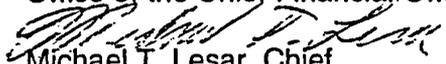




UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

April 20, 2005

MEMORANDUM TO: Tammy Croote  
License Fee Team  
Division of Financial Management  
Office of the Chief Financial Officer

FROM:   
Michael T. Lesar, Chief  
Rules and Directives Branch  
Division of Administrative Services  
Office of Administration

SUBJECT: OFFICE CONCURRENCE ON FINAL RULE REVISING 10 CFR PARTS  
170 AND 171 - REVISION OF FEE SCHEDULES; FEE RECOVERY  
FOR FY 2005 (RIN AH61)

The Office of Administration (ADM) concurs in the subject rulemaking, with the exceptions noted in the attached mark-up of the package.

When forwarding the rule for publication in the Federal Register, please have your staff note the following publication requirements.

- The package must include all items listed in the attached **ADM Publication Package Checklist**.
- All documents transmitted must be placed in **ADAMS** before the package is sent to ADM. See the Publication Package Checklist for instructions on profiling the rule and Congressional letters in ADAMS.
- The attached **ADAMS Public Availability Checklist** must be completed and returned with the final publication package.
- After publication of the Federal Register notice, a **Regulatory History** for this rule must be created in ADAMS. To facilitate generation of the regulatory history using the ADAMS report function, enter the Regulation Identifier Number (RIN) for the rule (RIN 3150-AH61) as the Case/Reference Number in the ADAMS profile of each document related to the rulemaking.

If you have any questions about this matter, please contact me at 415-7163 (MTL), or Betty Golden (bkg2) at 415-6863.

Attachments:

1. Mark-up of rulemaking package
2. ADM Publication Package checklist
3. ADAMS Public Availability checklist

Regarding 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 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's estimated fee recovery in FY 2005 from parts 171 and 170 fees is 69 percent and 31 percent, respectively.) 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 work papers 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 (63 FR 31840; June 10, 1998) 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 (64 FR 31448; June 10, 1999). 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. Additionally, in this year's fee rule, the NRC is revising its hourly rate calculation formula in order to better reflect actual agency costs, resulting in higher hourly rates. Once implemented, the NRC estimates that the increased hourly rates will increase fee recovery under part 170 from approximately 29 percent in FY 2005

to more than 37 percent<sup>in</sup> FY 2006. The NRC seeks whenever possible, consistent with applicable law, to assess part 170 fees to the identifiable recipients of the benefits provided.

## B. Specific Part 170 Issues

### 1. Hourly Fees

*Comment.* Several commenters expressed concerns about the large increases in NRC hourly rates associated with the proposed changes to 10 CFR 170.20. One commenter was concerned that these changes disproportionately shift NRC management and overhead costs to single unit licensees with an NRC project manager and two resident inspectors, as compared to multiple unit sites that may share project manager and resident inspector resources. This commenter stated that these overhead costs should more appropriately be included in 10 CFR Part 171 fees.

*Response.* The NRC acknowledges that the increases to the part 170 hourly rates are more significant this year than previous years, and agrees that these increases will have a greater impact on the sites that receive more part 170 services (e.g., sites with more than one resident inspector). The NRC's hourly rates are based on budgeted costs and must be established each year to meet the NRC's fee recovery requirements. The primary reason for the increases in the hourly rates in FY 2005 is 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. Therefore, the NRC is retaining the revised hourly rate formula as presented in the FY 2005 proposed fee rule. This results in hourly rates of \$205 for the nuclear reactor safety program, and \$197 for the nuclear materials and waste safety program. Although the higher hourly rates will have a greater impact on licensees that receive more part 170 services, the NRC believes this is appropriate because the new rates more accurately reflect the costs of providing these services.

## 2. Increase in the Category 9A Evaluation Fee

*Comment.* One commenter objected to the increase in the fees for materials category 9A (device safety evaluations) in 10 CFR 170.31, stating the increases are well beyond the inflation rate and capricious.

*Response.* The NRC recognizes that there was a large increase in the evaluation fee for materials category 9A. The change is a result of both the increase in the materials program hourly rate as well as a revised estimate of the average professional staff time required to process this type of application. As <sup>previously</sup> noted above, the increase in the hourly rate is due to the revision of the NRC's hourly rate calculation formula to better reflect actual agency costs. The change in the average professional staff time estimate is based on the biennial review of fees performed for the FY 2005 fee rule, in compliance with the Chief Financial Officers (CFOs) Act

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 OMB Circular A-25, "User Charges," 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. The NRC believes recovering the site-specific decommissioning costs associated with both licensed and unlicensed sites through part 170 fees is consistent with the full cost recovery provisions of IOAA and Circular A-25.

While the NRC acknowledges that decommissioning standards have been revised over the years, regulatory standards sometimes change for operating licensees, as well, in light of new safety or security issues or information. The NRC does not believe this is sufficient rationale for not imposing fees in these circumstances. Additionally, while the NRC is not providing the benefit of an operating license to sites in decommissioning—whether licensed or unlicensed—the NRC is incurring costs to provide other services to these sites, and believes this justifies the imposition of fees to recover these costs. As such, the NRC does not believe it is appropriate to not apply to this policy to existing sites in decommissioning. S GCV

However, NRC appreciates the concerns raised by this commenter. To address these concerns, NRC will delay the effective date of this requirement to one year after the effective date of the FY 2005 final fee rule. The NRC believes this later effective date will allow unlicensed sites to better plan for the imposition of these fees. This delayed effective date will also allow the owners/operators of unlicensed sites time to make as much progress as

practicable in completing these decommissioning activities <sup>before</sup> prior to the imposition of fees by the NRC. The NRC believes charging part 170 fees to unlicensed sites, but with sufficient notice before implementation, will appropriately implement the NRC's goal of enhancing the fairness and equity of its fee schedule while encouraging continued progress on meeting decommissioning standards.

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

*Comment.* One commenter suggested not amending part 170 to 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. This commenter stated that licensees are required to implement additional security requirements at their own cost, and that adding additional homeland security costs to the fee base could discourage licensees from voluntary implementation of technological advances or additional security measures beyond the scope of the orders.

