5/14/01
Jim
DBD
(e-mailed to OBC)

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 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:

{NOTE TO THOSE REVIEWING THIS DRAFT: THE COMMENTS HAVE NOT YET BEEN PLACED IN THE APPROPRIATE ORDER FOR THE FINAL RULE, AND AT THAT TIME THE NUMBERING WILL ALSO CHANGE}

1. FEE EXEMPTION FOR EDUCATIONAL INSTITUTIONS (Comment #1)

Comment. One college holding an NRC materials license commented that the proposed fee rule would represent a major financial burden to the college, and they would have to consider terminating their license. The commenter requested that NRC provide a fee exemption for small colleges and universities.

Response. The NRC has not changed the existing fee exemptions for nonprofit educational institutions. The Part 170 and Part 171 fee exemptions for nonprofit educational institutions were not shown in the proposed rule for public comment because only sections of a regulation that are being considered for change in a proposed rulemaking are published in the Federal Register as part of the rulemaking process.

As provided in 10 CFR 170.11(a)(4) and 10 CFR 171.11(a)(1), fees are not required for a license applied for by, or issued to, a nonprofit educational institution. However, the fee exemptions do not apply to those licenses which authorize human use, remunerated services to other persons, distribution of byproduct, source, or special nuclear materials or products containing byproduct, source, or special nuclear material, or activities performed under a Government contract. Therefore, most colleges and universities will continue to be exempt from Part 170 and Part 170 fees.

2. SMALL ENTITY FEES (Comments #2, 4, and 5)

Comment. One commenter stated that the range of $350,000 to $5,000,000 in gross annual receipts for the two tiers of annual fees for small entities is too large. The commenter indicated that their firm is at the lower end of the range, paying the same annual fee as another entity with four to five times their gross revenue. The commenter suggested that to help reduce the license fee burden on smaller entities, the NRC establish additional tiers between the $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.

To minimize the impacts of the annual fees, the NRC has established a maximum annual fee for licensees who qualify as a small entity under NRC's size standards. In 1992, the NRC established a lower tier small entity fee to further reduce the impact of the annual fees for those licensees with relatively low gross annual receipts of less than $250,000 and for small governmental jurisdictions with a relatively low population of less than 20,000 (57 FR 13625; April 17, 1992). In establishing this lower tier, the NRC stated that the additional tier would substantially reduce the impact of the annual fees for those licensees with relatively low gross annual receipts, while at the same time it would not substantially increase the amount of fees that other licensees would be required to pay to subsidize the small entities.

In 1995, the NRC published a final rule amending its size standards (60 FR 18344; April 11, 1995). One aspect of the amendment was to add a size standard of 500 or fewer employees for business concerns that are manufacturing entities. In the final FY 1995 fee rule, the gross-receipts level for the lower-tier small entity fees was increased to the current level of $350,000, and a lower tier of less than 35 employees was established for manufacturing entities.

For FY 2000, approximately 35 percent of the small entities qualifying for reduced annual fees qualified for the lower tier small entity fee. The NRC believes that maintaining a single lower tier annual fee for small entities with relatively low gross annual receipts of less than $350,000, for small governmental jurisdictions with a population of less than 20,000, and for manufacturing entities that have an average of less than 35 employees continues to provide a further reduction to the impact of the annual fees to a significant number of small entities.

Comment. Two comments were received concerning NRC's proposal to discontinue mailing NRC Form 526, "Certification of Small Entity Status for the Purposes of Annual Fees Imposed Under 10 CFR Part 171," with each annual fee invoice. One of the commenters indicated that the proposal would result in a burden on the licensees because they would have to obtain the form by other means, and that many of the "mom and pop" operations may not have access to the Internet. This commenter believes that, because only a small percentage of the total number of small entity forms submitted are filed by licensees who do not qualify for small entity status, the proposal would unfairly penalize those who do qualify as a small entity. The commenter stated that because NRC requires the Form, the NRC is obligated to supply it by a means that is accessible to all licensees. The commenter suggested that instead of discontinuing mailing the form with the annual fee invoices, the Form be modified to make it clear who qualifies and who does not qualify as a small entity.

