

[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).

G. Jackson (OCFO)

5/28/02
M. [unclear]

A. Legal Issues.

1. Information Provided by NRC in Support of Proposed Rule.

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 indicated that more detailed information would allow stakeholders to provide more effective feedback on the efficiency of NRC's regulatory activities and would propel the Commission to exercise its authority to promote increased fiscal responsibility. The commenter acknowledged the ability to access the agency work papers through the NRC's Public Document Room or by using the Agencywide Documents Access and Management System (ADAMS), but finds this supporting material to be indecipherable.

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^{as amended}, the proposed fees were developed to recover approximately 96 percent of the NRC's FY 2002 budget authority from the various classes of licensees. The proposed rule described the types of activities included in the proposed fees and explained how the fees were calculated to recover the budgeted costs for those activities.

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 96 percent of the NRC's FY 2002 budget authority, less the amounts

appropriated from the NWF and the General Fund, as required by OBRA-90, as amended.

Therefore the commenter's suggestion that more detailed information would allow the public to provide more effective comments concerning the efficiencies of NRC's regulatory activities and the manner in which NRC carries out its fiscal responsibilities are not addressed in this final rule.

The NRC acknowledges that the work papers supporting the proposed fee rule contain very detailed information. The work papers reflect the complexity of the fee calculation process that is necessary to ensure that the fees are fair and equitable to all licensees. The work papers show the total budgeted FTE and contract costs at the planned accomplishment level for each activity. The work papers also include extensive information detailing the allocation of the budgeted costs for each planned accomplishment within each program of each strategic arena to the various classes of licensees.

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 18, "Budget Estimates and Performance Plan, Fiscal Year 2003 (February 2002)," which discusses the NRC's budget for FY 2003, 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.

If there are outstanding concerns after reviewing the fee information in the proposed rule and the agency work papers, questions or comments should be referred to the fee information contact listed in this fee rule.

B. Specific Part 170 Issues.

Additionally, the contacts listed in the proposed fee rule were available during the public comment period to answer any questions that commenters had on the development of the proposed fees. No inquiries of this nature were received during the comment period.

1. Hourly Rates.

Comment. Several commenters opposed the \$152 proposed hourly rate for the materials program. The commenters stated that the hourly rate is excessive, is more than the professional hourly rates charged by national consulting firms, and is counterproductive to NRC's apparent efforts to reduce the total fee burden to uranium recovery licensees.

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 information technology. Overhead costs, as well as general and administrative costs, such as rent, utilities, supplies, and payroll and human resources staffs.

The increase in the hourly rates is primarily due to the Government-wide pay increase in FY 2002. 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. 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 \$156 compared to \$150 in FY 2001, and the professional hourly rate for the materials program is \$152 compared to \$144 in FY 2001. For

already experiencing a severe economic downturn because of the depressed uranium market. The commenters all believe there is excessive regulatory oversight by the NRC of the uranium recovery industry, especially in light of the NRC's performance-based licensing approach, which they contend should result in a reduced regulatory effort. Thus, the commenters assert that the NRC should consider a more balanced approach to uranium recovery regulation, resulting in less regulatory oversight and lower costs. Additionally, the commenters state that the NRC has failed to adequately deal with the issue of decreasing numbers of uranium recovery licensees, or charging annual fees to licensees whose facilities are in standby status. Specifically, as more states become Agreement States and/or additional sites are decommissioned, the number of NRC regulated sites continues to decline, leaving fewer licensees to pay a larger share of the NRC's regulatory costs. As such, the commenters argue that there is a lack of reasonable relationship between annual fees and regulatory services rendered by the NRC. One commenter indicated that the NRC's policy of charging annual fees to licensees in standby status, who require minimal oversight, is not commensurate with the benefit of holding a license, and unfairly penalizes those licensees who are waiting for market conditions to improve before they become operational again.

These commenters also supported the revised Office of Nuclear Materials Safety and Security's policy for assigning project managers of the committees of the commenters

Response. The NRC has responded to the ~~issues~~ ^{concerns} raised by these commenters in several previous fee rulemakings. Moreover, the NRC acknowledges that the uranium recovery industry is experiencing an economic downturn in the market for uranium. However, since FY 1991, when the 100 percent fee recovery requirement was enacted under OBRA-90, the Commission has consistently taken the position that it will not consider economic factors when establishing fees, except for reduced fees provided for small entities based on the provisions of the RFA. To

Two stated that this does benefit licensees in a standby mode because they don't generally use much of a Project Manager's time. The third commenter stated that recovering more of these costs through annual fees is more equitable because the costs are spread

grant fee relief to the uranium recovery industry on the basis of its economic conditions or business practices (e.g., a licensee's decision whether to remain operational or go into a standby status) could set an untenable precedent for the NRC with the potential to unravel the stability and viability of the entire fee system. Not only would other classes of licensees be required to subsidize the uranium recovery industry through increased fees, but other categories of licensees may also request similar treatment based on analogous economic considerations. Thus, it would be difficult to develop a rationale for waiving the fees for uranium recovery licensees while denying similar requests from other NRC licensees, such as well loggers or licensed medical facilities whose industries may also be experiencing economic downturns.

