Mark-up

J. Funches
5/7/03

[7590-01-P]

Changes have been incorporated into final.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AH14

Revision of Fee Schedules; Fee Recovery for FY 2003

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 94 percent of its budget authority in fiscal year (FY) 2003, less the amounts appropriated from the Nuclear Waste Fund (NWF). The amount to be recovered for FY 2003 is approximately $526.3 million.

EFFECTIVE DATE: (Insert date 60 days after publication).

ADDRESSES: The comments received and the agency work papers that support these final changes to 10 CFR Parts 170 and 171 are available electronically at the NRC's Public Electronic

Reading Room on the Internet at http://www.nrc.gov/reading-rm/adams.html. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, or 301-415-4737, or by email to pdr@nrc.gov. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR.

Comments received may also be viewed via the NRC's interactive rulemaking website (http://ruleforum.llnl.gov). This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, 301-415-5905; e-mail CAG@nrc.gov.

For a period of 90 days after the effective date of this final rule, the work papers may also be examined at the NRC Public Document Room, Room O-1F22, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738.

FOR FURTHER INFORMATION CONTACT: Ann Norris, telephone 301-415-7807; or Tammy Croote, telephone 301-415-6041; Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

SUPPLEMENTARY INFORMATION:

I. Background

II. Response to Comments

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I. Background

For FYs 1991 through 2000, OBRA-90, as amended, required that the NRC recover approximately 100 percent of its budget authority, less the amount appropriated from the U.S. Department of Energy (DOE) administered NWF, by assessing fees. To address fairness and equity concerns raised by the NRC related to charging NRC license holders for agency budgeted costs that do not provide a direct benefit to the licensee, the FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee recovery amount by 2 percent per year beginning in FY 2001, until the fee recovery amount is 90 percent in FY 2005. As a result, the NRC is required to recover approximately 94 percent of its FY 2003 budget authority, less the amounts appropriated from the NWF, through fees. In the Energy and Water Development Appropriation Act, 2003, contained in the Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), Congress appropriated $584.6 million to the NRC for FY 2003. This sum includes $24.7 million appropriated from the NWF. The total amount NRC is required to recover in fees for FY 2003 is approximately $526.3 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 2003 proposed fee rule on April 3, 2003 (68 FR 16374) to solicit public comment on its proposed revisions to 10 CFR Parts 170 and 171. The NRC received 26 comments dated on or before the close of the comment period (May 5, 2003) and several additional comments thereafter, for a total of 32 comments that were considered in this fee rulemaking. The comments have been grouped by issues, and are addressed in a collective response.

A. Legal Issues.

Information Provided by NRC in Support of Proposed Rule.

Comment. Several commenters urged the NRC to provide licensees and the public with a more detailed explanation of the activities and associated costs that form the basis for NRC's fees. Some commenters stated that the NRC should provide specific accounting of the major elements that comprise the annual fee, including detailed information on the outstanding major contracts, their purpose, and their costs. Other commenters indicated that this information should also be available for part 170 fees, claiming it is difficult to understand exactly what is included in the hourly rate. One of these commenters also stated that more detailed information on the total costs associated with each component of reactor regulation and all other generic costs 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.

Several commenters raised concerns that the NRC could not specifically identify where resources are being applied, as the agency identified approximately 76 percent of the NRC's budget for recovery under part 171 and only 24 percent under the discrete fee provisions of part 170. These commenters stated this meant that the NRC could only identify 24 percent of its expenditures as directly supporting the licensees, and that neither NRC nor industry management can determine whether applicable resources are being applied to appropriate priorities in such a case. These commenters further stated that the aggregation of a substantial portion of non-discrete expenditures to be recovered through part 171 fees makes it virtually impossible for licensees to understand and comment on the appropriateness of these expenditures, and that the NRC should revise parts 170 and 171 to discretely allocate generic program costs to individual dockets in order to improve the visibility of management oversight and associated accountability of these programs.

Response. Consistent with the requirements of OBRA-90, as amended, the purpose of this rulemaking is to establish fees necessary to recover 94 percent of the NRC's FY 2003 budget authority, less the amounts appropriated from the NWF, from the various classes of licensees. The efficiencies of NRC's regulatory activities and the manner in which NRC carries out its fiscal responsibilities are outside the scope of this rulemaking. 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. Therefore, the NRC believes that ample information was available on which to base constructive comments on the proposed revisions to parts 170 and 171 and that its fee schedule development is a transparent process.

In addition to the information provided in the proposed rule, the supporting work papers were available for public examination in the NRC's Agencywide Documents Access and Management System (ADAMS) and, during the 30-day comment period, in the NRC Public Document Room at One White Flint North, 11555 Rockville Pike, Rockville, MD. The work papers show the total budgeted full time equivalent (FTE) and contract costs at the planned accomplishment level for each agency 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 licenses, as well as information on categories of costs included in the hourly rate.

