



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

June 12, 2002

MEMORANDUM TO: Diane B. Dandois, Chief  
License Fee and Accounts Receivable Branch  
Division of Accounting and Finance  
Office of the Chief Financial Officer

FROM: Michael T. Lesar, Chief *Algonia Shepard/for*  
Rules and Directives Branch  
Division of Administrative Services  
Office of Administration

SUBJECT: OFFICE CONCURRENCE ON THE FINAL NOTICE OF RULEMAKING --  
10 CFR PARTS 170 AND 171 -- FEE RECOVERY FOR FY 2002

The Office of Administration concurs, subject to the comments provided, on the final rule that would establish the licensing, inspection, and annual fees necessary to recover approximately 96 percent of the NRC's operating budget for FY 2002. We have attached a marked copy of the package that presents additional comments.

If you have any questions concerning this matter, please have a member of your staff contact me at 415-7163 (MTL) or Cindy Bladey, ADM, at 415-6026 (CXB6).

Attachment: As stated

6/12/02  
ADM changes

[7590-01-P]

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 170 and 171**

**RIN: 3150-AG95**

**Revision of Fee Schedules; Fee Recovery for FY 2002**

**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 96 percent of its budget authority in fiscal year (FY) 2002, less the amounts appropriated from the Nuclear Waste Fund (NWF) and the General Fund. The amount to be recovered for FY 2002 is approximately \$479.5 million.

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

\$36.0 million shall be excluded from license fee revenues. The total amount to be recovered in fees and other offsetting receipts for FY 2002 is approximately \$479.5 million.

The NRC assesses two types of fees to meet the requirements of OBRA-90, as amended. First, license and inspection fees, established in 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, and for certain types of existing licenses, the review of renewal applications, the review of amendment requests, and inspections. 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. Response to Comments

The NRC published the FY 2002 proposed fee rule on March 27, 2002 (67 FR 14818), to solicit public comment on its proposed revisions to 10 CFR Parts 170 and 171. The NRC received 11 comments before the comment period ended on April 26, 2002, and three additional comments by May 24, 2002, for a total of 14 comments that were considered in this fee rulemaking. Many of the commenters raised similar issues. As such, these comments have been grouped according to similar issues, and are addressed in a collective response.

The comments and NRC's responses are as follows:

services provided to identifiable recipients. These are subject to IOAA fees, under applicable caselaw. See, e.g., Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission, 601 F. 2d 233 (C.A. 5, 1979), cert. den. 444 U.S. 1102 (1980). Further, the "primary beneficiary" concept is solidly rooted in pertinent caselaw, which authorizes the assessment of fees for specific services/benefits against identifiable beneficiaries, even if the service confers a benefit beyond that, i.e., upon the general public as well. Engine Mfrs. Ass'n v. E.P.A., 20 F. 3d 1177 (C.A.D.C. 1994).

To say that the CFO's rejection of the submitter's stated purpose and the related fee waiver request "makes it difficult for the staff to make an informed decision as to the intended use of the submittal" reverses the proper order of things. The staff must provide technical advice and recommendations to assist the CFO in making the appropriate determination of fee waiver entitlement. The submittal, and thus, potential for fee waiver, is to be weighed on the merits <sup>of</sup> and ~~of~~ how it relates to the NRC's regulatory initiatives, from which fee considerations flow, not the other way around. Moreover, while the program staff certainly should be able to communicate freely with the submitter on the technical merits of the submittal, it is appropriate for the program staff to be reluctant to discuss fee matters with the submitter because that is not the program staff's area of expertise. Fee issues and discussions are the responsibility of the CFO's staff; and therefore, to avoid confusion and misunderstanding, fee matters should be discussed with the CFO's staff instead of the program staff. On the other hand, the submitter is encouraged to have discussions with the technical staff as to those submissions that support the NRC's generic regulatory improvements or efforts. Submitters have a legitimate interest in advance information about the fee implications that will attend a submission, and interactions with both technical and CFO staff on relevant matters are fully appropriate.

The NRC has consistently declined to base its fees on the financial status of NRC licensees and applicants, except the impacts of the fees on small entities the NRC is required to consider under the provisions of the Regulatory Flexibility Act. Therefore, the NRC does not base fee waivers on the budgetary constraints of those requesting NRC services. Further, the determination of whether a fee waiver should be granted is independent of whether there is willingness <sup>by</sup> of the organization's members to pay the costs through part 171 fees. If the organization's members are willing to pay the costs of NRC's fees, the organization can seek reimbursement from its members. The IOAA prescribes the standards for charging fees to identifiable recipients for services or things of value, and there is nothing in the statute that authorizes fee-shifting through consensus.