Both commenters stated that the proposal would result in an additional burden on NRC staff due to increased telephone calls requesting the Form and staff efforts to mail or fax the Form to those requesting it. One commenter believes that many licensees do not read the proposed and final fee rules, and therefore would not be aware of the revised policy. This would result in more calls to the NRC asking why the Form was not enclosed with the invoice.

Response. NRC Form 526 is one sheet, with the five NRC size standards for small entities printed on the front, and the instructions for completing the Form printed on the back. Both sides of the Form state, in capital letters and in large print, that the Form should not be completed if the licensee does not qualify under one of the size standards shown. In addition, the Certification block, which is to be signed by the owner of the small entity or an official empowered to act on behalf of that entity, states "I certify that the above named NRC licensee qualifies as a small entity under the size standards established by the NRC for its licensees in 10 CFR 2.810 (60 CFR 18344). The licensee qualifies as a small entity under the specific size standard indicated above." Thus, the NRC believes the Form and the accompanying instructions are clear that the Form should be completed only by those licensees that qualify as a small entity under NRC's size standards.

However, as indicated in the proposed rule, the NRC continues to receive Forms completed by licensees who do not qualify as a small entity. When contacted about improperly filed Forms, many of these licensees indicate they thought they had to complete the Form because it was enclosed with the annual fee invoice. It is for this reason that the NRC proposed to discontinue including NRC Form 526 with each annual fee invoice.

Licensees who file an improperly completed NRC Form 526 do so under penalty of perjury, and could become the subject of an NRC investigation. This could lead to fines, imprisonment, or both, and the revocation or suspension of the license. The NRC believes that there is merit to trying to minimize the number of improperly filed forms, the resulting risk to the licensees, and the associated NRC resources. The NRC acknowledges, however, that not mailing NRC Form 526 with each annual fee invoice may place additional burdens on those licensees who do qualify as a small entity, as well as the NRC staff.

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 POWER REACTORS IN DECOMMISSIONING. (Comment #3)

Comment. The NRC received one comment concerning the spent fuel storage/reactor decommissioning annual fee. The commenter stated that the proposed 32 percent annual fee increase for this class of licensees is not equitable and places an undue burden on the licensees in the class. Comparing the proposed increased annual fee for the spent fuel storage/reactor decommissioning class to the proposed decreased annual fee for operating reactors, the commenter contends that the increase is an undue burden because the decommissioning plants do not generate revenue through the sale of electricity and have no guarantee of recovering additional costs by petitioning local public utility commissions.

The commenter said that the additional costs would have to be assumed by existing plant decommissioning funds, which could affect the resources available for performing plant decommissioning in a timely manner. The commenter believes that at a minimum the fees should be only incrementally increased by approximately six percent per year, corresponding with the NRC phased budget reductions. The commenter believes that this suggested approach would be consistent with the intent of OBRA-90, as amended.

Response. The rebaselined annual fees for FY 2001 reflect the budgeted costs for each class of licensees. Although NRC recognizes that there may be adverse economic impacts on those classes of licensees with annual fee increases, the NRC cannot mitigate the adverse economic impacts by eliminating or reducing the fee increases for one class without increasing the fees, and thereby creating adverse economic impacts, for another class of licensees.

The 32 percent increase in annual fees for the spent fuel storage/reactor decommissioning class of licensees reflects an increase in budgeted costs allocated to this class since the last annual fee rebaselining in FY 1999. For example, compared to FY 1999, there were increases in budgeted costs allocated to the spent fuel storage/reactor decommissioning class for waste safety research, for spent fuel storage licensing and inspection activities, and for rulemaking. Recovering the costs associated with spent fuel storage and reactor decommissioning from operating power reactors, reactors in decommissioning if they have fuel on site, and those Part 72 spent fuel storage licensees who do not hold a Part 50 license is consistent with the intent of OBRA-90 that NRC's resources be allocated among

licensees or classes of licensees, so that the licensees who require the greatest expenditure of the NRC's resources will pay the greatest annual fee.

