

9



DOCKETED
USNRC

National Mining Association

April 29, 2002 (8:55AM))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Katie Sweeney
Associate General Counsel
Legal & Regulatory Affairs

DOCKET NUMBER
PROPOSED RULE PR 170+171
(67FR 14818)

April 26, 2002

Secretary
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: Proposed Revision of Fee Schedules -- FY 2002

Dear Sir:

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) proposed revisions to the licensing, inspection and Annual Fees for Fiscal Year (FY) 2002. 67 Fed. Reg. 14818 (March 27, 2002). NMA notes several positive changes that will contribute to lower Annual Fees, and potentially lower the fee burden from less hourly fee charges, for uranium recovery licensees for FY 2002. Yet, as discussed below, NMA continues to have concerns about the underpinnings of the fee structure, in particular, the serious inequities caused by the Omnibus Budget Reconciliation Act of 1990 (OBRA) mandate that NRC recover nearly 100 percent of its budget each year.

NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. These comments are submitted by NMA on behalf of its member companies who are NRC licensees and who are adversely affected by the NRC fee regulations. These members include the owners and operators of uranium mills and mill tailings sites and in situ uranium production facilities.

NMA Petition for Rulemaking on Fees

Seven months ago NMA petitioned NRC to conduct a rulemaking to establish the basis and timeframe for waiving the assessment of all annual and periodic inspection and licensing fees of NRC uranium recovery licensees or, in the alternative, to establish the basis for waiving fees associated with a 10 CFR Part 41 rulemaking proceeding. In that petition, NMA submitted that maintenance of a viable domestic UR industry, including specifically maintenance of its substantial waste disposal capacity, as an important component of a viable domestic nuclear fuel cycle is demonstrably "in the public interest" of the United States of America.¹ In light of the

¹ In a letter to Kennecott Uranium Company approving a postponement of the requirements of timeliness in decommissioning for the Sweetwater Uranium Project dated July

current circumstances facing the uranium recovery industry, temporary fee relief is necessary to ensure the continuation of a domestic uranium industry. These comments will not repeat the arguments made in the NMA fee petition that show the relief requested is in the public interest but as NRC has noted, the NMA fee petition and the proposed rule are intertwined.

NMA fully supports NRC's efforts to obtain comments on NMA's petition for rulemaking, as such comments are necessary for NRC to make an informed decision. Yet, NMA questions the necessity of NRC requesting additional comments on the petition in the proposed FY 2002 fee rule given that NRC "not only published the petition in the Federal Register for comment (66 FR 55604; November 2, 2001), but also mailed the Federal Register document noticing the petition and inviting public comment to each of the NRC's more than 5,000 licensees." Thus, adequate opportunity was provided for comments on NMA's petition. Since review of the comments received expired on January 16, 2002 is already in progress, NMA hopes that the request for additional comment does not, in addition to taxing NRC's resources, slow down the process to the point that a decision cannot be made in time for publication of the final FY 2002 fee rule.

Annual Fees

If the Commission rejects NMA's petition for rulemaking, under the proposal, the new Annual Fee for uranium recovery licensees would decrease: the Class I fee would decrease from \$94,300 in FY 2001 to \$77,700 and the Class II fee would decrease from \$79,000 in FY 2001 to \$65,100. The decrease in Annual Fees is a result of NRC's proposal to revise its methodology for allocating uranium recovery budgeted costs. For the first time, NRC is proposing to assess the Department of Energy one-half of all NRC budgeted costs attributed to generic/other activities for the uranium recovery program. NMA strongly supports NRC's efforts to make the system more equitable by assessing all parties that benefit from the uranium recovery program and agrees wholeheartedly that "DOE stands to gain from NRC's generic regulatory efforts because DOE eventually will also accept the Title II specifically licensed sites under a general license from the NRC for long term surveillance and care."

NMA still has concerns about the Annual Fee, mainly, that there continues to be the lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory oversight program and the benefit derived from such services. As NMA has commented in the past, it is a fundamental principle of law that there must be a reasonable relationship between the cost to licensees of a regulatory program and the benefit derived from regulatory services.²

17, 2001, the Commission stated, "...The continued existence of the mill is in the public interest..." and "...Maintaining the domestic capacity to provide the raw materials for nuclear power is in the public interest".

² NRC's authority to prescribe fees for "regulatory services" under 10 CFR 170 is based on the Independent Offices Appropriation Act of 1952 (IOAA), 31 USC 9701. To be valid under the IOAA, a fee must "be reasonably related to, and may not exceed the value of the service to the recipient, whatever the agency's costs may be." Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985).

NMA acknowledges that the passage of the NRC Fairness in Funding Act, which could not have been accomplished without strong NRC support, addresses some of NMA's fairness and equity concerns regarding charging licensees for activities that provide licensees no direct benefit. That act amends OBRA by reducing the amount of NRC's budget that NRC must recover from its licensees. OBRA originally mandated that NRC recover approximately 100 percent of its budget authority each fiscal year. This year, NRC is required to recover approximately 96 percent of its budget. The OBRA amendment further decreases the fee recovery amount by an additional two percent per year until the fee recovery amount is 90 percent by FY 2005. While this Act alleviates some of NMA's equity concerns, it will not guarantee a reasonable relationship between costs and benefits.