The NRC has conducted numerous analyses concerning the issue of decreasing numbers of licensees, and the effect this has on annual fees. Although a decreasing licensee base is only one of several factors affecting annual fees, it presents a clear dilemma for both the uranium recovery group in its efforts to maintain a viable industry and the NRC which must recoup its budgeted costs from the licensees it regulates. In the wide range of scenarios the NRC evaluated during its analyses, most potential remedies to this problem involved establishing arbitrary fee caps or thresholds for certain classes of licensees. Other potential solutions involved combining fee categories. As noted previously, given the requirements of OBRA-90 to collect ~~approximately 100 percent~~ ^{Must} of NRC's budget authority through fees, failure to fully recover costs from certain classes of licensees due to caps or thresholds would result in other classes of licensees bearing these costs. Combining fee categories would also have the potential to increase the annual fees for certain licensees in the new combined category to cover part of the cost for the licensees whose fees were reduced by this action. The NRC ~~staff~~ ^{is} considers that

alternatives involving caps or thresholds, and combining fee categories, raise fairness and equity concerns. As such, the Commission has not adopted any of these approaches. Also, the NRC notes that commenters opposed a similarly postulated 50 percent cap on annual fee increases in response to this issue in the FY 1999 proposed fee rule. Thus, the NRC concluded that the most equitable option under the agency's current fee collection mandate was to maintain its existing fee policy, but continue to seek cost efficiencies through its annual programmatic reviews conducted as part of the budget process.

The issue of charging licensees in standby status has repeatedly been discussed in many previous fee rules. In summary, the Commission has stated that the existing policy of assessing annual fees based on whether a licensee holds a valid NRC license authorizing possession and use of source material, irrespective of the licensee's intent to operate its facility or remain in standby, represents the fairest option available under current legislation. This policy is based on the premise that the benefit the NRC provides a licensee is the authority to use licensed source material. Whether or not a licensee decides to exercise this authority is a business decision outside the realm of NRC jurisdiction. 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. 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.

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. ✓

3. Annual Fees for Power Reactor Licensees

Comment. Three commenters addressed the proposed annual fees for the power reactor class. Two 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 other commenter on this subject asserts the NRC should make it clear in the FY 2002 final rule that the agency's underlying intent is to assess multi-unit reactor modular facilities a single annual fee, regardless of whether the licensee holds a single or multiple combined operating license(s). One commenter stated the industry objects to the NRC's approach of allocating generic costs through Part 171, indicating that the power reactor class of licensees bear a large share of the annual fee burden.

Response. In the ^{new} FY 2002 proposed fee rule, the NRC stated its intent to revise §171.15(a) to clarify that annual fees are assessed on a per license basis, and not for each reactor unit. ✓
The NRC reiterates that this clarification is not a change to its existing policy of charging annual

fees for each license. Furthermore, the NRC is not proposing a specific annual fee category or amount for Part 52 combined licenses because there are no such existing licenses at this time. The NRC's intent when proposing these revisions was to make potential applicants for Part 52 combined licenses aware that they would be subject to annual fees. At this time, the NRC does not have the information required to make a decision with respect to assessing annual fees for Part 52 combined licenses for multi-unit modular reactors. In the future, when the NRC determines its fee structure for Part 52 combined licenses, the fees will be assessed in a fair and equitable manner, and to the maximum extent practicable, will reflect a reasonable relationship to the cost of the regulatory services provided.

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. The Part 171 annual fees are established to recover the costs for generic activities such as rulemakings and guidance development, as well as costs for other activities not recovered through Part 170 fees (e.g., allegations, contested hearings, special projects for which fee waivers are granted, orders issued under 10 CFR 2.202 or responses to such orders, etc.). The annual fees for each class also include

4. Annual Fees for Fuel Facilities Licensees

a share of the total surcharge costs to be recovered through annual fees assessed to NRC licensees. The surcharge is required in order for NRC to meet the statutory requirement of OBRA-90 as amended, that almost all of NRC's budget be recovered through ISAA and annual fees. 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 a law or Commission order.

(B)

policy, and those activities that support NRC ^{and equity} ~~fairness~~ ^{and equity} operating licenses and others. To address ^{concern} raised by NRC related charges NRC license holders for those purposes that do not directly benefit them, the FY 2001 Energy and Water

Development Appropriations Act amended OBR 98 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 by FY 2005. Thus, it is anticipated

that the ^{the} necessity for NRC to charge ^{fees} ~~fees~~ for costs that are not directly related to them or to their class will be eliminated, or almost eliminated, by FY 2005.