Because these costs are budgeted for activities related to the spent fuel storage/reactor decommissioning class, there is no basis to limit the fee increases that are necessary to recover the budgeted costs from the class.

In addition to reactor licensees in decommissioning, operating reactors and Part 72 licensees that do not hold a Part 50 license will also be assessed the increased FY 2001spent fuel storage/reactor decommissioning annual fee. The decrease in total FY 2001 annual fees for operating power reactors is due to reduced budgeted costs for the operating power reactor class compared to FY 1999.

4. INFORMATION PROVIDED IN THE PROPOSED RULE (Comment #11)

Comment. One commenter urged the NRC to provide licensees and the public with a more detailed explanation of the specific activities and associated costs that form the basis for the Part 171 annual fees, including detailed information on the outstanding major contracts, their purpose, and their costs. The commenter stated that to enable stakeholders to provide meaningful comment on the proposed rule, the NRC should provide sufficient detail on the costs associated with each component of reactor regulation and other generic costs. The commenter indicated that this more detailed information would allow licensees and the public to provide more effective feedback and comment on the efficiency of NRC's regulatory activities and would propel the Commission to exercise its authority to promote increased fiscal responsibility.

Response. The NRC believes that commenters were provided ample information on which to base constructive comments on NRC's proposed revisions to Parts 170 and 171. Consistent with the requirements of OBRA-90, the proposed fees were developed to recover approximately 98 percent of the NRC's FY 2001 from the various classes of licensees. In addition to the descriptions of the types of activities included in the proposed fees and explanations of how the fees were calculated to recover the budgeted costs for those activities, the proposed rule also announced that the work papers supporting the proposed rule were available for public examination. As the proposed rule stated, the work papers were available in the NRC's Agencywide Document Access and Management System (ADAMS) for public examination, and during the 30-day comment period the work papers were also available in the NRC Public Document Room at One White Flint North, 11555 Rockville Pike, Rockville, MD for the public's use. The work papers include extensive information detailing the activities 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 comments on NRC's regulatory activities and fiscal responsibilities are not addressed in this final rule.

5. NRC's BUDGET. (Comment #11)

Comment. One commenter offered several suggestions for reducing NRC's budget and for more efficient use of NRC resources. The commenter indicates that the proposed rule does not account for a reduced number of regional initiative inspections. The commenter suggested that further improvements in inspection and assessment efficiency could be realized by NRC's participation and oversight of licensee self-assessments, rather than NRC conducting independent inspections. The commenter also suggested that the NRC review the scope and content of inspection procedures to make them further risk-informed, that the NRC eliminate resources oriented to minimally safety-significant areas, and that the NRC consider consolidating the regional offices in the near-term and eliminating them in the longer term.

Response. As stated in the response to the preceding comment and in response to similar comments on previous fee rules, the NRC's budgets and the manner in which the NRC carries out its activities are not within the scope of this rulemaking. Therefore, this final rule does not address commenter's suggestions concerning NRC's budget and use of NRC resources. The NRC's budgets are submitted to the Office of Management and Budget and then to Congress for review and approval. The Congressionally-approved budget resulting from this process reflects the resources necessary for NRC to carry out its statutory obligations. In compliance with OBRA-90, the fees are established to recover the required percentage of the approved budget.

