

*Charlotte*  
*5/30/02*

[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 \$479.4 million.

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

*Response.* As previously stated in the proposed fee rule, the modifications to the fee waiver criteria do not represent a change in NRC policy. Rather, the changes are clarifications intended to assist applicants in determining in advance whether their submittals are likely to meet the fee waiver criteria.

The NRC has consistently applied its policy of waiving the part 170 fees for special projects submitted to the NRC for the purpose of supporting NRC's generic regulatory improvements, and assessing part 170 fees for the review of special projects that are submitted for other purposes, including those that support industry generic improvements. Part 170 fees are based on the provisions of the Independent Offices Appropriations Act of 1952 (IOAA). This statute allows Federal agencies to assess fees to recover costs incurred in providing special benefits to identifiable recipients. While the NRC has the authority to grant waivers from the part 170 fee requirements, fee exemptions are granted very sparingly in order to meet the requirements of OBRA-90 that almost all of the agency's budget authority be recovered through IOAA and annual fees.

The NRC finds no justification for granting a Part 170 fee waiver to an industry organization seeking an NRC approval of an industry initiative, unless the initiative will be used for NRC's generic regulatory improvements, and the initiative was submitted specifically for that purpose. In the latter case, the NRC's review and approval is part of the process of developing the NRC's generic regulatory program, and therefore the review activities are similar to other NRC generic regulatory activities whose costs are recovered through part 171 annual fees. Conversely, reviews of submittals that are for the industry's generic improvements or use are considered

*need search to locate outliers*

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 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 met. As always, under the fee waiver criteria, NRC will waive the review fees for special projects submitted for the purpose of supporting NRC's regulatory improvements as long as the NRC staff agrees that it will be used by the NRC in developing or improving its regulatory

framework. Not every submittal results in a safety improvement, burden reduction, or improved process. The NRC encourages any special project applicant who believes that its proposal will help improve NRC's regulatory process to discuss their proposal with the cognizant NRC program office staff prior to requesting a fee waiver from the Chief Financial Officer.

With regard to fee waivers for "ground breaking" licensing actions, the fee exemption provision for special projects **does not apply to licensing actions**. As defined in §170.3, special projects are those requests submitted to the NRC for review for which fees are not otherwise specified in part 170. Part 170 specifies fees for licensing actions, therefore, first-of-a-kind licensing actions are not special projects for purposes of part 170. The waiver criteria that were previously in footnote 4 of §170.21 and footnote 5 of §170.31, which in this final rule the NRC is moving to §170.11, have always specifically referred to special projects (see §170.11(a)(1)). The NRC will continue to address exemption requests for first-of-a-kind licensing actions on a case-by-case basis under §170.11(b).

The NRC believes the modifications to the fee waiver criteria language have the potential to save both NRC and industry resources because the industry will have more definitive guidelines on the types of submission that will be granted a fee waiver. The NRC believes these clarifications will better inform the industry, so they will not request fee waivers for those types of special projects which do not meet the waiver criteria. Further, it is unclear how relocating the fee waiver criteria to the exemption section of part 170 adds any formality to the process or how such purported formality will cost the industry or NRC resources and time as some commenters contend. Moving the criteria neither changes the process nor enhances its legal status. The

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*was there more than one commenter on this?*

NRC believes that it is more appropriate to have the fee exemption provisions for special projects with the existing Part 170 fee exemption provisions. ✓

The NRC, in this final rule, is revising the fee waiver criteria to clarify the fee exemption provisions. In addition, the exemption section of §170.11 is being revised to include the language that was previously located in footnote 4 to §170.21 and footnote 5 to §170.31.

### 3. Invoice Information.

*Comment.* One commenter asserted that NRC's invoices lack adequate explanations of the work done by NRC staff and NRC contractors. The commenter 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, the commenter contended that the change would serve the NRC, its licensees, and the public well.

*Response.* As the NRC has stated in the past, 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 Human Resources Management System (HRMS), 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 HRMS, the fee billing system captures the NRC 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