The NRC has also 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. This document is also available on the NRC public web site at http://www.nrc.gov/reading-rm.html. The extensive information available to the public meets all

legal requirements and the NRC believes it has provided the public with sufficient information on which to base their comments on the proposed fee rule. 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 were received about the fee development process.

With regard to the comments that expressed concern that too much of the NRC's budget was designated for recovery under part 171, the NRC notes that it ~~does recover as much of its budget as possible~~ has taken action to increase the amount recovered under part 170, consistent with existing Federal law and policy. ~~The NRC makes every attempt to recover costs under part 170~~. For example, in FY 1998 the agency began charging part 170 fees for resident inspectors and in FY 1999 the agency started charging part 170 fees for project manager activities associated with oversight of the assigned license or plant. The NRC assesses part 170 fees under the IOAA, and consistent with OMB Circular A-25, to recover the costs incurred from each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. Generic costs that do not provide special benefits to identifiable recipients can not be recovered under part 170. The NRC clearly sets forth the components of these generic costs in its workpapers and how those costs are recovered through annual fees.

Add an example the "National Security" related licenses and WIOX research with dates. Also mention (illustrate) where will security costs come from (licensees or non-licensees) under 171

B. Specific Part 170 Issues.

1. Increase in Hourly Rates

Comment. Several commenters raised concerns with the proposed increase to $158 for the hourly rate for the materials program. One commenter stated that there seems to be no reason

that the hourly rate for the materials program is higher than the hourly rate for reactors. This commenter also thought that the rates are out of line with rates paid by industry for safety professionals and managers.

Response. The NRC's hourly rates are based on budgeted costs and must be established at the revised levels each year to meet the fee recovery requirements. The hourly rates include not only average salaries and benefits for professional employees, but also a prorated share of overhead costs, such as supervisory, secretarial, and information technology support, as well as general and administrative costs, such as rent, utilities, supplies, and payroll and human resources staffs. These hourly rates are not developed in relation to one another but are based on budgeted costs for the reactors program and the materials program. Since the budgeted costs are different for each program, different rates result. These rates do not necessarily track with private sector rates, nor should they be used as a benchmark for industry standards. Instead, these rates reflect the budgeted costs of the reactors and materials programs.

A major reason for the four percent increase in the hourly rate for the materials program is the salary and benefits increase resulting primarily from the Government-wide pay raise. While salary and benefits also increase similarly for the reactor program, the increase is offset by a reduction in the average overhead cost per direct FTE for the reactor program. The 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 mandated by OBRA-90, as amended. The NRC is establishing in this final rule the revised hourly rates necessary to accomplish the fee recovery requirements. For part 170 activities, the

rates will be assessed for professional staff time expended on or after the effective date of this final rule.

2. Project Manager Billing Issues

Comment. Several commenters expressed concern with the increase in charges for Project Manager (PM) time to uranium recovery licensees and other materials licensees. Some of these commenters would like clarification of the status of the NRC's Office of Nuclear Materials Safety and Safeguards (NMSS) policy change that was implemented in July 2001, which states that a PM's costs are not billed to the licensee as part 170 fees if that PM spends 75 percent or less of his/her time in any two-week period on duties to support that licensee. Other commenters said that after an initial drop in part 170 charges for PM duties to uranium recovery licensees, these charges had increased recently even though duties related to the sites had not changed, and stated that PM time should not be charged to part 170 fees, whenever possible. Some commenters thought the Commission should reduce the impact of the hourly rate increase on uranium recovery licensees by doing everything possible to reduce the amount of time spent by staff working on licensing issues related to uranium recovery licenses. They suggested that this could be accomplished through the streamlining of the regulatory process, including delegating regulation of in-situ leach wellfields to the States through Memoranda of Understanding and more reliance on Safety and Environmental Review Panels and performance based-licensing.

Response. NMSS modified its policy for project management fee billing effective July 29, 2001. The modified policy states that an NRC employee must spend more than 75 percent of

his/her time in any two-week period performing duties to support a facility's license or certificate review to be considered a PM for full-cost fee billing purposes (Full-cost fee billing causes a prorated portion of a PM's indirect time to be charged to the licensee. The modified NMSS policy reduced the number of PMs whose indirect time is billed to the licensee.). The NRC has not changed that policy, nor how it is being implemented. The FY 2003 proposed fee rule did not propose to change the NMSS PM fee billing policy, so there was no need for the proposed rule to address its implementation status. If licensees have specific questions about particular invoices, they may request more details from the NRC and the staff will provide additional information. This has always been an option available to licensees and applicants who feel they need more information on the costs billed.

The NRC only charges fees to uranium recovery (or any other) licensees based on its budgeted costs. Regarding the comments suggesting that staff time devoted to regulating uranium recovery facilities should be reduced, the NRC notes that the manner in which NRC carries out its regulatory responsibilities is not addressed in this final rule, since this issue is outside the scope of this rulemaking. Nonetheless, the Commission strives to ensure that all of its efforts are needed to carry out its health, safety, common defense and security responsibilities and frequently modifies its regulatory regime to reduce unnecessary burden on the regulated community. Concerns about specific licensee review efforts conducted by the staff should be directed to the appropriate program office.

