From: Renu Suri
To: Robert Carlson; Tammy Croote
Date: 4/5/05 8:20AM
Subject: Response to Comments section for the FY 05 final rule

I have attached 2 files. One is a Table of all the comments received, sorted in the Category order. Second, is my attempt in responding to the comments. I used the 2003 and the 2004 final rule as well as the Communication Plan to respond to the comments. We can discuss this further at our 1:30 PM meeting.

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MESSAGE	779	04/05/05 08:20AM
Table of Comments on the 2005 Fee Rule.wpd	12791	04/05/05 08:14AM
FY 05 fee rule-response to comments.wpd	42747	04/04/05 07:08PM

Options

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LICENSEE COMMENTS ON FY 2005 PROPOSED FEE RULE

Category	Comment Description	Commenters	
Legal issues	Object to the disproportionate allocation of user fees to generic assessment under Part 171	NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Legal issues	Difficult to discern how NRC effectively manages the resources allocated against Part 171	NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Legal issues	Impedes the industry's ability to evaluate the agency's application of resources and priorities	NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Legal issues	NRC should provide an itemized accounting of the major elements that comprise the annual assessment under Part 171	NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Legal issues	Provide more details of the specific billings in the annual fee	GNF	
Specific Part 170 issues	Oppose the imposition of fees on unlicensed sites in decommissioning	Morgan Lewis on behalf of KACC (2)	
Specific Part 170 issues	Increase in hourly rates	Detroit(1), Wyoming, Westinghouse, GNF, NMA, Kennecott	
Specific Part 170 issues	Increase in fixed fees for 170.31-9A	MDS,	
Specific Part 171 issues	Increase in fixed fees for 171.16, 3B, 3J, 9A	MDS, PerkinElmer (3)	

LICENSEE COMMENTS ON FY 2005 PROPOSED FEE RULE

Specific Part 171 issues	UR-increase in annual fees	Wyoming, Kennecott, NMA	
Specific Part 171 issues	UR-increase due to fewer licenses	Wyoming, NMA	
Specific Part 171 issues	UR- reevaluate the loss of work load and reduce the fees accordingly	Kennecott, NMA	
Specific Part 171 issues	UR-DOE must be assessed ½ of all NRC budget attributed to generic/ other activities	NMA	
Specific Part 171 issues	UR-may not possess sufficient staff to process future applications for uranium mills	Wyoming	
Specific Part 171 issues	Unpredictable changes to the annual fees for fuel cycle facilities. Did not mention the one-time adjustment for Duke in the 2004 rule.	BWXT	
Other Issues	Strain on the budget	MDS, Westinghouse, GNF	
Other Issues	Cap the fee increase	MDS	
Other Issues	provide an estimate of fees in advance to better predict regulatory expenses	Southern, BWXT	
Other Issues	Oppose the increase in fees for security activities	MDS	
Other Issues	manage its regulatory process to maximize agency efficiency and effectiveness	NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Other Issues	phase in the increase over a longer period of time	Westinghouse	

LICENSEE COMMENTS ON FY 2005 PROPOSED FEE RULE

Other Issues	Issue a five year projected forecast	GNF, NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Other Issues	Review of productivity and efficiency be conducted that will directly reduce the hourly rate	GNF	
Other Issues	fees not attributed to licensee activities e.g. HLS should not be included in Annual fee	GNF, NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Other Issues	support removal of HLS cost from the fee base	Progress Energy, Southern, NEI, Detroit, Dominion, Progress Energy, Southern, Duke	
Other Issues	Reallocate resources from the inspection of plants that little or no safety significance to risk-informing regulatory requirements, reviewing lice renewal applications and licensing new reactor designs	Southern, NEI, Detroit, Dominion, Progress Energy, Southern, Duke	

(1) shifts Management and Support to single unit licensees, should be part of annual Fees

(2) Kaiser Aluminum and Chemical Co. Voluntarily agreed to decommission to current standards because (1) cos. are not receiving a benefit from NRC e.g. earning revenue from licensed activities (2) discourages voluntary decommissioning these cos. (3) should not have to shoulder all costs due to changed decommissioning standards (4) should not apply to cos. currently in decommissioning since it is unfair to change the fee structure midstream since these costs were unanticipated.

(3) This increase will have to be passed on to our customers. Since 80% of our product is sold overseas, our offshore competition will gain a cost advantage. Therefore, with lower sales the manufacturing jobs will be at risk

II. Response to Comments

The NRC published the FY 2005 proposed fee rule on February 22, 2005 (70 FR 8677) to solicit public comment on its proposed revisions to 10 CFR Parts 170 and 171. The NRC received 12 comments dated on or before the close of the comment period (March 24, 2005) and 3 additional comments thereafter, for a total of 15 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. These commenters stated that the NRC should inform stakeholders of the costs associated with each component of reactor regulation and all other generic costs in sufficient detail to enable them to provide meaningful comment on the proposed fee rules. The commenters stated that the NRC should provide an itemized accounting of the major elements that comprise the annual fee, including detailed information on the outstanding major contracts, their purpose, and their costs.

