year. Any changes resulting from these efforts will be included in the FY 2002 fee rule.~~

Licensees who have questions about their status as a small entity or about the process for filing the NRC Form 526 should contact the NRC's license fee staff at 301-415-7554, or e-mail the fee staff at fees@nrc.gov.

3. Annual Fees For Uranium Recovery Licensees.

Comment. The NRC received 5 comments concerning the annual fees charged to NRC's uranium recovery class of licensees. While most of the commenters acknowledged the reduction in annual fees for the uranium recovery class compared to FY 2000, many stated that the reduction does not make up for an increase in total charges over the last two years and does not go far enough. Some commenters are concerned with what they believe is a lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory

Discussions between the industry and the NRC continue as of the date of this Federal Register notice, and the industry may file a rulemaking petition, or seek some other form of relief from fees. The NRC will consider fully and carefully, and with an open mind, any petition the industry may choose to file. For now, however, for the reasons given in the remainder of this response, the NRC will pursue its existing policies on the fees to be charged the uranium recovery industry.

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oversight program, and the benefit derived from that program. Several commenters indicate that sites that are on standby or awaiting approval of reclamation plans should not be subject to annual fees because they require minimal NRC oversight. Some commenters stated that the decision to cease operations, go into standby, or begin decommissioning ^{is} are rarely at the licensee's discretion, but rather ^{is} are based on the realities of the uranium market. Several commenters stated that the NRC must find an equitable way of dealing with the decreasing number of licensees in the uranium recovery area, which could result in the remaining few paying for the entire program. X ✓

Some commenters referred to the April 10, 2001, Commissioner's Briefing provided by the National Mining Association, where the status of the uranium recovery industry, the impacts of NRC's fees on the industry, and the potential for seeking fee relief were discussed. Several commenters supported an industry-wide effort to seek relief from NRC's fees through a petition for rulemaking or by pursuing legislative relief. Commenters claim that the fees NRC charges uranium recovery licensees threaten the viability of the industry, which is vital to the nation's long-term energy security. X ✓

Response. ^{INSERT} The NRC has responded to similar comments concerning the impact of its fees on the uranium recovery industry in several prior fee rulemakings. Most recently, the NRC responded to these concerns in the FY 2000 final rule (65 FR 36950, 36951; June 12, 2000). As explained there, the NRC recognizes that fees may result in a substantial financial hardship for the uranium recovery industry, particularly in light of the industry's economic status and the potential for a decreasing number of uranium recovery licensees. However, consistent with the

OBRA-90 requirement that the annual fees must, to the maximum extent practicable, have a reasonable relationship to the cost of providing regulatory services, the NRC's proposed annual fees for the uranium recovery class of licensees reflect the NRC's cost of its regulatory services to the class. The NRC determined the costs to be allocated to each class through an extensive review of each planned accomplishment in the major program areas.

As the NRC has stated since FY 1991, when the 100 percent fee recovery requirement was first implemented, the agency recognizes that assessing fees to recover these costs as required by OBRA-90 may result in adverse economic impacts on some licensees. However, a reduction in the fees assessed to one class of licensees would require a corresponding increase in the fees assessed to other classes. It is largely for this reason that the NRC ~~decided against~~ *has not before* ~~basing~~ the annual fees on licensees' economic status, market conditions, or the inability of licensees to pass through the costs to its customers. Instead, the NRC has only considered the impacts it is required by law to consider. *not base*

The NRC provides reduced annual fees for licensees who qualify as small entities under NRC's size standards, based on a determination under the provisions of the Regulatory Flexibility Act that annual fees have a significant economic impact on a substantial number of small entities. The reduction in annual fees for qualifying small entity uranium recovery licensees is significant. For example, for FY 2000, an in-situ mill licensee paid a reduced annual fee of \$400 based on their small entity status, a reduction of \$26,850. Because OBRA-90 requires that the NRC recover most of its budget through fees, costs not recovered from licensees based on their small entity status, or for any other reason, are allocated to other

the NRC's fee recovery requirement by 2 percent per year beginning in FY 2001, until the fee recovery amount is 90 percent by FY 2005. This results in a reduction of \$9.3 million in the total fees to be assessed to NRC licensees in FY 2001, a reduction which is shared by all licensees, including uranium recovery licensees.

The NRC has previously considered whether licensees in a standby status or awaiting approval of their reclamation plans should be granted a full or partial exemption from annual fees based on their non-operating status. For example, the NRC addressed this issue in response to comments on the FY 1991 rule (56 FR 31461; July 10, 1991), and further elaborated on it in 1995 in response to a petition for rulemaking from the American Mining Congress (now the National Mining Association) (60 FR 20918; April 28, 1995). The Commission ^{currently believes} ~~has concluded~~ that the current policy of assessing annual fees based on whether a licensee holds a valid NRC license that authorizes possession and use, whether or not the facility is actively operating or in a standby status, represents the fairest option available under current legislation. This policy is based on the basic premise that the benefit the NRC provides a licensee is the authority to use licensed material. Whether or not to exercise that authority is a business decision of the licensee. ✓

Based on the fee recovery requirements of OBRA-90, reducing the number of licensees paying annual fees by granting relief for licensees in a standby status would increase the annual fees assessed to the remaining licensees. Providing such fee relief would ~~only~~ ^{add} to the effects of decreasing numbers of licensees on annual fees, which continues to be of concern to commenters. Licensees in a standby status continue to receive benefit from NRC's generic ✓
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Comment. One fuel facility licensee referenced its March 13, 2001, request for a license amendment to delete certain commitments related to discontinued operations for purposes of downgrading the license. The commenter stated that as a result of their request, the fee rule should reflect the downgrade of the license from Category 1.A(1)(b) to Category 1.A.(2)(a) and the FY 2001 annual fee should be prorated accordingly.

Response. The NRC's Office of Nuclear Materials Safety and Safeguards (NMSS) has confirmed that the commenter's subject application will result in the removal of certain authorizations from the license. The matrix used for purposes of determining annual fees for the fuel facility class has been modified to reflect the licensee's reduced activities. However, the reduced licensed activities do not result in a decrease in the FY 2001 annual fee for this licensee. The resulting safety and safeguards effort factors, although lower than before, are not low enough to place the license in the next lower fee category. In the matrix for the proposed fee rule, which is available in the work papers supporting the proposed rule, the total safety and safeguards effort factors for individual licensees in category 1.A.(1)(b), the higher fee category, is 28, while the total for the individual licensee in category 1.A.(2)(b), the lower fee category, is 11. ^{between 11-27?} The licensee's reduced activities result in a total effort factor of 22, which does not place the license in the lower category. Accordingly, this final rule does not reflect a change of fee category for the commenter's license. However, as noted in the section III. Final Action, the matrix has also been changed to reflect decreased activities for another fuel facility, which results in that licensee moving from fee category 1.A.(2)(1) to fee category 1.A.(2)(b) and therefore paying a lower fee for FY 2001 than what was reflected in the proposed rule. As a result, the annual fee for each of the remaining fuel facility licensees has increased from the proposed rule.

Must be at least 27