*Response.* The NRC acknowledges the impact of these fees on the licensees. However, the NRC must comply with OBRA-90 and recover most of its budget, including homeland security costs, <sup>#</sup> through fees to licensees. As such, <sup>also</sup> the NRC must recover the costs of licensee-specific actions resulting from security-related orders through either parts 170 or 171 fees. The NRC believes it is more fair and appropriate to recover these costs through part 170 fees because the activities are licensee-specific and serve an identifiable beneficiary. By recovering the costs of licensee-specific activities resulting from orders through part 170 fees, as opposed to part 171 annual fees, the NRC will more fairly allocate the cost recovery of these activities

amongst licensees. This is because part 170 fees will be charged to a licensee based on the actual time NRC spends ensuring compliance for that licensee, rather than spreading total industry costs evenly to all licensees. This will allow the NRC to recover more fees from licensees that <sup>use</sup> utilize more NRC resources in complying with these orders. The NRC believes this will provide additional, incentive for licensees to fully cooperate with security orders.



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The NRC also believes this change is important because the NRC's use of orders to impose additional requirements for safety or security reasons has recently 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 changing cost recovery for the development of these orders; these costs will 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 a lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory program and the benefit derived from <sup>these</sup> 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. ✓

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 cited the dramatic recovery of the price of uranium and indicated that this may generate future requests for licensing actions. The commenter was concerned that the NRC may not possess sufficient experienced staff to process these requests. 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. 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. However, 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 (the percentage of the budget associated with reactors) of the \$2.3 million in net surcharge costs is included in reactor annual fees, and the remainder is spread to all other licensees' annual fees.

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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). In FY 2005, total surcharge costs allocated to the uranium recovery class are \$8,600.

However, the NRC acknowledges that license fee classes with fewer licensees are more impacted by changes to the budget and changes to part 170 collections. Budgeted resources not recovered through part 170 fees are recovered through part 171 annual fees. As such, <sup>to</sup> the extent that part 170 fees do not completely recover the costs of budgeted resources for part 170 activities, these costs are included in annual fees. The NRC does note that the increases to hourly rates enacted through this rulemaking will enable the agency to recover more of the budgeted resources for licensee-specific activities, and once implemented, will reduce costs that must be recovered through annual fees. ✓

With respect to the 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 <sup>these</sup> such services, the NRC notes that the uranium recovery fees reflect the budgeted <sup>previously</sup> resources associated with the regulation of NRC's uranium recovery licensees. As <sup>described</sup> 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, and the total surcharge cost allocated to the uranium recovery class is \$8,600 in FY 2005. 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. 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 and expected future licensing activities in formulating its budget.

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 over the increase in annual fees for fuel facilities licensees. The comments discussed the unpredictability of estimating proposed fee increases, as well as that the NRC did not mention in the FY 2004 fee rule a one-time adjustment it had made to account for part 170 fees received for prior year activities (which decreased annual fees in FY 2004 for fuel facilities).

*Response.* The NRC appreciates the concerns raised about fee predictability and stability, and does strive to notify licensees as early as possible of proposed fee changes. While the one-time adjustment for the fuel facilities was discussed in the FY 2004 final fee rule (69 FR 22671; April 26, 2004), the NRC acknowledges that the rule did not fully explain the potential impacts of this adjustment. The NRC aims to more fully explain any such changes in the future.

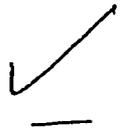
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Although the NRC understands that large fluctuations in fees are undesirable, the NRC must recover most of its budget to comply with OBRA-90, as amended. To do so, the NRC annually promulgates a rule establishing licensee fees. <sup>Because</sup> In 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 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 increased annual fees for fuel facilities compared to FY 2004 due to an increase in budgeted resources for fuel facilities. A decrease in part 170 fees from this class also contributed to the annual fee increase.

### 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 commentator stated that the increase will have to be passed on to their customers which will place <sup>it</sup> 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.



Annual fees for materials users increased for certain fee categories for two reasons. First, the budgeted resources for the materials users class increased from FY 2004 to FY 2005. Second, the distribution of the materials users class resources to fee categories within this class was revised based on the biennial review of fees. As mentioned previously, the staff biennially reviews the average professional staff hours associated with processing applications and performing inspections. This review was performed in FY 2005, and indicated that staff hours spent on certain categories of materials users licensees had increased significantly in a few instances (e.g., categories 3H, 3I, 9A, and 9B) since the last biennial review of fees. Because

the total budgeted resources for the materials users class are distributed to fee categories within that class based on these average review times, this resulted in more significantly increased annual fees for these categories of licensees.

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<sup>er</sup> 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 OBRA-90, as amended, the NRC must recover approximately 90 percent of its budget authority in FY 2005, less the amounts appropriated from the 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. This required fee recovery includes homeland security budgeted resources.

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 will continue 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. <sup>Some</sup> 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 the 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. Fees Communication and Timing, Including Fee Increase Phase-Ins or Caps

*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 fee increases over a longer period of time, and others similarly suggested the idea of a cap to fee increases. Another commenter requested that the proposed hourly rate increase be rescheduled until such time as the offsetting annual fee reduction will coincide with the increase.

*Response.* The NRC acknowledges the concerns raised by these commenters. As a matter of law (OBRA-90, as amended) 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. However, because the NRC does not know in advance what its future budgets will be (i.e., proposed budgets must be submitted to the OMB 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. Even if the NRC were able to reasonably predict a future year total budget, the annual fee amounts are also highly sensitive to the allocation of these total resources to license fee classes, the numbers of licensees in a fee class, and the proportion of total class costs recovered from part 170. Estimating these factors even further in advance than

the NRC currently does would likely lead to future fee projections that would prove to be inaccurate, and therefore misleading to licensees.

With respect to the comment that requested that the proposed hourly rate increase be rescheduled until such time as the offsetting annual fee reduction will coincide with the increase, this is not practicable due to the timing of the NRC's fee recovery requirements. Because the NRC must collect its current fiscal budget by September 30, 2005, the FY 2005 annual fees must take effect in time for the NRC to collect these fees by that date. If the NRC wished to offset FY 2005 annual fees by increasing part 170 revenue by applying the FY 2005 increased hourly rates, it would have to retroactively bill licensees for the increased hourly rates for all the hours charged thus far to licensees in FY 2005, and collect the revenue for this increase by September 30, 2005. The NRC believes it is more practicable to implement the higher hourly rates as of the effective date of this rule, and use the increased revenue from these revised rates to offset annual fee collections in FY 2006.