These commenters further stated that industry's ability to evaluate the NRC's application of resources and priorities is impeded because the NRC allocated 72 percent of its recoverable budget to the generic assessment under part 171, while only 28 percent is recovered under the discrete fee provisions of part 170.

Response. Consistent with the requirements of OBRA-90, as amended, the purpose of this rulemaking is to establish fees necessary to recover 90 percent of the NRC's FY 2005 budget authority, less the amounts appropriated from the NWF, from applicants and the various classes of NRC licensees. The proposed rule described the types of activities included in the proposed fees and explained how the fees were calculated to recover the budgeted costs for those activities. 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 20, "Performance Budget:Fiscal year 2005" (February 2004), which discusses the NRC's budget for FY 2005, 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.

The NRC notes that, regarding the comments that expressed concern that too much of the NRC's budget was designated for recovery under part 171, it assesses part 170 fees under the IOAA, and consistent with Office of Management and Budget (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. 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. The NRC is not at liberty to allocate fees indiscriminately between parts 170 and 171, because fee allocation is controlled by statute. Generic costs that do not provide special benefits to identifiable recipients cannot be recovered under part 170. The NRC's workpapers clearly set forth the components of these generic costs and how those costs are recovered through annual fees. Additionally, the NRC notes that it has taken action to maximize the amount recovered under part 170, consistent with existing Federal law and policy. For example, in FY 1998 the NRC began charging part 170 fees for all resident inspectors' time and in FY 1999 the NRC started charging part 170 fees for all project manager activities associated with oversight of the assigned license or plant. In FY 2003, the NRC also amended its regulations to allow the NRC to recover costs associated with contested hearings on licensing actions involving U.S. Government national security initiatives through part 170 fees assessed to the affected applicant or licensee (67 FR 64033; October 17, 2002). Included under this provision are activities involving the fabrication and use of mixed oxide fuel. The NRC seeks whenever possible, consistent with applicable law, to align its fee billing with the identifiable recipient of the benefit provided.

A. Specific Part 170 Issues.

1. Hourly Fees

Comment: Several commenters expressed concerns about the large increase in NRC hourly rates associated with the proposed changes to 10 CFR 170.20. One commenter wrote in to say that it "believes the change disproportionately shifts NRC management and overhead costs to single unit licensees, and these overhead cost should more appropriately be included in 10 CFR Part 171 fees."

Response: The increases to the Nuclear Reactor Safety and the Nuclear Materials and Waste Safety programs hourly rates are primarily due to the NRC's use of a revised estimate of the number of direct hours per FTE in calculating these rates. The NRC's new hourly rates are justified because they more accurately reflect the full cost of providing services under Part 170. The OMB's Circular A-25, "User Charges," emphasizes that agency fees should reflect the full cost of providing services to identifiable beneficiaries. The higher hourly rates are consistent with this guidance. The increases also support industry and Congressional comments that consistently recommend the NRC collect more of its budget through Part 170 fees-for-services vs. Part 171 annual fees. Once implemented, this change would increase fee recovery under Part 170 from approximately 30 percent to approximately 37 percent.

2. Increase in the Category 9A evaluation fee

Comment: One commenter objected to the increase in the fees for the Materials Category 9, Device, product, or sealed source safety evaluation, sub-category, Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices.

Response: Changes in FY 2005 annual fees for categories of licensees within the materials class reflect not only changes in budgeted resources for the materials class of licensees, but also changes in estimates of average professional staff time for materials users license applications and inspections, derived from the biennial review performed for the FY 2005 fee rule.

3. <u>Fees for unlicensed sites in decommissioning</u>

Comment: One commenter expressed its opposition to the imposition of fees on unlicensed companies currently in site decommissioning.

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. Recovering the site-specific decommissioning costs associated with these unlicensed sites through part 170 fees is consistent with the full cost recovery provisions of IOAA and the OMB's guidance in Circular A-25, "User Charges." By recovering the costs of decommissioning activities from the owners or operators of these unlicensed sites, as NRC does from licensed sites, the NRC believes the fairness and equity of its fee schedule would be enhanced.

B. <u>Specific Part 171 Issues.</u>

1. <u>Annual Fees for Uranium Recovery Licensees</u>.

Comment. The NRC received three comments objecting to the large increases in the annual fees for uranium recovery licensees. 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. Additionally, the commenters stated that the NRC needs to 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. One commenter suggested re-visiting the alternative of establishing arbitrary fee caps or thresholds for certain classes or other potential solutions.