Too heavy a continues to fall on uranium recovery facilities, particularly those sites awaiting NRC approval of Reclamation Plans or those on "standby." Given the complex regulatory scheme and numerous license conditions imposed on these sites, it is rarely a matter of licensee discretion when to operate or finalize closure of a site. Indeed, the realities of the uranium market are a large determinant in whether a licensee ceases operations, goes on standby or begins decommissioning. Sites that are on standby or awaiting approval of Reclamation Plans require minimal oversight yet must continue to pay an Annual Fee that is clearly not commensurate with the benefit of holding the license.

This problem of the lack of reasonable relationship between Annual Fees and services rendered by NRC is exacerbated as more states become Agreement States and more sites are decommissioned, leaving fewer NRC licensees to bear an even greater share of the burden. NRC needs to determine an equitable way of dealing with the scenario that could result in the last licensee having to pay for the entire program. NRC appears to have no plan to deal with this situation despite the NRC Office of Inspector General's identification of this issue as a problem in its briefing to the Commission on its 1993 Fee Audit:

It is our understanding that no long-range plan has been prepared by NRC to address these potential effects. The Commission may be interested in determining the economic implications of future higher license fees and a declining number of licensees

Transcript of December 10, 1993, Briefing by IG on Fee Audit.

NRC must determine an equitable way of dealing with this scenario that is already playing out in the uranium recovery area. For example, there are only three conventional mills remaining as NRC licensees and the number of in-situ leach facilities continue to decrease.

Hourly Fees

If the Commission rejects NMA's petition for rulemaking, under the proposal, the new hourly rate applicable to the uranium recovery category of licensees would increase significantly from \$144 in FY 2001 to \$152. While NMA believes an hourly rate of \$152 is excessive, NMA strongly supports NRC's proposal to address NMA's concerns about full cost recovery for

project managers' time. Under the new policy announced in the proposed rule, if project management duties to support a licensee/facility do not exceed 75 percent of the assigned person's time in any given two week period, then the staff member will be considered a Point of Contact. As a result, that person's time which is not specifically associated with a licensing action or inspection is now recovered through Annual Fees, a more equitable result since it allows such costs to be spread across a range of licensees. The revised policy has resulted in classifying approximately four staff members as project managers at this time, compared to approximately 97 in FY 2000.

NMA requests that NRC continue its efforts to provide invoices that contain more meaningful descriptions of the work done by NRC staff and NRC Contractors. With hourly rates as high as \$152, NRC should be held to at least the same standard of accountability to its licensees as the private sector is to its clients. In the private sector, adequate explanations and dates are provided to clients in order for clients to fully understand what was done and when it was done. This type of billing system allows costs to be specifically identified. NMA recognizes that implementing such a system would require major revisions to NRC's entire computer billing program, but it is a change that would serve well NRC, its licensees and the public. NRC will not accept licensee inconvenience as an excuse for failure to properly fulfill its license responsibilities so inconvenience provides NRC with no excuse either.

Fee Waiver Provisions

The proposed rule revises the criteria for fee waivers and relocates the fee waiver information to a new exemption section at 10 CFR 170.11(a)(1). These provisions should be revised to encourage industry to work cooperatively with the NRC on generic regulatory improvements or efforts.

Licensees often undertake pioneering or "ground breaking" licensing actions. The associated NRC review fees for such first-of-a-kind licensing actions are often substantial. The result of such pioneering actions, however, is an assessment that which may contribute to generic regulatory activities and which may serve as precedence for other licensees. It is through such efforts that many safety improvements, burden reductions, improved regulatory processes, and public confidence enhancements result. Such "ground-breaking" actions by licensees should be encouraged and supported by the NRC. The proposed rule does just the opposite. The restrictive application of the "primary beneficiary" criterion as proposed will have unintended consequences. There will be a chilling effect on licensees that would otherwise have volunteered to pilot significant regulatory initiatives that have safety benefits and burden reduction benefits.

We echo the Nuclear Energy Institute's recommendation that the proposed sections (A), (B), (C), and (D) of 10 CFR 170.11(a)(1)(iii) be deleted and that the following new paragraph be added:

(iv) To request action for a specific licensee(s), but which also has the potential to result final regulatory decisions or final products which could provide a useful precedent to additional licensees or which could contribute to the development of generic regulatory improvements.

Conclusion

NMA supports the positive changes that will contribute to lower Annual Fees, and potentially lower the fee burden from less hourly fee charges, for uranium recovery licensees for FY 2002. If the Commission rejects NMA's petition for rulemaking, NRC must continue to find ways to reduce fees for uranium recovery licensees. NMA encourages NRC to minimize dual jurisdiction issues and associated costs to licensees such as NRC should rely more heavily on the existing state regulations specific to ISL mining. NMA appreciates the opportunity to provide comments on the proposed FY 2002 fee rule. If you have any questions or if we can be of assistance, please contact me at 202/463-2627.

Sincerely,

A handwritten signature in cursive script that reads "Katie Sweeney". The signature is written in black ink and is positioned to the right of the typed name.

Katie Sweeney