3. Fee Waivers for Special Projects

Comment. One commenter raised a number of concerns with NRC's fee waiver policy. This commenter stated that this policy is flawed, unworkable, and counterproductive to regulatory

efficiency and effectiveness. In particular, this commenter stated that NRC's fee waiver policy is not consistent with the definitions of part 170 and part 171 fees as described in the FY 2003 proposed fee rule. The commenter stated that the Office of the Chief Financial Officer (OCFO) had been charging part 170 fees for documents that did not fall under the description in the FY 2003 proposed fee rule of documents for which part 170 fees should be assessed. This commenter challenged as flawed various reasons that OCFO had previously given to deny fee waivers in the past. The commenter advocated cooperative efforts between NRC and industry, and expressed concern that OCFO positions blocked this cooperation. The commenter suggested changing NRC's fee waiver policy to eliminate disincentives for industry to be proactive in addressing generic regulatory issues.

Response. The NRC did not propose to revise its policy for those services which part 170 fees are assessed, nor the existing fee waiver policy in this rulemaking. The proposed rule's description of purposes for which part 170 fees would apply is intended to be illustrative, not exhaustive. The NRC clarified its fee waiver policy in the FY 2002 final fee rule (67 FR 42612; June 24, 2002), and responded extensively to comments similar to the one summarized above in the Response to Comments section of that final rule. The Commission's position with respect to its existing fee waiver policy has not changed. In brief, the NRC has consistently applied its policy of waiving the part 170 fees for a special project submitted to the NRC for the purpose of supporting "NRC's" generic regulatory improvements, and assessing part 170 fees for the review of a special project that is submitted for other purposes, including those that support "industry" generic improvements. The NRC finds no justification for granting a part 170 fee waiver, as the comment suggests, whenever a nuclear industry organization submits a proposal for generic regulatory improvement. Fee waivers will be granted only if the NRC determines the submission will be used for NRC's generic regulatory improvements, and the initiative was submitted

specifically for that purpose. Thus, fee waivers are only appropriate where the NRC's review of the industry initiative is part of the process of developing the NRC's generic regulatory program, and the review activities are similar to other NRC generic regulatory activities whose costs are recovered through part 171 annual fees.

The NRC does not believe its fee waiver policy discourages cooperative efforts between the agency and industry, and that its assessment of part 170 fees for a special project is fully consistent with the NRC's policies on industry initiatives. Under the existing fee waiver criteria, NRC will waive the review fees for a special project submitted for the purpose of supporting the agency's regulatory improvements as long as the NRC staff agrees with the applicant at the time of submission that it will be used by the NRC in developing or improving its regulatory framework. The NRC encourages any special project applicant who believes that its proposal will help improve NRC's regulatory process to discuss its proposal with the cognizant NRC program office staff prior to requesting a fee waiver from the Chief Financial Officer.

C. Specific Part 171 Issues.

1. Annual Fees vs. Hourly Fees

Comment. One commenter stated that it prefers annual fees to hourly fees, since it is easier to plan and allocate resources related to annual fees, while hourly fees are more unpredictable and more difficult to incorporate into a licensee's financial plan. Some commenters complained, however, that a disproportionate amount of the budget is recovered through annuals fees.

Response. While the NRC appreciates the concerns raised by this commenter, the agency notes that its collection of part 170 fees is consistent with Federal law. The NRC assesses part 170 fees under the IOAA, which allows Federal agencies to assess fees to recover costs incurred in providing special benefits to identifiable recipients. In addition, the Conference Report accompanying OBRA-90 specifically states that the Conference Committee "... expects the NRC to continue to assess fees under the [IOAA] to the end that each licensee or applicant pays the full cost to the NRC of all identifiable regulatory services such licensee or applicant receives" (136 Cong. Rec. H12692-3, daily ed. October 26 1990). The NRC has received additional direction on this issue in the Office of Management and Budget (OMB) Circular A-25, in which OMB states it is Federal policy that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. The NRC abides by this direction in charging part 170 fees to recover the costs of providing special benefits to identifiable recipients. Further, the NRC notes that, as required by OBRA-90, the part 171 annual fee recovery amounts are offset by the estimated part 170 fee collections. As explained above, the NRC is not at liberty to allocate fees indiscriminately between parts 170 and 171, as statute controls fee allocation. This applies both to comments that more of the budget should be shifted from part 170 fees to part 171 as to the position advocating the reverse.