The NRC has considered requests to cap fee increases or phase them in over a longer period of time. In the FY 1999 proposed fee rule, the NRC solicited comments on the idea of a cap to fee increases (64 FR 15876; April 1, 1999). While some comments supported this proposal, others did not because they believed it would lead to some licensees subsidizing the costs of other licensees. The NRC did not adopt a fee increase cap in the FY 1999 final fee rule in light of fairness and equity concerns with this approach and a lack of overwhelming support from commenters (64 FR 31448; June 10, 1999). Upon subsequent evaluation, the NRC continues to believe that the legal and fairness concerns with these fee cap strategies or other

through part 170 licensing and inspection fees, part 171 annual fees, and other offsetting receipts.

The NRC estimates that approximately \$161.8 million will be recovered in FY 2005 from part 170 fees and other offsetting receipts. The NRC derived this estimate based on the previous four quarters of billing data for each license class, with adjustments to account for changes in the NRC's FY 2005 budget as appropriate. The remaining \$376.2 million would be recovered through the part 171 annual fees, compared to \$389.9 million for FY 2004.

The primary reason for the decrease in total fees for FY 2005 is that the NRC's fee recovery is 90 percent in FY 2005, compared to 92 percent in FY 2004. In accordance with the FY 2001 Energy and Water Development Appropriations Act, this decrease in the NRC's required fee recovery is sufficient to offset the increase of 1.5 percent in the NRC's non-NWF budget in FY 2005.

Table I summarizes the budget and fee recovery amounts for FY 2005.

TABLE I. - BUDGET AND FEE RECOVERY AMOUNTS FOR FY 2005

[Dollars in millions]

|  |                |
|--|----------------|
| Total Budget Authority .....                   | \$669.3        |
| Less NWF .....                                 | <u>-68.5</u>   |
| Balance .....                                  | \$600.8        |
| Fee Recovery Rate for FY 2005 .....            | <u>x 90.0%</u> |
| Total Amount to be Recovered For FY 2005 ..... | \$540.7        |

contact the License Fee Team, Division of Financial Management, Office of the Chief Financial Officer, at 301-415-7554, or e-mail fees@nrc.gov. In addition to publication in the *Federal Register*, the final rule will be available on the Internet at <http://ruleforum.llnl.gov> for at least 90 days after the effective date of the final rule.

The NRC is amending 10 CFR parts 170 and 171 as discussed in Sections A and B below.

A. Amendments to 10 CFR Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services Under the Atomic Energy Act of 1954, as Amended.

The NRC is revising the hourly rates used to calculate fees and to adjust the part 170 fees based on the revised hourly rates and the results of the agency's biennial review of fees required by the CFOs Act of 1990. Additionally, the NRC is revising part 170 to provide for the assessment of full cost fees for licensee-specific activities resulting from most orders and decommissioning activities associated with unlicensed sites; clarify that part 170 fee waivers need to be requested from, and granted by, the CFO in writing in certain instances; notify licensees that the NRC intends to apply its existing full cost recovery policy for project managers to license renewal project managers; and make minor administrative changes, including those to enhance consistency between the fee categories used in part 170 and part 171.

The ~~A~~ amendments are as follows:

1. Hourly Rates

The NRC is revising the two professional hourly rates for NRC staff time established in § 170.20. These rates are based on the number of FY 2005 direct program full time equivalents (FTEs) and the FY 2005 NRC budget, excluding direct program support costs and NRC's appropriations from the NWF. These rates are used to determine the part 170 fees. The rate for the reactor program is \$205 per hour (\$296,782 per direct FTE). This rate is applicable to all activities for which fees are assessed under §170.21 of the fee regulations. The rate for the materials program (nuclear materials and nuclear waste programs) is \$197 per hour (\$285,336 per direct FTE). This rate is applicable to all activities for which fees are assessed under §170.31 of the fee regulations. In the FY 2005 proposed fee rule, the reactor program rate was \$205 and the materials program rate was \$198. The materials program rate decreased by one dollar between the FY 2005 proposed and final rules due to the movement of some budgeted resources from the materials program to the surcharge. In the FY 2004 final fee rule, the reactor and materials program rates were \$157 and \$156, respectively. The increase to the reactor and the materials program rates from FY 2004 is primarily due to the NRC's use of a revised estimate of the number of direct hours per FTE in calculating these rates. The recent Government-wide pay raise is another reason for the proposed increase in the hourly rates.

As described in further detail below, the NRC currently assumes 1,776 hours per direct FTE are available for direct program work, while the new hourly rate assumes 1,446 hours per direct FTE are available for direct program work. Because the NRC's hourly rates are calculated by dividing the total annual costs of a direct FTE by average annual direct hours per FTE, the lower the number of direct hours per FTE used in the calculation, the higher the hourly rates.

The NRC is revising its estimate of direct hours per FTE to more accurately reflect the NRC's costs of providing part 170 services, which will allow the NRC to more fully recover the

costs of these services through part 170 fees. Because costs not recovered under part 170 are recovered through part 171 annual fees, the increase in total part 170 fees (caused by the hourly rate increase) will result in a reduction to total annual fees of the same amount. As such, this hourly rate increase will shift some fee recovery from part 171 annual fees to part 170 fees for licensee-specific services. (Because revenue from these increased part 170 fees will not be received by the NRC until FY 2006—in light of the effective date of the final rule and the timing of the NRC's regular billing cycle—the reduction in annual fees from this change will not occur until FY 2006.)