6. CLARIFICATION OF FEE WAIVER PROVISIONS IN $170.21, FOOTNOTE 4 AND $170.31, FOOTNOTE 5) (Comment #11)

Comment. Two comment were received on the NRC's clarification of the fee waivers provided in 10 CFR 170.21, Footnote 4, criterion 3, and 10 CFR 170.31, Footnote 5, criterion (c) for certain documents submitted to the NRC. One commenter expressed concern that the NRC is shifting cost recovery for generic activities from Part 171 to Part 170. Both commenters contend that the clarification will discourage generic actions and is inconsistent with the Commission's policies aimed at encouraging industry organizations to work cooperatively with the NRC and recognizing the efficiencies and effectiveness to be gained from these efforts. The commenters assert that the clarification represents a change in policy and will discourage industry initiatives, which serve to reduce NRC resource demands and expedite resolution of issues on a generic basis. One commenter further contends that the clarification is inconsistent with the NRC's strategic goal of making its activities and decisions more effective, efficient, and realistic, and recommends that NRC retain "the original interpretation" of the fee waiver.

Response. The NRC'S original interpretation of the subject fee waiver provisions has not changed, and has been consistently applied in granting or denying fee waiver requests. However, the NRC has experienced an increase in the number of fee waiver requests that do not meet the criteria. The NRC believes that this increase may be due, at least in part, to the fact that the statements of consideration in the FY 1994 fee rule concerning the waivers (59 FR 36895; July 20, 1994) were not repeated in subsequent fee rulemakings and are not codified in the regulations. Therefore, licensees may be submitting fee exemption requests that do not meet the criteria because, due to the passage of time, they may not be familiar with the intent of the fee waiver provisions.

The Footnotes currently state, in part, that fees will not be assessed for requests/reports submitted to the NRC ..."As a means of exchanging information between industry organizations and the NRC for the purpose (emphasis added) of supporting generic regulatory improvements or efforts." As the statements of consideration for the 1994 fee rule clearly indicate, the fee waiver applies 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 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 the waiver provisions have been applied by the NRC, and is not inconsistent with the NRC's strategic goals.

URANIUM RECOVERY ISSUES

7. ANNUAL FEES FOR URANIUM RECOVERY LICENSEES. (Comments 6, 7, 9, 10, 11)

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 oversight program, and the benefit derived from that program. Several commenters indicate

that sites that are on standby or awaiting approval of reclamation plants 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 are rarely at the licensee's discretion, but rather 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.

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.

Response. 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 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.

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 licensees. The subsidy for small entities is recovered through the surcharge, with reactors paying about 80 percent of the total surcharge costs.

A decrease in the number of licensees does not necessarily reduce the need for NRC's generic efforts and other activities recovered through Part 171 annual fees. For example, the number of licensees does not affect the NRC's costs to establish a risk-informed, performance-based regulatory framework or to maintain the Emergency Response Center. However, the NRC budget process provides an on-going mechanism for assuring that its programs are carried out in the most efficient and effective manner. In FY 1999, budgeted costs of $5.8 million was allocated to the uranium recovery, including $0.7 million in surcharge costs. In FY 2001, $4.3 million was allocated to the uranium recovery class, including $0.4 million in surcharge costs. Thus, the budgeted costs for this class, including the allocated surcharge costs, have been reduced by 25 percent since the last rebaselining in FY 1999. After subtracting the estimated Part 170 collections and other adjustments, the costs remaining to be recovered through annual fees assessed to the class for FY 2001 is $1.5 million, compared to $2.1 million for FY 1999, a reduction of approximately 29 percent as reflected in the reducted annual fees to be assessed uranium recovery licensees for FY 2001.

The NRC has no choice but to assess annual fees to NRC licensees to recover the budgeted costs not recovered through Part 170 fees and other receipts. However, as stated in the proposed rule, to address fairness and equity concerns raised by the NRC related to assessing fees to NRC licensees to recover costs for activities that do not directly benefit them, the FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to reduce 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 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 guidance and rules applicable to the uranium recovery class of licensees and therefore should continue to pay annual fees..