2. Annual Fees for Materials Users, Including Small Entities

Comment. Two nuclear density gauge users commented that their fees are too high, and create a significant financial burden on small business owners. One of these users indicated only a small fraction of the company's revenues was generated from NRC licensed activities, but that these activities are essential to support projects it designs and monitors. With respect to

the NRC's upper fee level for small entities, this commenter stated that the broad revenue range encompassing $350,000 to $5,000,000 in gross annual receipts tends to favor larger firms while burdening smaller businesses. Thus, they urge the NRC to consider adding more tiers for small businesses to reduce the license fee burden on smaller entities. The other commenter stated that license fees make it difficult for small projects to recover expenses, and requested smaller fees.

Response. The NRC stated in the FY 2001 fee rule (66 FR 32452; June 14, 2001), that it would re-examine the small entity fee every two years, in the same years in which it conducts the biennial review of fees as required by the Chief Financial Officer (CFO) Act of 1990 (Pub. L. 101-578, November 15, 1990, 104 Stat. 2838). Accordingly, as discussed in the FY 2003 proposed fee rule, this year the NRC re-examined the small entity fees, and determined that no change to the small entity fee is warranted for FY 2003. The NRC last revised its small entity fees in FY 2000 (65 FR 36936; June 12, 2000), when it increased the small entity annual fee and the lower tier small entity fee by 25 percent. For FY 2003, the NRC has determined that the current small entity fees of $500 and $2,300 continue to meet the objective of providing relief to many small entities while recovering from them some of the NRC costs associated with regulatory activities that benefit them.

The NRC has addressed comments regarding the impact of fees on industry in previous fee rulemakings. The NRC has stated since FY 1991, when the 100 percent fee recovery requirement was first implemented, that it recognizes the assessment of fees to recover the agency's costs may result in a substantial financial hardship for some licensees. However, consistent with the OBRA-90 requirement that annual fees must have, to the maximum extent practicable, a reasonable relationship to the cost of providing regulatory services, the NRC's

annual fees for each class of license reflect the NRC's budgeted cost of its regulatory services to the class. The NRC determines the budgeted costs to be allocated to each class of licensee through a comprehensive review of every planned accomplishment in each of the agency's major program areas. Furthermore, a reduction in the fees assessed to one class of licensees would require a corresponding increase in the fees assessed to other classes. Accordingly, the NRC has not based its 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 that it is required to address by law.

Based on the provisions of the Regulatory Flexibility Act (RFA), the NRC provides reduced annual fees for licensees who qualify as small entities under the NRC's size standards. The materials users class has the most licensees who qualify for these reduced fees of any class. As such, the materials users class receives the largest amount of annual fee reductions of any class. About 24 percent of these licensees (approximately 1,200 licensees) have requested small entity certification in the past. The FY 2003 total estimated fee amount that will not be collected from licensees who pay reduced annual fees based on their small entity status is approximately $4.5 million, which must be collected from other NRC licensees in the form of a surcharge. Further reductions in fees for materials users would create an additional fee burden on other licensees, thus raising fairness and equity concerns.

As stated in 10 CFR 2.810, 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, is 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 that an agency must examine ways to minimize significant impacts that its rules may have on a substantial number of small entities. Therefore, the NRC does not plan to modify its small entity fee structure, nor provide any further reduction in annual fees beyond that already established for small entities. The NRC will re-examine the small entity fees again in FY 2005.

3. Annual Fees for Uranium Recovery Licensees

Comment. The NRC received several comments regarding annual fees for uranium recovery licensees. These comments supported the reduction in annual fees for these facilities that resulted from the decision to rebaseline FY 2003 annual fees. One commenter also supported the continued implementation of last year's determination that the DOE must be assessed one-half of all NRC budgeted costs attributed to generic/other activities for the uranium recovery program. However, despite the proposed reductions, these commenters stated that there continues to be the lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory program and the benefit derived from such services. These commenters 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. 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 stated that the NRC has failed to adequately address the issue of decreasing numbers of uranium recovery licensees. 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. These commenters urged NRC to continue its efforts to seek cost efficiencies through its annual reviews conducted as part of the budget process. One commenter stated that uranium recovery licensees continue to be subject to unnecessary costs due to overlapping Federal or State agency jurisdiction. The commenter stated that in non-Agreement States, the NRC should accept the groundwater quality assessments conducted by the state or the Environmental Protection Agency rather than performing duplicative environmental assessments. Several commenters suggested that the agency proceed expeditiously with extension of the reactor oversight process for these and other facilities as a risk-informed, performance-based oversight process that recognizes the inherent safety of these operations should further reduce unnecessary regulatory burdens.

Response. The NRC has responded to similar concerns raised by commenters in several previous fee rulemakings. First, in response to the specific suggestions about how the NRC should regulate these licensees or operate more efficiently, the NRC again notes that the purpose of this rule is to recover the required percentage of its FY 2003 budget authority, and that the manner in which the NRC carries out its regulatory activities is outside the scope of this rulemaking.

The NRC must assess annual fees to NRC licensees to recover the budgeted costs not recovered through part 170 fees and other receipts. The NRC recognizes that this presents fairness and equity issues as costs must be recovered from licensees for activities that do not directly benefit them. To address these fairness and equity concerns, as previously noted, 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.