Previously, the NRC used an estimate of 1,776 hours per FTE to calculate the reactor and materials program hourly rates, based on OMB Circular A-76, "Performance of Commercial Activities." However, this Circular provides assumptions to be used to estimate personnel costs for the competition of commercial activities, and does not provide guidance about assumptions to be used for purposes of fee calculation. (OMB's Circular A-25, "User Charges," also does not specifically address the number of hours to assume per FTE in calculating fees, but does emphasize that agency fees should reflect the full cost of providing services to identifiable beneficiaries.) The 1,776 estimate from Circular A-76 includes time for administrative, training, and other activities a direct program FTE may perform that, while relevant to consider for certain costing purposes, would more accurately be considered overhead. Therefore, this estimate should not be assumed to be 'direct' time for purposes of calculating a rate per hour of direct activities, which is the intended purpose of the NRC's hourly rates. While the 1,776 estimate would be a useful fee calculation input were more detailed information not available, the NRC has been collecting more detailed information from its new time and labor system since

November 2001, which is now the NRC's established source of data for employee work activities. The NRC has performed a review of its time and labor data, which indicates that 1,446 hours per FTE more accurately reflects the time expended by NRC program employees performing activities directly associated with the programmatic mission of the NRC.

The NRC recognizes that the increase to the hourly rates is more significant than those hourly rate changes that have occurred in previous years. However, the NRC believes that this increase is justified in light of the review of the NRC's time and labor data, which showed that NRC direct employees spend, on average, 1,446 hours per year on activities directly associated with the programmatic mission of the NRC. The NRC believes that the use of 1,446 hours per FTE is more appropriate for the purpose of the NRC's fee calculation than other estimates of hours per FTE used for different agency financial purposes. By using an estimate of hours per FTE that reflects only direct staff time, the resulting hourly rates more accurately reflect the full cost of providing services under part 170. For this reason, the NRC believes that this estimate of hours per FTE is consistent with guidance provided in OMB Circular A-25 on recovering the full cost of services provided to identifiable recipients. This change also supports industry comments that consistently recommend that the NRC collect more of its budget through part 170 fees-for-services vs. part 171 annual fees.

Higher hourly rates will result in (1) increased full cost fees for licensing and inspection activities, and (2) increased materials flat fees for license applications. As noted, total part 171 annual fees will decrease by the same amount as the increase in total part 170 fees. This shift from part 171 to part 170 will be greater for those fee classes with a higher proportion of part 170 to part 171 work activities (e.g., operating power reactors, uranium recovery, rare earth). Because annual fees are adjusted to recover the remainder of the budgeted resources for a

facilities  
?

for new license applications and amendments for export and import licenses remained the same for each of the five fee categories in §§170.21 and 170.31.

The licensing fees for fee categories K.1 through K.5 of §170.21, and fee categories 1C, 1D, 2B, 2C, 3A through 3P, 4B through 9D, 10B, 15A through 15E, and 16 of §170.31<sup>y</sup> are based on the revised professional staff hours needed to process the licensing actions multiplied by the revised materials program professional hourly rate for FY 2005. As previously noted, the revised higher hourly rate of \$197 for the materials program is a key reason for the increases in the revised licensing fees. ✓

The biennial review also included the “flat” fee for the general license registrations covered by fee Category 3.Q. As a result of this review, the revised fee per registration is \$620, compared to the current fee of \$610. The revised fee is based on the current estimated number of registrants, current annual resource estimates for the program, and the FY 2005 materials program hourly rate. The next biennial review of the registration fee will be included in the FY 2007 fee rule; however, the registration fee may change in the FY 2006 fee rule if there is a change to the materials program FTE rate for FY 2006.

As compared to the FY 2005 proposed fee rule, a few of the licensing fees in §§170.21 and 170.31 are slightly lower due to the decrease by one dollar in the materials program hourly rate between the FY 2005 proposed and final fee rules.

The amounts of the materials licensing “flat” fees are rounded as follows: fees under \$1,000 are rounded to the nearest \$10, fees that are greater than \$1,000 but less than \$100,000 are rounded to the nearest \$100, and fees that are greater than \$100,000 are rounded to the

#### 4. Charging Fees for Unlicensed Sites in Decommissioning

The NRC currently does not charge part 170 fees to owners or operators of unlicensed sites in decommissioning. However, the NRC does perform work related to the decommissioning of these sites that is recoverable under IOAA through part 170 fees because this work is associated with an identifiable beneficiary. These costs are currently recovered through either a surcharge that is included in NRC licensees' annual fees or through taxpayer-funded appropriations (i.e., Department of Treasury's General Fund). 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 will be enhanced. Therefore, the NRC is adding a new category (14B) to 'Schedule of Materials Fees' at \$170.31 that will provide for the assessment of part 170 fees to recover the full cost of site-specific decommissioning activities for unlicensed sites. (The current Category 14 at \$170.31 will be renumbered as Category 14A.) Section 170.2 will also be revised to expand the scope of part 170 to cover an owner or operator of an unlicensed site in decommissioning being conducted under NRC oversight.

However, in light of concerns raised by a commenter on the FY 2005 proposed fee rule regarding charging part 170 fees to unlicensed sites in decommissioning, the NRC is providing that this change will not ~~take effect~~ <sup>be implemented</sup> until one year from the effective date of the FY 2005 final fee rule. The NRC believes that this will provide sufficient notice for these unlicensed sites to plan for these costs. Additionally, the NRC believes this delayed effective date may encourage unlicensed sites to complete their decommissioning work as quickly as practicable because work

performed by the NRC for these sites <sup>before</sup> prior to the effective date <sup>implementation</sup> of this rule provision will not be subject to part 170 fees. ✓

### 5. Fee Waivers

Under §170.11(a)(1)(iii), part 170 fees are not required for a report/request that has been submitted to the NRC specifically for the purpose of supporting NRC's development of generic guidance and regulations. The NRC is clarifying this section by stating that this fee exemption applies only when it is requested from, and granted by, the CFO in writing. While this is consistent with current practice in requesting and granting these fee waivers, the NRC believes this revision will enhance clear communication about implementation of this fee waiver provision.