For this reason, it is also unpersuasive to argue that the NRC should liberally grant part 170 fee waivers based on "revenue neutrality." Under that theory, the NRC need never charge part 170 fees, because whatever is not recouped there will be recovered through part 171 fees. Although the budgeted costs still would be recovered regardless of how the charges are assessed, that is not the standard for fee assessment under the IOAA, nor should it be for purposes of granting or denying fee waiver requests.

Moreover the NRC's fee schedule is not an incentive program. Fees are established in accordance with applicable legal requirements and not meant to be either inducements or disincentives. Rather, they are established to recover the NRC's costs, as required by law. Further, the assessment of part 170 fees for special projects is fully consistent with the NRC's policies on industry initiatives. In SECY 97-303, "The Role of Industry (DSI-13) and Use of Industry Initiatives," the staff stated that fees will be assessed unless the fee waiver criteria is

1. Mixed Oxide Fuel (MOX) Contested Hearing Costs

*Comment.* One nuclear industry group commented that the NRC's proposal to assess MOX contested hearing costs to the fuel facility class is unfair, and that it is a violation of OBRA-90 to charge licensees for an agency activity or program from which the licensees receive no benefit. In this case, the commenter asserts that fuel facility licensees should not be responsible for bearing the costs of hearings associated with MOX fabrication because this process has no relation to the NRC's regulatory services from which fuel facility licensees obtain a benefit. Specifically, the MOX program is a Federal government initiative to ensure national security through the disposition of plutonium stockpiles. The commenter further adds that the beneficiaries of the MOX program are the Federal government and the nation's citizenry because it will aid in the reduction of weapons-grade plutonium. As such, the commenter contends that commercial fuel facility licensees should not have to subsidize the Federal government's efforts to ensure national security, and that such costs should be appropriated through the General Fund and removed from the NRC fee base. The commenter also states that NRC distributes hearing costs for license applications among the affected class of licensees, and to the extent that they benefit the entire class, this approach is logical. However, the commenter further indicates that hearing costs related to the disposition of plutonium under the MOX program do not meet the threshold of benefitting other licensees in the class, and therefore should not be assessed as such. The commenter <sup>raises</sup> ~~make~~ a final <sup>concern</sup> ~~point~~ about the NRC's fee allocation methodology for hearing costs <sup>being problematic in the</sup> ~~that~~ when applied to certain types of licensees whose numbers are few, this <sup>methodology</sup> could conceivably lead to a competitor having to bear the hearing costs of its competition during NRC licensing proceedings.

*Response.* OBRA-90 mandates that the NRC collect IOAA (part 170) and annual fees (part 171) to recover almost all of its budgeted costs, less the amounts appropriated from the NWF. Therefore, the NRC must recover hearing costs through part 170 fees for services or through part 171 annual fees. OBRA-90 also requires that, to the maximum extent practicable, the annual charges shall have a reasonable relationship to the cost of providing regulatory services. The NRC has a longstanding policy of charging the affected applicant or licensee part 170 fees for uncontested hearings (i.e., those required as part of the licensing process), and not charging part 170 fees for contested hearings. As a result, the costs for contested hearings are recovered through part 171 annual fees assessed to the affected class of licensee. This policy has been reconfirmed in the statement of considerations and in responses to comments received from the public during many past fee rulemakings, in court pleadings, and in an NRC report to Congress on fees. Commenters have consistently supported the policy of not assessing part 170 fees for contested hearings and instead recovering these costs through part 171 annual fees. However, as a special exception to the cost-recovery policy for hearings, the Commission has decided that the cost of contested hearings involving Commission-specified national security related proceedings is more appropriately recovered through part 170 fees assessed to the affected applicant or licensee. Therefore, the NRC will <sup>publish in the</sup> issue a proposed rule for public comment that would implement this policy in a subsequent Federal Register. The NRC plans to conduct the rulemaking so that the proposed change, if adopted in a final rule, would be effective for FY 2003.