The Commission is ~~greatly~~ concerned about the issue of decreasing numbers of licensees and its implications. Although a decreasing licensee base is only one of several possible 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 by statute recover its budgeted costs from the licensees it regulates. Potential remedies to this problem involve establishing arbitrary fee caps or thresholds for certain classes of licensees, or combining fee categories. However, alternatives involving caps or thresholds, and combining fee categories, also raise potential legal and fairness and equity concerns. As noted previously, given the requirements of OBRA-90, as amended, to collect most 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. At this time, the Commission is not prepared to adopt any of these approaches. The NRC notes that the annual fees for the Uranium Recovery class decreased from FY 2001 to FY 2002, and remained stable for FY 2003 due in part to the concerted efforts by the program offices to reduce budgeted costs associated with this program. However, the NRC recognizes the concerns expressed and will

continue its efforts to seek cost efficiencies and reduce regulatory burdens, without compromising its commitment to public health and safety.

4. Annual Fees for Power Reactor Licensees

Comment. One commenter stated that there is insufficient basis to support the required costs to the power reactor licensees for activities not directly attributable or beneficial to their operation. Another commenter expressed concern about the 15 percent increase in the operating power reactor annual fee, despite the two percent drop in the agency's overall recovery rate as mandated by the FY 2001 Energy and Water Appropriations Act. Both commenters raised fairness and equity concerns regarding utilities paying for agency activities that do not provide a direct benefit to them.

Response. The part 171 power reactor annual fees are established to recover the costs for generic activities related to power reactors such as research, rulemakings and guidance development, as well as costs for other activities for the class not recovered through part 170 fees (e.g., allegations, most contested hearings, special projects for which fee waivers are granted, orders issued under 10 CFR 2.202 or responses to such orders). The annual fees for each class also include a share of the total surcharge costs. The surcharge is established to recover the costs for NRC activities that are not attributable to an existing NRC licensee or class of licensees, such as activities that are exempt from part 170 fees by law or Commission policy. The surcharge is required in order for NRC to meet its statutory fee recovery requirements. To address fairness and equity concerns 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. This decrease, six percent in FY 2003, is applied to the surcharge amount.

The annual fee for the power reactor class includes ~~a portion of~~ the agency's homeland security costs related to power reactors for this fiscal year, which significantly contributed to the 15 percent increase in power reactor fees. Additionally, the increased workload for the new reactor licensing activities [~~and reactor license renewal activities~~] contributed to the increase.

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 the estimated part 170 collections, in accordance with OBRA-90, as amended.

5. Annual Fees for Fuel Facilities Licensees

Comment. Several commenters expressed concerns with the annual fees for fuel facilities licensees. One commenter stated that these fees are unreasonably high and not in accord with NRC's Strategic Plan: Fiscal Year 2000 - Fiscal Year 2005. Other commenters did not understand why there was a significant discrepancy between the increase in annual fees for fuel fabricators (43 percent) in comparison to power reactors (15 percent), when much of the annual

fee increase was attributed to the costs of security-related activities and these activities are similar for both types of facilities. These commenters requested that NRC review this discrepancy and consider revisions to more equitably allocate these costs. Another commenter expressed concerns about the annual fees for gaseous diffusion plants (GDPs), stating that it did not believe that the annual fee for a GDP should be equal to or more than the annual fee for a power reactor. This commenter suggested that NRC reevaluate its methodology to establish the FY 2003 fees with the objective of achieving a fee structure that is fair and equitable when viewed in its entirety. Another commenter stated that low enriched uranium fuel facilities constitute a very small part of the nuclear fuel cycle and pose only minimal risk, and that their facility operated in a very competitive international market and so the magnitude of the fee increase represents a serious economic burden. The commenter asked that the proposed fees for fuel facilities be reviewed and that the amount of the increase be reduced to a more reasonable level (on the order of 10 percent) to be consistent with other facilities and the general increasing costs of NRC operations.

Response. The part 171 annual fees for each class of licenses are established to recover the costs for generic activities related to that class of licenses, including rulemakings and guidance development, as well as costs for other activities for the class not recovered through part 170 fees. The NRC believes this methodology is consistent with all applicable laws, regulations, and policies. Because the costs for one class of licenses may increase or decrease at different rates than the costs for other classes of licenses, fees for different classes will increase or decrease at different rates accordingly. The NRC has considered capping fee

increases for classes of licenses, but has not chosen to do so for potential legal and fairness and equity reasons.