### 6. Full Cost Recovery of Project Manager Time

The FY 1999 final fee rule (64 FR 31448; June 10, 1999) expanded the scope of part 170 fee assessments to include full cost recovery for project managers assigned to a specific plant or facility. Under this policy at <sup>re</sup> (§170.12(b)(iv)), most project managers' time, excluding leave and time spent on generic activities such as rulemaking, is recovered through part 170 fees ✓ assessed to the specific applicant or licensee to which the project manager is assigned. The NRC will begin applying this policy to 'license renewal' project managers as of the effective date of this final rule. Although the NRC does not currently apply this full cost recovery policy to license renewal project managers, this change does not require a modification to its regulations. Rather, given the increase in license renewal activities since 1999, when full cost recovery for project managers was enacted, the NRC recognizes that the existing policy should also apply to license renewal project managers. However, because this is a change in the application of

3. Revise §§170.21 and 170.31 to provide that part 170 fees will be assessed for any licensee-specific activity resulting from orders issued by the Commission not related to civil penalties or other civil sanctions;

4. Revise §§170.2 and 170.31 to provide that part 170 fees will be assessed for any licensee-specific activities associated with unlicensed sites in decommissioning being conducted under NRC oversight, effective one year from the effective date of the FY 2005 final fee rule;

5. Revise §170.11 to clarify that certain fee waivers need to be requested from, and granted by, the CFO in writing;

6. Apply the existing policy at §170.12 of full cost recovery for project managers to license renewal project managers; and

7. Make administrative changes <sup>6\*</sup> to §170.31, including those to enhance consistency in the identification of fee categories between parts 170 and 171. ✓

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Licenses, and Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals and Government Agencies Licensed by the NRC.

The NRC is revising the annual fees for FY 2005 to reflect the FY 2005 budget and changes in the number of NRC licensees (including those resulting from the transfer of regulatory responsibility to Agreement States), eliminate 'size of reactor' as a reason for granting annual fee exemptions, and make certain administrative amendments. The amendments are as follow:

## 1. Annual Fees

The NRC is establishing rebaselined annual fees for FY 2005. The Commission's policy commitment, made in the statement of considerations accompanying the FY 1995 <sup>final</sup> fee rule (60 FR 32218; June 20, 1995), and further explained in the statement of considerations accompanying the FY 1999 <sup>final</sup> fee rule (64 FR 31448; June 10, 1999), determined that base annual fees will be re-established (rebaselined) at least every third year, and more frequently if there is a substantial change in the total NRC budget or in the magnitude of the budget allocated to a specific class of licensees. The fees were last rebaselined in FY 2004. Based on the change in the magnitude of the budget allocated to certain classes of licensees, the Commission has determined that it is appropriate to rebaseline the annual fees again this year. Rebaselining fees results in decreased annual fees compared to FY 2004 for five classes of licenses (operating power reactors, test and research reactors, spent fuel storage/reactor decommissioning, rare earth mills, and transportation), and increased annual fees for two classes (fuel facilities and uranium recovery). For the materials users class, two categories (sub-classes) of licenses will have decreased annual fees, two categories' annual fees remain unchanged, while the remainder will have increased annual fees. The annual fee for industrial users of nuclear material (Category 3P), which is the largest materials users category and includes nearly 1,700 of the NRC's approximately 4,500 materials licensees, will not change. Annual fees changed for certain classes and categories of licensees between the FY 2005 proposed and final fee rules because of changes to part 170 revenue estimates (based on the latest billing data available) for certain license fee classes and a small increase in budgeted resources allocated to the surcharge. The changes in annual fees from the FY 2005 proposed to final fee rules range from a three percent decrease for the spent fuel/reactor decommissioning class to a nine percent increase for test and research reactors and uranium recovery facilities.

The annual fees in §§171.15 and 171.16 will be revised for FY 2005 to recover approximately 90 percent of the NRC's FY 2005 budget authority, less the estimated amount to be recovered through part 170 fees and the amounts appropriated from the NWF. The total amount to be recovered through annual fees for FY 2005 is \$376.2 million, compared to \$389.9 million for FY 2004.

Within the eight fee classes of licensees that pay annual fees, the FY 2005 annual fees will increase for many categories of licenses, decrease for others, and remain the same in two instances, as compared to FY 2004 fees. The increases in annual fees range from approximately two percent for a master materials license to approximately 267 percent for registrations issued for device or product safety evaluations. The decreases in annual fees range from approximately five percent for operating power reactors to approximately 53 percent for rare earth mills.

Factors affecting the changes to the annual fee amounts include: adjustments in budgeted costs for the different classes of licenses; the reduction in the fee recovery rate from 92 percent for FY 2004 to 90 percent for FY 2005; the estimated part 170 collections for the various classes of licenses; the decrease in the number of licensees for certain categories of licenses; and the \$2.2 million carryover from additional collections in FY 2004 that were unanticipated at the time the FY 2004 final rule was published (i.e., this FY 2004 carryover was used to reduce the FY 2005 fees).

Table III below shows the proposed rebaselined annual fees for FY 2005 for a representative list of categories of licenses. The FY 2004 fee is also shown for comparative purposes. 

TABLE III. - REBASELINED ANNUAL FEES FOR FY 2005

| <u>Class/category of licenses</u>  | <u>FY 2004</u>    | <u>FY 2005</u>    |
|--|-------------------|-------------------|
|  | <u>Annual Fee</u> | <u>Annual Fee</u> |
| Operating Power Reactors (including Spent Fuel Storage/Reactor Decommissioning annual fee) | \$3,283,000       | \$3,113,000       |
| Spent Fuel Storage/Reactor Decommissioning   | 203,000           | 159,000           |
| Test and Research Reactors (Nonpower Reactors)   | 62,500            | 59,500            |
| High Enriched Uranium Fuel Facility  | 4,573,000         | 5,449,000         |
| Low Enriched Uranium Fuel Facility   | 1,533,000         | 1,632,000         |
| UF <sub>6</sub> Conversion Facility  | 657,000           | 699,000           |
| Conventional Mills   | 14,500            | 30,200            |
| Transportation: Users/Fabricators  | 91,300            | 80,900            |
| Users Only   | 7,400             | 4,300             |
| Typical Materials Users: Radiographers   | 11,900            | 12,800            |
| Well Loggers   | 4,600             | 4,100             |
| Gauge Users (Category 3P)  | 2,500             | 2,500             |
| Broad Scope Medical  | 25,000            | 27,300            |

The annual fees assessed to each class of licenses include a surcharge to recover those NRC budgeted costs that are not directly or solely attributable to the classes of licenses, but must be recovered from licensees to comply with the requirements of OBRA-90, as amended. Based on the FY 2001 Energy and Water Development Appropriations Act, which 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, the total surcharge costs for FY

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examined at the NRC Public Document Room located at One White Flint North, Room O-1F22, 11555 Rockville Pike, Rockville, MD 20852-2738.