Although the comments indicate that annual fees are assessed to certain licensees because of a failure on NRC's part to approve their reclamation plans, this is not the case. The NRC waives the annual fee for those licensees who have relinquished their authority to operate and have permanently ceased operations, as long as the notifications of such actions are filed by the dates provided in the fee regulations. The reclamation plans do not have to be approved by the NRC for the fee waiver to apply.

8. INVOICE INFORMATION (Comments No. 6, 7. 9, 10. 11)

Comment. Several commenters assert that NRC's invoices lack adequate explanations of the work done and the dates the work was performed. These commenters urged the NRC to continue its efforts to provide invoices that contain more detailed information on the specific costs. While recognizing that this would require major revisions to NRC's billing system, commenters contend that the change would serve the NRC, its licensees, and the public well.

Response. As the NRC has stated in response to similar comments on previous rules, the NRC believes that sufficient information is provided on the invoices for licensees and applicants to base payment of the costs assessed under Part 170. For NRC staff effort, specific policies and procedures are in place for NRC staff to follow in recording time in the NRC's Regulatory Information Tracking System (RITS), which is the NRC's current system for tracking staff hours expended. The system contains specific codes for the various types of licensing reviews, leave, training, general administration effort, etc. From RITS, the fee billing system captures the staff hours for activities billable under Part 170 as well as the work effort code descriptions for those billable hours. For these activities, the staff hours, work effort codes, the name of the staff member performing the work, and the date the work was completed, if applicable, are printed on the Part 170 invoices. Currently, the work effort codes are the only available data describing the work performed, and they are the lowest level of detail available in RITS. However, the NRC believes that the summary work descriptions shown on the invoices are sufficient to allow licensees to identify the subject of the NRC's efforts. Additionally, the inspection report number is provided on inspection fee bills. Further, as the NRC has stated in previous rules, any applicant or licensee who does not understand the charges or needs more information in order to understand the bill may request additional details from the NRC. All available information in support of the bill will be provided. This has always been an option available to licensees and applicants who feel they need more information on the costs billed.

For contractor costs billed to uranium recovery licensees under Part 170, the NRC includes copies of the contractors' summary cost reports with the invoices. Again, any additional information that is available is provided upon a specific request of the applicant or licensee. However, as the NRC has explained in the past, the NRC does not plan to develop additional systems solely to provide additional information on its fee invoices. The Office of Management and Budget Circular A-25, which provides guidelines for Federal agencies to assess fees for Government services, provides that new cost accounting systems do not need to be established solely for the purpose of determining or estimating full cost.

9. PROJECT MANAGER BILLING

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 acitivites; 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 a few, or in some cases only one, licensees 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 activities 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 examples of PM activities that would be included in Part 170 fees, indicated that licensees would be charged for PM activities for work on the NRC's accounting system or work for another branch/office.

Response. The NRC's assesses Part 170 fees for PM activities under the authority of the IOAA. In the FY 1999 fee rule the NRC stated that expanding the scope of Part 170 to include, for example, full cost recovery for PMs, is consistent with Title V of the IOAA, interpretations of that legislation by the Federal courts, and Commission guidance. These guidelines provide that Part 170 fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. Because PM activities are services which the NRC provides to specific, identifiable recipients, it is more appropriate that the costs be recovered through Part 170 fees assessed to the recipient of that service than through annual fees assessed to the licensees in the class subject to annual fees.

Contrary to the commenter's claim, generic activities conducted by PMs are not recovered through Part 170 fees. Generic activities as those NRC activities that broadly benefit classes or subclasses of licensees. Examples of generic activities, as stated in the FY 1999 final rule and reiterated in the FY 2000 final rule (l64 FR 31451; June 10, 1999, and 65 FR 36947; June 12, 2000, respectively), include rulemaking and development of generic guidance documents. General activities such as training, general correspondence, attending staff meetings, coordination with and support to other offices, and processing documents into the Agencywide Document Access and Management System (ADAMS) are not generic activities. In responding to uranium recovery industry comments in the FY 2000 final rule, the NRC listed these examples of the types of PM activities that are recovered through PM Part 170 fees. The

examples provided by the NRC in the FY 1999 and FY 2000 fee rules of PM activities to be billed under Part 170 and those excluded from Part 170 billing were not intended to be complete lists. For example, in addition to the listed activities excluded from Part 170 PM fees, the NRC also excludes from Part 170 fees for PM activities related to activities for which Part 170 are otherwise not assessed, such as contested hearings, responses to petitions, and responding to allegations. y the PM assigned to their site that PM fees for PM activities .