The NRC appreciates the concerns raised about fee predictability and stability. In order to recover its budgeted annual costs in compliance with the OBRA-90, as amended, the NRC annually promulgates a rule establishing licensee fees. In light of concerns about annual fluctuations in these fees, the NRC announced in FY 1995 that annual fees would be adjusted only by the percentage change (plus or minus) in NRC's total budget authority, adjusted for changes in estimated collections for 10 CFR Part 170 fees, the number of licensees paying annual fees, and as otherwise needed to assure the billed amounts resulted in the required collections. The NRC indicated that if there were a substantial change in the total NRC budget authority or the magnitude of the budget allocated to a specific class of licenses, the annual fee base would be recalculated by rebaselining. Commission policy sets the maximum interval between rebaselined fee schedules at three years. Based on the change in the magnitude of the budget to be recovered through fees, the Commission determined that it was appropriate to rebaseline its part 171 annual fees in FY 2003. Rebaselining fees resulted in increased annual fees compared to FY 2002 for four classes of licenses (power reactors, spent fuel storage/reactor decommissioning, fuel facilities, and rare earth facilities), and decreased annual fees for two classes (non-power reactors and uranium recovery). For the small materials users and transportation classes, some categories of licensees will have increased annual fees and others will have decreased annual fees.

Regarding the comment that fees to fuel facilities represent an economic burden, since FY 1991 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 policies reflected in the Regulatory Flexibility Act. Granting fee relief to the fuel facility licensees on the basis of economic considerations 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 licenses be required to subsidize fuel facilities 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 one class of licenses while denying similar requests from other NRC licensees which may also be experiencing economic downturns.

The annual fees for the fuel facility class reflect increased budgeted costs for activities that are not subject to cost recovery under part 170, primarily homeland security activities related to fuel facilities. Such activities include the issuance and follow-up of orders directing the fuel facility licensees to take interim compensatory measures to increase security, and a series of risk-informed vulnerability assessments the NRC is conducting on fuel facilities.

The NRC initially established a fuel facility "effort/fee" matrix in the FY 1995 fee rule (60 FR 32218; June 20, 1995), further revising it in the FY 1999 fee rule (64 FR 31448; June 10, 1999). The purpose of this matrix is to accurately reflect the NRC's current costs of providing generic and other regulatory services to each type of fuel facility. The matrix depicts the categorization of licenses according to their activities, level, scope, depth of coverage, and rigor or generic

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regulatory programmatic effort applicable to each facility category from a safety and safeguards perspective. The relative weighted factors for each facility type for the various fee subclasses are depicted in Table VII. The matrix has been quite valuable in helping the NRC assign appropriate fees for each type of fuel facility. It is routinely available among the workpapers during the public comment process of each year's rulemaking for revision of fee schedules and the fact that it has withstood this scrutiny for many years continues to lend support to the NRC's confidence in it as a robust tool in the fee development process.

Annual Fees for Spent Fuel Storage/Reactor Decommissioning

Comment. One commenter stated that the proposed 29.3 percent increase in annual fees for spent fuel storage/reactor decommissioning licensees is not equitable and places an undue burden on this particular class of licensees, which do not generate revenue through the sale of electricity and do not have a guarantee of recovering additional costs by petitioning local public utility commissions. The commenter further stated that rapidly rising annual fee increases for spent fuel storage/reactor decommissioning licensees place undue budget constraints that could affect the resources available for performing plant decommissioning activities.

Response. The NRC has responded to similar comments in previous rulemakings. Annual fees for the classes of licenses are based on the budgeted costs for the classes, as well as a surcharge to recover the costs for NRC activities that are not attributable to an existing NRC licensee or class of licensee, including activities that are exempt from part 170 fees by law or Commission policy. Since budgeted costs for one class of licenses may rise or fall at different

rates than for other classes of licenses, so will annual fees. The 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 FY 2002, including homeland security activities that are on the fee base for FY 2003. Recovering the costs associated with spent fuel storage and reactor decommissioning from operating power reactors, power reactors in decommissioning or possession only status if they have fuel on site, and independent spent fuel storage part 72 licensees who do not hold a part 50 license, is consistent with the intent of OBRA-90 to assess annual fees to licensees or classes of licenses, commensurate with the expenditure of the NRC's resources. The Commission believes it would be inequitable to grant fee relief to one class of licenses (except to address small entity issues in accordance with the Regulatory Flexibility Act) on the basis of economic considerations, since this class would then need to be subsidized by other classes of licenses.

D. Other Issues.

1. Security Costs

Comment. The majority of comments did not support the NRC collecting security-related costs from licensees. These commenters noted that the FY 2003 NRC budget includes $29.3 million for homeland security activities, and stated that these activities should be funded through the General Treasury as part of the nation's protection of critical infrastructure. Some of these commenters also stated that significant security costs are being incurred for nuclear vulnerability assessments without due consideration of the evaluated threats or rigor of the methodology for conducting these assessments, which is not the best way to allocate the nation's resources in defending against terrorist attacks. Other commenters noted their belief that there is overlap

and duplication of functions in Nuclear Security and Incident Response with those of other Federal agencies, particularly the Department of Homeland Security. One comment suggested that the increased fees for FY 2003 did not appear to reflect a consideration for the substantial work and engineered solutions that have already been implemented in the area of security.