The comments supported the continuation of the 2002 determination that the Department of Energy must be assessed one-half of all NRC budgeted costs attributed to generic/other activities for the uranium recovery program. In addition, one commenter citing a dramatic recovery of the price of uranium indicated a concern the t NRC "may not possess sufficient experienced staff to process future license applications and amendment requests that this price increase will generate."

Response. The NRC has responded to similar concerns raised by commenters in several previous fee rulemakings. The NRC again notes that the purpose of this rule is to recover the required percentage of its FY 2005 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 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. 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.

2. <u>Annual Fees for Fuel Facilities Licensees</u>.

Comment. One commenter expressed concern with the increase in annual fees for fuel facilities licensees.

Response: 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 2005. Rebaselining fees resulted in decreased annual fees compared to FY 2004 for five classes of licenses, and increased annual fees for two classes. For the small materials users, some categories of licensees will have increased annual fees and others will have decreased annual fees.

3. Increase in the Annual Fees for Some Materials Licensees

Comment: Two commenters strongly objected to the increase in the annual fees for some of the categories of the materials licenses. One commentor stated that the increase will have to be passed on to their customers which will place it at a cost disadvantage in a very competitive environment.

Response. 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 activity 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.

D. Other Issues.

1. Recovery of Security Costs.

Comment. Several commenters strongly objected to the NRC collecting security-related costs from licensees. These commenters stated that homeland security issues related to nuclear power plants are part of the U.S. government's overall responsibility to protect its critical infrastructure, and hence these costs should be excluded from the fee structure and funded through the general treasury. These commenters noted that the nuclear industry has already incurred significant security costs, and that these costs have not been reimbursed by the Federal government, unlike what has occurred for other industries. While the commenters stated that they recognized the public benefit of enhancing the already strong security at nuclear facilities, they thought it fundamentally unfair to require licensees to pay for the NRC's additional security-related oversight.

Because of concerns raised regarding homeland security activities and their cost recovery, these comments urged the NRC to continue to engage the Department of Homeland Security and congressional leaders to achieve a more equitable outcome for NRC licensees.

Response. The NRC appreciates the concerns raised by commenters regarding homeland security costs being funded through license fees. However, the NRC's required fee recovery is set by statute and therefore, is outside the scope of this rulemaking. To implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, which requires that the NRC recover approximately 90 percent of its budget authority in FY 2005, less the amounts appropriated from the Nuclear Waste Fund (NWF). The total amount to be recovered for FY 2005 is approximately $540.7 million. After accounting for carryover and billing adjustments, the net amount to be recovered through fees is approximately $538 million.

The NRC has supported previous legislative efforts to remove homeland security costs from the fee base, and continues to do so. In the 2003 Congressional session, an Energy Policy Bill (H.R.6) was introduced that would amend OBRA-90 to remove many homeland security costs from the fee base (except homeland security costs associated with fingerprinting, background checks, and security inspections). In its August 29, 2003, letter to the House Committee on Energy and Commerce, the Commission supported the fee recovery provisions of the Energy Policy Bill. The House has approved the Energy Policy Bill produced by the conference committee and the Senate started debate on the conference committee report. However, as of the date of this rule, no further action has been taken by the Senate or House on this bill. The successor to H.R.6, S.2095, introduced in the current session of Congress, also would remove many homeland security costs from the fee base. The NRC continues to support legislative efforts to remove homeland security costs from the fee base.

2. <u>NRC Budget</u>.

Comment. Some commenters stated that NRC fees should reflect NRC efficiencies and provided 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, without impeding operational safety. Commenters suggested that changes in NRC's regulatory approach, such as the reactor oversight process, as well as revised inspection, assessment and enforcement processes, should result in reduced fees. Some comments included suggestions to reallocate resources dedicated to inspection of areas of plants that have little or no safety significance, to efforts to risk-inform regulations, review license renewal applications and license new reactor designs.

Response. The NRC's budget 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 Congressional budget process affords stakeholders and the public opportunities to comment, including oversight meetings, testimony, press briefings, etc. 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, the NRC will continue efforts to ensure that the NRC carries out its statutory obligations in an efficient manner.

3. <u>Fee Rule Communication and Timing</u>.

Comment. Several commenters raised concerns that the timing of issuance of the fee rule makes it difficult for licensees to plan for regulatory expenses within the framework of their normal budget cycles. To address this issue, commenters suggested that the NRC publish an estimate of fees for the following year, coincident with issuance of the proposed fee rule each year. The commenters recognized that while it would likely be impossible for the NRC to offer exact projections, the Commission should be able to develop reasonable estimates of the next year's fees. One commenter suggested phasing in the increase over a longer period of time.

Response. The NRC acknowledges the concerns raised by these commenters. However, 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 NRC believes it is not practicable to project fees based on future estimated budgets. The NRC will continue to strive to issue its fee regulations as early in the fiscal year as is practicable to give as much time as possible for licensees to plan for changes in fees.