From: Renu Suri
To: Robert Carlson
Date: 4/11/05 3:08PM
Subject: I've attached the latest Response to Comments

CC: Tammy Croote

Mail Envelope Properties (425ACB46.7A1 : 2 : 50165)

Subject:	I've attached the latest Response to Comments
Creation Date:	4/11/05 3:08PM
From:	Renu Suri
Created By:	RXS6@nrc.gov

Recipients
nrc.gov
twf5_po.TWFN_DO
RDC (Robert Carlson)
TXC1 CC (Tammy Croote)

Post Office	**Route**
twf5_po.TWFN_DO	nrc.gov

Files	**Size**	**Date & Time**
FY 05 fee rule-response to comments.wpd	50205	04/11/05 03:07PM

Options

Expiration Date:	None
Priority:	Standard
Reply Requested:	No
Return Notification:	None
Concealed Subject:	No
Security:	Standard

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 13 comments dated on or before the close of the comment period (March 24, 2005) and 3 additional comments thereafter, for a total of 16 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 (Note the NRC's estimated fee recovery in FY 2005 from parts 171 and 170 fees is 69 percent and 31 percent, respectively).

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.

B. 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 NRC agrees that the increase in the hourly rates will have a greater impact on the sites which use more Part 170 services. 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 primary reason for the increase to the Nuclear Reactor Safety and the Nuclear Materials and Waste Safety programs hourly rates in FY 2005 is 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. NRC estimates that once implemented, this change will increase fee recovery under Part 170 from approximately 30 percent to approximately 37 percent. However, given the effective date of the FY 2005 final fee rule, 60-days after publication of the rule, in late summer, the impact of the higher fees will be evident in the following fiscal year, FY 2006, when the bulk of the fees collected reflect the use of these changes.

2. Increase in the Category 9A evaluation fee

Comment. One commenter objected to the increase in the fees for the Materials Category 9A, (Device safety evaluation in 10 CFR Part 170.31)

Response. We recognize that the there was a large increase in the rates this year. The change is a result of the increase in hourly rates as well as the changes in estimates of average professional staff time for materials users license applications and inspections. The change in estimates is derived from the biennial review performed for the FY 2005 fee rule. The estimate of average professional staff time for category 9A nearly doubled in FY 2005 compared to FY 2004.

3. Fees for unlicensed sites in decommissioning

Comment. One commenter expressed its opposition to the imposition of fees on unlicensed companies currently in site decommissioning. The commenter disagreed with NRC's policy of imposing the fees on "..companies that voluntary agreed to undertake decommissioning.."

Response. The NRC appreciates the concerns raised by this commenter, the agency notes that its collection of part 170 fees is consistent with Federal law. By recovering the costs of decommissioning activities from the owners or operators of these unlicensed sites, as NRC does from licensed sites, the agency believes the fairness and equity of its fee schedule is be enhanced. However, NRC will phase-n this fees. The fees will be effective on year after the dffective date of the FY 2005 Final Fee Rule. This will address some of the the issues raised by the commenter.

As a matter of policy, 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."

4. Fees for Licensee-Specific Activities Resulting from Security Related Orders

Comment. One commenter suggested not amending the part 170 which would "allow fees to be assessed for any licensee-specific activity resulting from orders issued by the Commission not related to civil penalties or other civil sanctions."

Response. The NRC acknowledges the impact of the fees on the licensees. In recent years, the NRC's use of orders to impose additional requirements for safety or security reasons has increased. For example, subsequent to the September 11, 2001, terrorist attacks, the Commission imposed security requirements on various groups of licensees through orders. These orders resulted in the NRC's review of licensee-specific amendments and other activities that normally would have been billable under part 170, except that they were associated with orders.

Given the changing regulatory environment and the extent of licensee-specific activities that are resulting from orders unrelated to civil penalties or other civil sanctions, the NRC is revising its regulations to allow for full cost recovery of these activities under part 170 from NRC licensees. The NRC is not proposing to change cost recovery for the development of these orders; these costs would continue to be recovered under part 171.

C. Specific Part 171 Issues.

1. Annual Fees for Uranium Recovery Licensees.

Comment. The NRC received three comments objecting to the large increase 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." This commenter also noted a previous Commission comment which indicated the existence of a uranium recovery facility was in the public interest.