Response. The NRC appreciates the concerns raised by commenters with regard to homeland security costs being funded through licensee fees. The NRC notes that the President's FY 2003 budget requested that NRC's funding for homeland security activities be excluded from the fee base, as was the case in FY 2002. However, the Energy and Water Development Appropriations Act, 2003, contained in the Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), included NRC's budget for homeland security activities in the fee base. Therefore, the FY 2003 fees must include the $29.3 million budgeted for NRC's homeland security activities. The Commission agrees that there are merits to the arguments that licensees should be treated in the same fashion as other owner/operators of critical infrastructure that do not generally pay user fees for Federal agency homeland security costs. ~~Although the requested fee relief is not available for FY 2003, the NRC will continue to request that Congress provide funding from the General Funds of the Treasury for the agency's security activities.~~ The NRC notes that S. 1043, the "Nuclear Infrastructure Security Act of 2003," recently approved by the Senate Committee on Environment and Public Works, provides that amounts appropriated to the NRC for homeland security activities would be excluded from the fee base except for costs associated with fingerprinting, background checks and security inspections.

In response to the comments that expressed concern regarding how the NRC is expending homeland security funds, as stated previously, the NRC's budget and manner in which the agency carries out its activities are not within the scope of this rulemaking. Nonetheless, the

NRC is addressing the issues raised regarding the costs of vulnerability assessments and NRC's relationship with the Department of Homeland Security.

we also [illegible] state we [illegible] not discuss program. Also, we don't need for defend vulnerability assessment

It is the NRC's position that vulnerability assessment, while expensive, is imperative in this evolving threat environment. The NRC believes it has an obligation to reassess the adequacy of existing safeguards and security programs and to take rapid action to develop additional requirements as warranted. The facilities regulated by the NRC present a distinct set of security concerns that require focused review, and while the NRC acknowledges that other Federal agencies are also conducting vulnerability assessments addressing critical infrastructure, the NRC is closely coordinating its efforts with those agencies and the Department of Homeland Security to minimize redundancy and to ensure consistency with Federal law and policy.

2. NRC Budget

Comment. Many commenters offered suggestions for reducing NRC's budget and for more efficient/different use of NRC's resources. Many of these comments addressed expenditures on homeland security, while others suggested more generally that NRC reduce expenditures, streamline processes, or otherwise perform activities more efficiently. Commenters suggested that changes in NRC's regulatory approach, such as the reactor oversight process and risk-informed changes to inspection, assessment, and enforcement processes, should result in reduced fees. One commenter suggested that increased cooperation between the NRC and industry could increase efficiency and conservation of limited resources.

Response. 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 the

commenters' suggestions concerning the NRC's budget and the use of NRC resources. The NRC's budget is submitted to the Office of Management and Budget and to Congress for review and approval. The Congressionally-approved budget resulting from this process reflects the resources deemed 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.

3. Cost Recovery for Agreement State Activities

Comment. One commenter stated that it supported the approach to allocate Agreement State Program activities to user fees, rather than the General Fund. Another commenter suggested the opposite approach, and stated that the costs for activities like Agreement State Programs should not be allocated to user fees, but rather paid for from the General Fund.

Response. The FY 2003 proposed fee rule did not propound to change how the NRC recovers costs for Agreement State Program activities, nor does this final rule make any changes with regard to recovery of these costs. The Commission has the authority to, but as a matter of policy does not, assess part 170 fees for specific services rendered to an Agreement State. Agreement States devote significant monetary and staff resources to national radiation control programs, and this effort assists the NRC and other Federal agencies in protecting public health and safety. The NRC costs for these Agreement State activities are funded through a surcharge, which is allocated to the various license classes on a prorated basis. The surcharge is being funded from the general fund of the Treasury as a result of the FY2001 Energy and Water Development Appropriation ~~which is~~ ~~In response to the comment that Agreement State Program activities should be funded from the Treasury's General Fund, the NRC notes that this is outside the scope of this rulemaking.~~

~~Reduce the amount that must be recovered from fees by 10 percent [illegible]~~

add to previous paragraph

~~However,~~ to address fairness and equity concerns related to charging NRC license holders for agency budgeted costs that do not provide a direct benefit t the licensee, the FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee recovery amount by 2 percent per year beginning in FY 2001, until the fee recovery amount is 90 percent in FY 2005. This 2 percent per year reduction from the fee base accounts for activities such as Agreement State Oversight and Agreement State Regulatory Support ~~that provide no direct benefit to NRC licensees~~.