The PM activities charged under Part 170 are general activities and activities specifically related to the site, such as licensing reviews. The general activities billed under Part 170, do, as the commenter indicated, include time that a PM spends in reporting to the NRC's accounting system. General activities are part of the costs to the agency of providing the PM services, and the NRC continues to believe that the costs are most appropriately recovered from the licensees benefitting from the PM services.

The concept that the assessment of Part 170 fees for PM activities increases the costs to the uranium recovery class is incorrect. PM charges might results in an increase for a particular licensee at a particular point in time; however, billing for PM time under Pat 170 does not cause an increase, or a decrease, in the total fees assessed to the class. Based on the OBRA-90 fee recovery requirements, all budgeted costs allocated to a class that are not recovered through Part 170 fees paid by the class are recovered through annual fees assessed to those licensees in the class subject to the annual fees. Thus, all budgeted costs allocated to a class are paid by the class, either through Part 170 fees or Part 171 fees.

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 PM Part 170 fees paid 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 addition $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 licensees 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.

10. HOURLY RATES

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 professional hourly rates charged by national consulting firms, and should be substantially reduced.

RESPONSE. The NRC's hourly rates are based on budgeted costs and must be established at the revised levels to meet the fee recovery requirements. The professional FTE rates include not only average salaries and benefits for professional employees, but also a prorated share of overhead costs, such as supervisory and secretarial support, and informational technology overhead costs, as well as general and administrative costs, such as rent, heat, supplies, and payroll and human resources staffs.

The proposed hourly rate of $144 for the materials program is a very slight increase over the $143 hourly rate for FY 2000. As stated in the proposed rule, the increase is primarily due to Government-wide pay increase in FY 2001. The revised hourly rates, coupled with the direct contract costs, recover through Part 170 fees the full cost to the NRC of providing special services to specifically identifiable beneficiaries as provided by the IOAA, and the revised hourly rates plus direct contract costs recover through Part 171 annual fees the required amount of NRC's budgeted costs for activities not recovered through Part 170 fees, as required by OBRA-90, as amended. The NRC is establishing in this final rule the revised hourly rates necessary to accomplish the fee recovery requirements. The professional hourly rate for the reactor program is $150, and the professional hourly rate for the materials program is $144. For Part 170 activities, the rates will be assessed for professional staff time expended on or after the effective date of this final rule.

11. QUARTERLY BILLING SCHEDULE FOR CLASS I AND CLASS II LICENSE

Comment. Two commenters supported the NRC's proposal to establish a quarterly annual fee billing schedule for Class I and Class II uranium recovery licensees, regardless of the annual fee amounts.

Response. The NRC is modifying s171.19 in this final rule to establish a quarterly annual fee billing schedule for uranium mill licensees (Class I) and solution mining licensees (Class II). Because the annual fees for these licensees have been close to the $100,000 threshold for quarterly billing, slight changes in the annual fees have resultedt in frequent changes in their billing schedules. This change will provide these licensee with a consistent, predictable schedule for paying their annual fees.

12. ANNUAL FEES FOR FUEL FACILITIES (COMMENT #13)

Comment. One fuel facilities licensee referenced their pending license amendment request to delete certain commitments related to discontinued operations for purposes of downgrading the license to a lower fee category.

Response. **TBD. WE ARE WORKING WITH NMSS ON THIS ISSUE**