<sup>As to the</sup> ~~With regard to the commenters' recommendation for the NRC to obtain separate~~ <sup>that</sup> appropriations from the General Fund to cover the MOX contested hearing costs, <sup>but getting approval</sup> this is not practicable for FY 2002. The Congress has already passed the FY 2002 Appropriations Act,

and the NRC is well into implementing its budget under this authority. Furthermore, the commenter is incorrect about how NRC hearing fees are assessed to licensees. As discussed above, the NRC assesses the specific applicant or licensee part 170 fees for the costs of uncontested hearings that are part of the required license application process. However, for contested hearings, the NRC assesses the affected class of licensees the associated costs of the hearing through part 171 annual fees. Similarly, the commenter's point about one licensee conceivably subsidizing the costs of a competitor's licensing hearing is incorrect for the aforementioned reason. Costs associated with a contested hearing are not assessed to a specific category of licensee as mentioned by the commenter, but instead are assessed to the entire affected class of licensees.

In the case of the MOX contested hearing costs for FY 2002, the NRC agrees that the fuel facility licensees should not be required to bear the entire expense burden for this Commission-specified national security related proceeding. Specifically, the MOX program is a Federal government directed national security initiative involving the disposition of plutonium stockpiles. Notwithstanding, the rulemaking to recover the MOX and other Commission-specified national security contested hearing costs through part 170 fees will not be effective before FY 2003. Therefore, the Commission is making an interim change for this fiscal year only, to recover the \$433,000 budgeted in FY 2002 for MOX contested hearing activities through part 171 annual fees assessed to all classes of licensees, based on their respective percentages of the NRC's budget. The final FY 2002 annual fees have been adjusted to reflect this change. As a result, the annual fees for the fuel facility class have decreased from the proposed rule, and the annual fees have increased for the operating power reactor, non-power reactor, uranium recovery, and



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As stated in §2.810, NRC size standards, the NRC uses the Small Business Administration's (SBA) definition of receipts. Based on the SBA definition, revenue from all sources, not solely receipts from NRC licensed activities, <sup>is</sup> are considered in determining whether a licensee qualifies as a small entity under the NRC's revenue-based size standards.

The NRC 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 revenues. As noted previously, reductions in fees for small entities must be paid by other NRC licensees in order to comply with the OBRA-90 requirement to recover most of the agency's budget authority through fees. While establishing additional tiers would provide further fee relief to some small entities, it would result in an increase of the small entity subsidy paid by other licensees. The NRC must maintain a reasonable balance between the provisions of OBRA-90 and the RFA requirement for the agency to examine ways to minimize significant impacts that its rules may have on a substantial number of small entities. Therefore, the NRC is not providing any modification to its small entity fee structure, nor any further reduction in annual fees beyond that already provided for small entities.

### 3. Annual Fees for Uranium Recovery Licensees

*Comment.* Two uranium recovery industry groups and one licensee commented on the FY 2002 proposed fee rule. All unanimously supported the NRC's revised methodology for allocating uranium recovery budgeted costs, which results in reduced annual fees for the commercial uranium recovery licensees. However, despite the proposed reductions, these

realm of NRC jurisdiction. Additionally, licensees in a standby status continue to benefit from NRC's generic guidance and rules applicable to the uranium recovery class of licensees, and therefore should continue to pay annual fees. Furthermore, based on fee recovery requirements of OBRA-90, reducing the number of licensees paying annual fees by granting relief for licensees in a standby status would ultimately increase the annual fees assessed to the remaining licensees. In effect, providing such fee relief would exacerbate the existing condition of decreasing numbers of licensees, which is an ongoing concern of the commenters.

In this rulemaking, the Commission has adopted the proposed revised methodology for allocating uranium recovery budgeted costs. Moreover, the FY 2002 annual fees reflect the Office of Nuclear Material Safety and Safeguard's revised policy for assigning PMs. As explained <sup>previously,</sup> ~~in the response to comment in section C.1 above,~~ <sup>part 171</sup> ~~the final~~ annual fees ~~this year~~ for the uranium recovery class includes a prorated share of the FY 2002 budgeted costs for the MOX contested hearing.