Response. The NRC acknowledges that uranium recovery annual fees increased by a large percentage (90 percent to 115 percent) from FY 2004 to FY 2005. However, the FY 2005 uranium recovery annual fee of $30,200 is still significantly lower than previous years. (For example, these fees ranged from approximately $82,000 to $132,000 in FY 2001, and $39,000 to $64,000 in FY 2003.) Annual fees fluctuate from year to year based on a number of factors,

including the budgeted resources for a license fee class. Additionally, because annual fees must recover all fee class resources not recovered through part 170 fees, annual fees are impacted by the part 170 fees collected from that fee class.

In response to concerns regarding decreasing numbers of NRC licensees in light of more states becoming Agreement States, the NRC notes that budgeted resources providing support to Agreement States or their licensees are included in total surcharge costs, and total surcharge costs are reduced by the fee relief (i.e., direct appropriations) provided by Congress. (As previously noted, to address fairness and equity concerns associated with licensees paying for the cost of activities 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.) To the extent that this fee relief is insufficient to cover all surcharge costs, these remaining surcharge costs are spread to all licensees based on their percentage of the budget. In FY 2005, $2.3 million of the $62.4 million in total surcharge costs was not covered by the 10 percent fee relief, and therefore is included in licensees' annual fees. Eighty-two percent of this $2.3 million in net surcharge costs is included in reactor annual fees, and the remainder is spread to all other licensees' annual fees.

As such, NRC's uranium recovery licensees are not generally burdened with the costs of regulating Agreement State licensees or any other costs not associated with uranium recovery licensees (only to the extent that a small portion of these costs are spread to all licensees through the net surcharge). Although, the license fee classes with fewer licensees are more impacted by changes to the budget and changes to part 170 collections. In FY 2005, total surcharge costs allocated to the uranium recovery class are $8,600. The NRC does note that the increases to hourly rates enacted through this rulemaking will enable the agency to recover more costs of licensee-specific activities, and once implemented, will minimize costs that must be recovered through annual fees.

With respect to general comment that there is a lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory program and the benefit derived from such services, the NRC notes that the uranium recovery fees reflect the budgeted resources associated with the regulation of NRC's uranium recovery licensees. As described above, the fee relief of 10 percent for FY 2005 covers almost all (with the exception of $2.3 million) of the budgeted resources associated with activities that do not directly benefit NRC licensees. The NRC must by statute assess annual fees to uranium recovery licensees to recover their budgeted costs not recovered through part 170 fees and other receipts. Fee recovery alternatives involving caps or thresholds 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. While the NRC acknowledges the previous Commission comment about the existence of a uranium recovery facility being in the public interest, this does not negate the NRC's legal obligation to collect fees to recover the costs of regulating uranium recovery facilities.

In response to the comment that the NRC may not possess sufficient experienced staff to process future licensing actions for uranium recovery licensees, the NRC notes that this rule establishes fees to recover 90 percent of the NRC's FY 2005 budget, in compliance with OBRA-90. The NRC's current and future budgets are not within the scope of this rulemaking. However, the NRC does consider market forces in its budget formulations.

Finally, the NRC notes that this final rule continues the policy of assessing the Department of Energy one-half of all NRC budgeted costs attributed to generic/other activities for the uranium recovery program.

2. Annual Fees for Fuel Facilities Licensees.

Comment. One commenter expressed concern with the increase in annual fees for fuel facilities licensees. The comments discussed the unpredictability of estimating the impact of the proposed fee increase including no notice in the fee rule of the "..one-time adjustment increase for revenue.." in FY 2004 rule.

Response. The NRC appreciates the concerns raised about fee predictability and stability. The one-time adjustment for the fuel facilities was discussed, although not highlighted, in the FY 2004 Final Fee Rule (69 FR 22671; April 26, 2004).

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, annual fees for some categories of licensees increased while others decreased.

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. NRC Budget.

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. Fee Rule Communication and Timing.

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. Another commenter requested, " ..that the proposed hourly rate increase be rescheduled until such time as the offsetting reduction will coincide with the increase."

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. In addition, 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, 2005.

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.