a. Fuel Facilities

The FY 2005 budgeted cost to be recovered in annual fees assessment to the fuel facility class of licenses is approximately \$24.1 million compared to \$21.6 million in FY 2004. The annual fee increase is partly attributable to the decrease in estimated part 170 revenue for the fuel facility class compared to FY 2004. This FY 2005 decrease results partly from part 170 fuel facilities' revenue in FY 2004 including a one-time \$2.1 million adjustment (increase) for revenue to account for fuel facilities fees that were improperly coded (i.e., costs associated with the Duke Cogema Stone and Webster application) and not factored into the fee calculations for FY 2001, FY 2002, and FY 2003, as discussed in the FY 2004 final fee rule. The annual fee increase is also due to an increase in budgeted resources for this class of licensees. The annual fees are allocated to the individual fuel facility licensees based on the effort/fee determination matrix established in the FY 1999 final fee rule (64 FR 31448; June 10, 1999). In the matrix (which is included in the NRC workpapers that are publicly available), licensees are grouped into categories according to their licensed activities (i.e., nuclear material enrichment, processing operations, and material form) and according to the level, scope, depth of coverage, and rigor of generic regulatory programmatic effort applicable to each category from a safety and safeguards perspective. This methodology can be applied to determine fees for new licensees, current licensees, licensees in unique license situations, and certificate holders.

This methodology is adaptable to changes in the number of licensees or certificate holders, licensed or certified material and/or activities, and total programmatic resources to be

The FY 2005 budgeted cost, including surcharge costs, to be recovered through annual fees assessed to the uranium recovery class is approximately \$701,810. Approximately \$551,000 of this amount will <sup>be</sup> assessed to DOE. The remaining \$151,000 will be recovered through annual fees assessed to conventional mills, in-situ leach solution mining facilities, and 11e.(2) mill tailings disposal facilities. The annual fees for these facilities increased from FY 2004 to FY 2005 due to a slight increase in budgeted resources for this license fee class, and because the NRC estimates that a smaller proportion of these resources will be recovered under part 170.



Consistent with the change in methodology adopted in the FY 2002 final fee rule (67 FR 42612; June 24, 2002), the total annual fee amount, less the amounts specifically budgeted for Title I activities, is allocated equally between Title I and Title II licensees. This will result in an annual fee being assessed to DOE to recover the costs specifically budgeted for NRC's Title I activities plus 50 percent of the remaining annual fee amount, including the surcharge and generic/other costs, for the uranium recovery class. The remaining 50 percent of the surcharge and generic/other costs are assessed to the NRC Title II program licensees that are subject to annual fees. The costs to be recovered through annual fees assessed to the uranium recovery class are shown below.

Should this have a Table # ?

DOE Annual Fee Amount (UMTRCA Title I and Title II general licenses):

|   |              |
|---|--------------|
| UMTRCA Title I budgeted costs .....                               | \$ 399,471   |
| 50 percent of generic/other uranium recovery budgeted costs ..... | 146,890      |
| 50 percent of uranium recovery surcharge .....                    | <u>4,280</u> |
| Total Annual Fee Amount for DOE .....                             | 550,640      |

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Annual Fee Amount for UMTRCA Title II Specific Licenses:

|   |         |
|---|---------|
| 50 percent of generic/other uranium recovery budgeted costs ..... | 146,890 |
|---|---------|

resources for this class of licensees increased in FY 2005, annual fees will increase for most of the fee categories in this class.

h. Transportation

Of the approximately \$4.3 million in FY 2005 budgeted costs to be recovered through annual fees assessed to the transportation class of licenses, approximately \$1.1 million will be recovered from annual fees assessed to DOE based on the number of part 71 Certificates of Compliance that it holds. Of the remaining \$3.2 million, approximately 16 percent is allocated to the 84 quality assurance plans authorizing use only and the 35 quality assurance plans authorizing use and design/fabrication. The remaining 84 percent is allocated only to the 35 quality assurance plans authorizing use and design/fabrication. This results in an annual fee of \$4,300 for each of the holders of quality assurance plans that authorize use only, and an annual fee of \$80,900 for each of the holders of quality assurance plans that authorize use and design/fabrication. Fees will decrease for transportation licensees in FY 2005 due to a reduction in budgeted resources allocated to this fee class compared to FY 2004.

2. Small Entity Annual Fees

The NRC stated in the FY 2001<sup>final</sup> fee rule (66 FR 32452; June 14, 2001), that it would re-examine the small entity fees every two years, in the same years in which it conducts the biennial review of fees as required by the CFOs Act. Accordingly, the NRC has re-examined the small entity fees, and does not believe that a change to the small entity fees is warranted for FY 2005. The revision to the small entity fees in FY 2000 (65 FR 36946; June 12, 2000) was based on the 25 percent increase in average total fees assessed to other materials licensees in

However, none of these smaller reactors is still licensed to operate. For several years the NRC has issued no waivers on the basis of size. Moreover, the NRC streamlined its fee program in the FY 1995 final fee rule (60 FR 32218; June 20, 1995), by establishing a uniform annual fee for power reactors, based on an analysis that showed that the difference in fees resulting from a breakdown of reactors into different fee categories was small relative to the amount of the annual fee per reactor. Therefore, the NRC believes that the current reference to 'size of the reactor' in §171.11(c), as a consideration in evaluating annual fee exemption requests, is no longer needed. No other class of licensee contains an exemption provision based on size.

#### 5. Administrative Amendments

The NRC is eliminating reference to specific facility names under Category 1.A of the 'Schedule of Materials Annual Fees and Fees for Government Agencies Licensed by the NRC' in §171.16. This is an administrative change that is being made to streamline the fee schedule <sup>in</sup> light of the fact that <sup>because</sup> the listing of individual facilities within a fee category is not necessary to identify license fee amounts. Given this change, a licensee within Category 1.A will determine its annual fee amount by the fee subcategory assigned to its license, as is the practice for other licensees.