#### 4. Annual Fees for Power Reactor Licensees

*Comment.* Three commenters addressed the proposed annual fees for the power reactor class. Two of these commenters agreed with the NRC's policy, clarified in the proposed fee rule, of charging annual fees on a per license basis, and not on a reactor-unit basis. However, according to one of the commenters on this issue, this approach would not be equitable if the NRC assesses two separate annual fees to a dual unit standard reactor facility, such as those certified under part 52, Appendix C, if the sum of these fees exceeded the annual fee charged to multi-unit reactor modular facilities, providing these modular facilities had a single license. The

CFR 2.202 or responses to such orders, etc.). The final annual fees this year for power reactors also include a prorated share of the FY 2002 budgeted MOX contested hearing costs as <sup>previously</sup> explained ~~in the response to comment in section C.1 above~~<sup>g</sup>. The annual fees for each class also includes a share of the total surcharge costs to be recovered through annual fees assessed to NRC licensees. The surcharge is established to recover the costs for NRC activities that are not attributable to an existing NRC licensee or class of licensee, activities that are exempt from part 170 fees based on law or Commission policy, and those activities that support NRC operating licensees and others. The surcharge is required in order for <sup>the</sup> NRC to meet the statutory requirement of OBRA-90, as amended, that almost all of <sup>the</sup> NRC's budget be recovered <sup>the</sup> through IOAA and annual fees. To address fairness and equity concerns raised by <sup>the</sup> NRC related to charging NRC license holders for these expenses that do not directly benefit them, the FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee recovery amount by two percent per year beginning in FY 2001, until the fee recovery amount is 90 percent in FY 2005. Thus, it is anticipated that the necessity for <sup>the</sup> NRC to charge licensees for costs that are not directly related to them or to their class will be eliminated, or almost eliminated, by FY 2005.

The agency workpapers supporting both the proposed and final fee rules show the budgeted costs for each activity at the NRC's planned accomplishment level, and the classes of licenses to which these costs are allocated. Furthermore, the workpapers show by class the total costs allocated, and the estimated part 170 collections. The annual fees are established to recover the difference between the NRC's total recoverable budgeted costs (less the Nuclear Waste Fund and General Fund) and the estimated part 170 collections, in accordance with OBRA-90, as amended.

reduction in the fees assessed to one class or category of licensees would require a corresponding increase in the fees assessed to other licensees. Consequently, the NRC has not based its fees on licensees' economic status, market conditions, or the ability of licensees to pass through the costs to its customers.

The final annual fees this year for the fuel facility class, including the uranium hexafluoride conversion category of licensees, have been adjusted to reflect the Commission's decision with respect to recovering FY 2002 costs for the MOX contested hearing. Specifically, <sup>9</sup>that the FY 2002 budgeted costs for the MOX contested hearing <sup>will</sup> be assessed to all classes of licensees in their annual fees. In the proposed fee rule, <sup>100%</sup>all of these costs were included in the annual fees <sup>alone</sup> for <sup>of</sup>only the fuel facility class. As a result of this change, the final FY 2002 annual fees for the fuel facility licensees are less than the proposed annual fees.

### C. Other Issues.

#### 1. NRC Budget

*Comment.* One commenter stated that the NRC's overall budget should be reduced by more efficient use of resources resulting from the agency's revised regulatory approach. Specifically, under the NRC's reactor oversight program, there has been a reduction in the number of regional initiative inspections, yet these reductions are not accounted for in the proposed fees. Moreover, according to the commenter, successful implementation of the reactor oversight program provides the NRC an opportunity to reallocate existing resources to

2. Add to §170.11, Exemptions, the fee waiver provisions that are currently in Footnote 4 to §170.21 and Footnote 5 to §170.31, and clarify the fee waiver provisions currently in criterion (c) of these Footnotes. These Footnotes, as well as material in the definition of *Special Projects* in §170.3 related to certain special requests and reports submitted to NRC for review, have been deleted.

**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.**

The NRC is revising the annual fees for FY 2002, amending part 171 to specifically cover combined licenses issued under part 52, clarifying the annual fee exemption provision for reactors, and modifying the methodology for allocating the uranium recovery annual fee amount among the types of uranium recovery licenses. As explained <sup>previously</sup> ~~in the preceding response to~~ ~~comments in section C.D.~~ the final annual fees for this year reflect the Commission's decision that the FY 2002 budgeted costs for the MOX contested hearing should be assessed to all licensees in their annual fees, instead of being charged only to the fuel facility class of licensees. Accordingly, these costs have been treated as a fee adjustment and assessed to all classes of licensees based on their respective percentages of the NRC's budget. The amendments are as follows.

1. **Annual Fees**

The NRC is establishing rebaselined annual fees for FY 2002. The Commission's policy commitment, made in the statement of considerations accompanying the FY 1995 fee rule (60