4. Fee Increase Communication and Timing

Comment. Several commenters suggested that the NRC communicate the potential magnitude of fee increases earlier in the process. The commenters stated that this communication would allow licensees to forecast and mitigate financial impacts. These commenters expressed disappointment that the NRC gave its licensees no warning that significant increases were being contemplated. Several commenters expressed concern that NRC fee increases are seen by licensees almost a year after their budgets have been initially set, and suggested that NRC shift its process by one year (e.g., the 2003 fee collection would be the 2004 fee projection). One commenter specifically requested that NRC review and forecast ongoing costs and fees over the next five years so that licensees can make accurate business forecasts. One commenter stated that NRC's method of collecting retroactive fees during the last government quarter for the previous three quarters will create a significant and unanticipated negative financial impact.

Response. The NRC appreciates the concerns raised by these commenters. However, as a matter of law (OBRA-90, as amended) and policy the NRC must collect the statutorily mandated

The law also requires that these fees be established by rulemaking.

level of fees by the end of the fiscal year to which they are attributed, in this case, September 30, 2003. The NRC does make every effort to issue its proposed and final fee rules in a timely manner to give licensees as much time as possible to plan for fee increases. However, the agency must ensure that it fully complies with all applicable legislation, regulations, and policies, as well as perform the required fee calculations, in a relatively short time each year to produce its fee rules. This year Congress did not enact NRC appropriations for FY 2003 until February 20, 2003. Because the NRC does not know in advance what its future budgets will be (i.e., proposed budgets must be submitted to the Office of Management and Budget for its review before the President submits the budget to Congress for enactment), the agency believes it is not practicable to set fees based on future estimated budgets, nor would such an approach be consistent with its statutory mandate. The NRC will continue to strive to issue its fee regulations as early in the process as is practicable in order to give as much time as possible for licensees to plan for changes in fees.

III. Final Action

The NRC is amending its licensing, inspection, and annual fees to recover approximately 94 percent of its FY 2003 budget authority, including the budget authority for its Office of the Inspector General, less the appropriations received from the NWF. The NRC's total budget authority for FY 2003 is $584.6 million, of which approximately $24.7 million has been appropriated from the NWF. Based on the 94 percent fee recovery requirement, the NRC must recover approximately $526.3 million in FY 2003 through part 170 licensing and inspection fees, part 171 annual fees, and other offsetting receipts. The total amount to be recovered through

fees and other offsetting receipts for FY 2003 is $46.8 million more than the amount estimated for recovery in FY 2002.

The NRC estimates that approximately $127.5 million will be recovered in FY 2003 from part 170 fees and other offsetting receipts. For FY 2003, the NRC also estimates a net adjustment of approximately $1.9 million for FY 2003 invoices that the NRC estimates will not be paid during the fiscal year, and for payments received in FY 2003 for FY 2002 invoices. The remaining $396.8 million will be recovered through the part 171 annual fees, compared to $345.6 million for FY 2002.

A primary reason for the increase in total fees, as well as the annual fee amount, for FY 2003 compared to FY 2002 is that the amount to be recovered for FY 2003 includes $29.3 million for homeland security activities, whereas the FY 2002 funding for homeland security was excluded from fees. While the President's FY 2003 budget requested that NRC's funding for homeland security activities continue to be excluded from the fee base, the Energy and Water Development Appropriations Act, 2003, contained in the Consolidated Appropriations Resolution, 2003 (Pub. L. 108-7), included NRC's budget for homeland security activities in the fee base. Therefore, the FY 2003 fees include the $29.3 million budgeted for NRC's homeland security activities. Other reasons for the fee increases include the 2003 Federal pay raise, and the increased workload for new reactor licensing activities and reactor license renewal.

Table I summarizes the budget and fee recovery amounts for FY 2003. Due to rounding, adding the individual numbers in the table may result in a total that is slightly different than the one shown.

TABLE I - BUDGET AND FEE RECOVERY AMOUNTS FOR FY 2003

[Dollars in Millions]

Total Budget Authority	$584.6
Less NWF	- 24.7
Balance	$559.9
Fee Recovery Rate for FY 2003	x 94.0%
Total Amount to be Recovered For FY 2003	$526.3
Less Carryover from FY 2002	- 0
Amount to be Recovered Through Fees and Other Receipts	$526.3
Less Estimated Part 170 Fees and Other Receipts	- 127.5
Part 171 Fee Collections Required	$398.8
Part 171 Billing Adjustments	
Unpaid FY 2003 Invoices (estimated)	2.4
Less Payments Received in FY 2003 for Prior Year Invoices (estimated)	- 4.3
Subtotal	- 1.9
Adjusted Part 171 Collections Required	$396.8

The FY 2003 final fee rule is a "major" final action as defined by the Small Business Regulatory Enforcement Fairness Act of 1996. Therefore, the NRC's fees for FY 2003 will become effective 60 days after publication of the final rule in the Federal Register. The NRC will send an invoice for the amount of the annual fee to reactors and major fuel cycle facilities upon publication of the FY 2003 final rule. For these licensees, payment will be due on the effective date of the FY 2003 final rule. Those materials licensees whose license anniversary date during FY 2003 falls before the effective date of the final FY 2003 rule will be billed for the annual fee