

5/28/03  
7:00pm

Ann --

Per your request.



[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AH14

Revision of Fee Schedules; Fee Recovery for FY 2003

Bob-  
Please  
review  
provide  
changes by  
A.M. tomorrow.  
Thanks,  
Oren  
P.S. Return the  
attached change to me.

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

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 <sup>more</sup> ~~additional~~ 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 ~~for~~ which part 170 fees are assessed, nor the existing fee waiver policy in this rulemaking. The proposed rule's description of purposes ~~to~~ <sup>for</sup> 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 ~~very~~ 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

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 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, ~~Other potential solutions involve combining~~ <sup>or</sup> combining fee categories, ~~however,~~ <sup>However,</sup> alternatives involving caps or thresholds, and combining fee categories, also raise <sup>OK</sup> ~~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

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.

The annual fee for the power reactor class includes a portion of the homeland security costs for this fiscal year, which 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

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 established an "effort/fee" matrix in the FY 1999 ~~fee~~ fee rule (64 FR 31448; June 10, 1999) <sup>initially</sup> to determine the amount of effort associated with the fuel facilities. The matrix depicts the categorization of licenses according to their activities, level, scope, depth of coverage, and rigor or generic regulatory programmatic effort applicable to each <sup>facility</sup> category from a safety and <sup>FY 1995 fee rule (60 FR 32219; June 20, 1995),</sup> further revising it in the

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.

Ann -- run the comment below by OGC.

safeguards perspective. The relative weighted factors <sup>for each</sup> per facility, <sup>type</sup> for the various subclasses are <sup>fee</sup> ✓ depicted in Table VII. Because the existing effort/fee matrix has undergone the scrutiny of ~~the~~ public comment ~~process~~ during a previous rulemaking process, the NRC is reluctant to change ~~to~~ this Annual Fees for Spent Fuel Storage/Reactor Decommissioning methodology considering its broad industry acceptance.

**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, <sup>(including</sup> and the security-related activities that are on the fee <sup>line item</sup> base for FY 2003. Recovering the costs associated with spent fuel storage and reactor decommissioning from operating power reactors, power reactors in decommissioning or ✓

However, it should be noted that the NRC's budget reflects its efforts to be effective and efficient. Over recent years the NRC has eliminated programs, improved processes, reduced overhead requirements, and implemented efficiencies and cost savings. The Commission continues to search vigorously for additional opportunities to streamline its operations and to achieve efficiencies.

take out  
Discuss  
w/ Terry.  
Need some  
examples

Per Terry  
take out.

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.

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. However, to address fairness and equity concerns 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. This 2 percent <sup>per year</sup> reduction <sub>from the fee base</sub> accounts for activities such as Agreement State Oversight and Agreement State Regulatory Support. *that ~~are~~ 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 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