

Addressees - Memorandum dated May 23, 2003

SUBJECT: FINAL NOTICE OF RULEMAKING - 10 CFR PARTS 170
AND 171 - 94 PERCENT FEE RECOVERY FOR FY 2003

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O-16 E15
O-4 E5
T-6 D59
O-15 D21

*new edits
3/28 made changes
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OGC-03- 002049

May 23, 2003

MEMORANDUM TO: Multiple Addressees
(See Attached List)

FROM: Robert Carlson, Team Chief *ROC*
License Fee Team
Division of Financial Management
Office of the Chief Financial Officer

SUBJECT: FINAL NOTICE OF RULEMAKING -- 10 CFR PARTS 170
AND 171 -- 94 PERCENT FEE RECOVERY FOR FY 2003

Attached for your concurrence is a final rule for the FY 2003 fees to be assessed to recover 94 percent of the NRC's FY 2003 budget authority. In order to meet the statutory requirement to assess and collect the fees by September 30, 2003, this final rule must be published by June 18, 2003.

Please note that in order to meet the expedited schedule for the FY 2003 rule, we are providing each addressee a separate concurrence copy. Please provide your concurrence as quickly as possible, but no later than Noon Wednesday, May 28, 2003.

If you have any questions, please contact Ann Norris on 415-7807, or Tammy Croote on 415-6041. Thank you for your assistance in this matter.

Attachment: As stated

cc: M. Virgilio, NMSS
S. Collins, NRR
D. Lee, OIG
H. Bell, OIG
S. Reiter, OCIO

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(See Attached List)

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cc: M. Virgilio, NMSS
S. Collins, NRR
D. Lee, OIG
H. Bell, OIG
S. Reiter, OCIO

bcc: J. Funches, CFO
P. Rabideau, DCFO

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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 rule 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 under part 170, consistent with existing Federal law and policy. 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 does clearly set forth in its workpapers the components of these generic costs and how those costs are recovered through annual fees.

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 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.

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

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.

policy for those services on which part 170 fees are assessed, nor the

The proposed rule's description of purposes to which part 170 fees would apply is intended to be illustrative, not exhaustive.

Response. The NRC did not propose to revise its existing fee waiver policy in this rulemaking. 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, and the Commission's position 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. Fee waivers are thus 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 therefore 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. Therefore, the NRC is not revising its fee waiver policy. Under the existing fee waiver criteria, NRC will waive the review fees for a special project submitted for the purpose of supporting NRC's regulatory improvements as long as the NRC staff agrees 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 annual 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 by 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 part 170 and 171, as statute controls fee allocation. This applies both to 2. Annual Fees for Materials Users, Including Small Entities comments that more of the budget should be shifted from part 170 fees to part 171, as to the position advocating the reverse.*

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

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 jurisdictions. The commenter stated that in non-Agreement States, the NRC should accept the groundwater quality assessments conducted by the state or the

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 fee categories. 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. ^{However,} Alternatives involving caps or thresholds, and combining fee categories, ^{also} raise fairness and equity concerns. At this time, the Commission is not prepared to adopt any of these approaches. 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 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.

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

the need to take rapid action, the NRC is striving to carry out its security responsibilities in a manner that does not needlessly replicate the efforts of others. (Additional comments on the NRC's budget are summarized below.)

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.

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.

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 propose 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} ~~denote~~ significant monetary and staff resources to 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 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.

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 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 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 (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

(e) The activities comprising the surcharge are as follows:

(1) LLW disposal generic activities;

(2) Activities not directly attributable to an existing NRC licensee or class(es) of

licenses; e.g., international cooperative safety program and international safeguards activities; support for the Agreement State program; Site Decommissioning Management Plan (SDMP) activities; and

(3) Activities not currently assessed licensing and inspection fees under 10 CFR Part 170 based on existing law or Commission policy (e.g., reviews and inspections of nonprofit educational institutions and reviews for Federal agencies; activities related to decommissioning and reclamation; and costs that would not be collected from small entities based on Commission policy in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.)

Dated at Rockville, Maryland, this 27th day of March, 2003.

For the Nuclear Regulatory Commission.

Jesse L. Funches,
Chief Financial Officer.

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Dated at Rockville, Maryland, this _____ day of _____, 2003.

For the Nuclear Regulatory Commission.

 Jesse L. Funches,
 Chief Financial Officer.

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