Additionally, the NRC is modifying §§171.15(d)(1)(ii) and 171.16(e)(2) to clarify that activities comprising the annual fee surcharge include activities associated with unlicensed sites and unregistered general licensees. Currently, these paragraphs state that complex materials site decommissioning activities not covered under part 170 are included in the surcharge. Because this surcharge category also includes part 171, or generic costs associated with these

This final rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

## VII. Regulatory Analysis

With respect to 10 CFR Part 170, this final rule was developed under Title V of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines the Commission took into account guidance provided by the U.S. Supreme Court on March 4, 1974, in National Cable Television Association, Inc. v. United States, 415 U.S. 36 (1974) and Federal Power Commission v. New England Power Company, 415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia: National Cable Television Association v. Federal Communications Commission, 554 F.2d 1094 (D.C. Cir. 1976); National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir. 1976); Electronic Industries Association v. Federal Communications Commission, 554 F.2d 1109 (D.C. Cir. 1976); and Capital Cities Communication, Inc. v. Federal Communications Commission, 554 F.2d 1135 (D.C. Cir. 1976). The Commission's fee guidelines were developed based on these legal decisions.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in Mississippi Power and Light Co. v. U.S. Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). This court held that --

license for a facility, or the procedures or organization required to design, construct, or operate a facility.

### List of Subjects

10 CFR Part 170 -- Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

10 CFR Part 171 -- Annual charges, Byproduct material, Holders of certificates, registrations, approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 170 and 171.

552 and

### PART 170 -- FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: Sec. 9701, Pub. L. 97-258, 96 Stat. 1051 (31 U.S.C. 9701); sec. 301, Pub. L. 92-314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93-438, 88 Stat. 1242, as amended

(2) The NRC, at the time the document is submitted, plans to use it for one of the purposes given in paragraph (a)(1)(iii)(A)(1) of this section. In this case, the exemption applies even if ultimately the NRC does not use the document as planned; and

(3) The fee exemption is requested in writing by the person submitting the report/request to the Chief Financial Officer in accordance with 10 CFR 170.5, and the Chief Financial Officer grants this request in writing.

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4. Section 170.20 is revised to read as follows:

§170.20 Average cost per professional staff-hour.

Fees for permits, licenses, amendments, renewals, special projects, part 55 re-qualification and replacement examinations and tests, other required reviews, approvals, and inspections under §§170.21 and 170.31 will be calculated using the following applicable professional staff-hour rates:

(a) Reactor Program (§170.21 Activities): \$205 per hour

(b) Nuclear Materials and Nuclear Waste Program  
(§170.31 Activities): \$197 per hour

5. In §170.21, Category K in the table and footnote 1 are revised to read as follows:

and footnote 4  
is added

<sup>4</sup> Licensees paying fees under Categories 1A, 1B, and 1E are not subject to fees under Categories 1C and 1D for sealed sources authorized in the same license except for an application that deals only with the sealed sources authorized by the license.

<sup>5</sup> The NRC does not charge part 170 fees to Federal agencies, per 31 U.S.C. 9701.

PART 171 -- ANNUAL FEES FOR REACTOR LICENSES AND FUEL CYCLE LICENSES AND MATERIALS LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC.

7. The authority citation for part 171 continues to read as follows:

Authority: Sec. 7601, Pub. L. 99-272, 100 Stat. 146, as amended by sec. 5601, Pub. L. 100-203, 101 Stat. 1330, as amended by sec. 3201, Pub. L. 101-239, 103 Stat. 2132, as amended by sec. 6101, Pub. L. 101-508, 104 Stat. 1388, as amended by sec. 2903a, Pub. L. 102-486, 106 Stat. 3125 (42 U.S.C. 2213, 2214); sec. 301, Pub. L. 92-314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93-438, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

§171.11 [Amended].

8. Section 171.11 is amended by removing paragraph (c)(2), and paragraphs (c)(3), (c)(4), and (c)(5) are redesignated as (c)(2), (c)(3), and (c)(4), respectively.

*redesignations*  
*paragraphs*

9. In §171.15 paragraphs (b), (c), (d), and (e) are revised to read as follows:

§171.15 Annual Fees: Reactor licenses and independent spent fuel storage licenses.

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|     |   |                          |
|-----|---|--------------------------|
|     | government authorities. ....  | N/A <sup>8</sup>         |
| 16. | Reciprocity .....   | N/A <sup>8</sup>         |
| 17. | Master materials licenses of broad scope issued to<br>Government agencies ..... | 251,000.                 |
| 18. | Department of Energy:   |                          |
|     | A. Certificates of Compliance .....   | 1,097,000. <sup>10</sup> |
|     | B. Uranium Mill Tailing Radiation<br>Control Act (UMTRCA) activities .....      | 551,000.                 |




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<sup>1</sup> Annual fees will be assessed based on whether a licensee held a valid license with the NRC authorizing possession and use of radioactive material during the current fiscal year. However, the annual fee is waived for those materials licenses and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 2004, and permanently ceased licensed activities entirely by September 30, 2004. Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession only license during the fiscal year and for new licenses issued during the fiscal year will be prorated in accordance with the provisions of §171.17. If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration, or approval held by that person. For licenses that authorize more than one activity on a single license (e.g., human use and irradiator activities), annual fees will be assessed for each category applicable to the license. Licensees paying annual fees under Category 1A(1) are not subject to the annual fees for Category 1C and 1D for sealed sources authorized in the license.

<sup>2</sup> Payment of the prescribed annual fee does not automatically renew the license, certificate, registration, or approval for which the fee is paid. Renewal applications must be filed in accordance with the requirements of parts 30, 40, 70, 71, 72, or 76 of this chapter.

<sup>3</sup> Each fiscal year, fees for these materials licenses will be calculated and assessed in accordance with §171.13 and will be published in the Federal Register for notice and comment.

<sup>4</sup> A Class I license includes mill licenses issued for the extraction of uranium from uranium ore. A Class II license includes solution mining licenses (in-situ and heap leach) issued

NOTE: THIS APPENDIX WILL NOT APPEAR IN THE CODE OF FEDERAL REGULATIONS.

FINAL  
APPENDIX A TO THIS PROPOSED RULE --  
FINAL REGULATORY FLEXIBILITY ANALYSIS FOR THE  
AMENDMENTS TO 10 CFR PART 170 (LICENSE FEES) AND  
10 CFR PART 171 (ANNUAL FEES)

I. Background.

The Regulatory Flexibility Act (RFA), as amended (5 U.S.C. 601 et seq.), requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The NRC has established standards for determining which NRC licensees qualify as small entities (10 CFR 2.810). These size standards were established based on the Small Business Administration's most common receipts-based size standards and include a size standard for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in §171.16(c) of this final rule are based on the NRC's size standards.

From FY 1991 through FY 2000, the Omnibus Budget Reconciliation Act (OBRA-90), as amended, required that the NRC recover approximately 100 percent of its budget authority, less

not constitute a request to amend the license. Any request to amend a license must be submitted to the respective licensing staff in the NRC's regional or headquarters offices.

- d. Check the appropriate size standard for which the licensee qualifies as a small entity. Check only one box. Note the following:
- (i) A licensee who is a subsidiary of a large entity does not qualify as a small entity.
  - (ii) The size standards apply to the licensee, including all parent companies and affiliates--not the individual authorized users listed in the license or the particular segment of the organization that uses licensed material.
  - (iii) Gross annual receipts means all revenue in whatever form received or accrued from whatever sources--not solely receipts from licensed activities. There are limited exceptions as set forth at 13 CFR 121.104. These are: the term receipts excludes net capital gains or losses; taxes collected for and remitted to a taxing authority (if included in gross or total income), proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS); and amounts collected for another entity by a travel agent, real estate agent, advertising agent, or conference management service provider.
  - (iv) The owner of the entity, or an official empowered to act on behalf of the entity, must sign and date the small entity certification.

The NRC sends invoices to its licensees for the full annual fee, even though some licensees qualify for reduced fees as small entities. Licensees who qualify as small entities and file NRC Form 526, which certifies eligibility for small entity fees, may pay the reduced fee, which

Send to Michael Lesar, ADM/DAS/RDB (Mail Stop: T-6, D59) a package containing:

1. A cover memo conveying the following information:

- The RIN number of the rule (in the subject line of the memo)
- The ADAMS accession number of the Federal Register Notice (FRN), which must include in the same file any attachments or appendices to be published with it
- A statement that ADM/DAS/RDB has been given owner's rights in ADAMS to the FRN
  - The FRN must be profiled as "Non-Sensitive/Publicly Available"
  - The ADAMS *Keyword* field must contain the phrase "SISP review complete"
  - Do not finalize the document in ADAMS until notified; RDB may need to make changes
- ADAMS accession numbers for all documents to be posted on NRC's RuleForum Web Site
  - Documents must be Non-Sensitive/Publicly Available and SISP review complete
- The name and phone no. of a staff contact and/or responsible secretary/administrative ass't

2. The signed original and thirteen (13) clean and clear copies of the FRN.

- The FRN and all appendices must be double-spaced, single-sided, with 1-inch margins
  - Remove the concurrence page
  - Place the NRC billing code [7590-01-P] on the upper right hand corner of the first page
- The FRN and all appendices must have page numbers at the bottom or top center of each page except the first page; page numbering of appendices must be continuous with that of the FRN (do not re-set page numbering to "1" for each appendix)
- Include a few lines of text on the signature page in addition to the standard signature block

3. An electronic version of the FRN, in WordPerfect, on a 3.5-inch diskette. The rule and all appendices must be presented consecutively in the same file. This diskette will be forwarded to the Office of the Federal Register (OFR) for use in typesetting the document.

4. The completed ADAMS Inventory of Publicly Available Documents (ML032310007) for the FRN. Verify that all publicly available NRC documents mentioned in the FRN can be accessed by the public in ADAMS (or will be accessible by the projected date of publication).

5. One (1) copy of each Congressional letter prepared for the rule.

- Include a concurrence page for approval by the Chief of RDB and the Director of OCA.
- Note the ADAMS accession number of the letters file on the concurrence page
- Provide ADM/DAS/RDB and OCA with owner's rights to the letters in ADAMS.
  - Do not finalize the documents in ADAMS; RDB or OCA may need to make changes.

6. Three (3) copies of the SBREFA Congressional Review Act form, one each for the House, the Senate, and the GAO. (See the InForms Master List, form # GAO-001).

7. Distribution copies of any daily staff note, press release, etc., prepared for the rule.

**Office of Administration**  
**ADAMS Inventory of Publicly Available Documents**  
**Cited in Rulemakings**

**INSTRUCTIONS**

Publicly available documents cited in *Federal Register* notices must be released to the public through the ADAMS PARS Library. Posting to the NRC's public web site is NOT an acceptable substitute.

**COMPLETE the attached form**, listing all publicly available NRC documents mentioned in the *Federal Register* notice. Verify that each publicly available document cited in the notice is (or will be) accessible to the public in ADAMS before publication of the notice.

**INCLUDE the completed form in the publication package** sent to the Rules and Directives Branch (ADM/DAS) for transmittal to the *Federal Register*.

**NOTE:** Only the Document Processing Center (DPC) can make a document accessible to the public by copying it to the ADAMS Publicly Available Record System (PARS) Library.

**A document cannot be copied to PARS unless it meets the following conditions:**

1. The document must be properly profiled according to the appropriate **ADAMS Document Template**. The profile provides information the DPC needs to finalize the document as an official agency record. The profile should include information not otherwise available to DPC, such as document **Sensitivity, Availability, Release Date and Case/Reference** data.
2. The **Availability** field in the ADAMS profile must say "Publicly Available". This gives the DPC permission to release the document to the public.
3. The **Keyword** field in the ADAMS profile must contain the phrase "SISP Review Complete".
4. The **Date to be Released** field in the ADAMS profile must contain an appropriate date. This tells the DPC when to release the document to the public.
5. The **Document Sensitivity** field in the ADAMS profile must say either "Non-Sensitive" or "Non-Sensitive - Copyright." Sensitive documents cannot be released to the public.
6. The Document Processing Center group must be made an "owner" of the document in the ADAMS **Security** panel. This allows the DPC to change the document's properties. The Public User group should be made a "viewer" of the document.
7. The ADAMS pointer for the document must be copied (or dragged) to the appropriate sub-folder under the **ADAMS DPC Processing** folder in the ADAMS Document Manager. This places the document in the DPC's "IN box" for final processing.

A properly profiled document that is moved to the ADAMS DPC Processing folder in a timely manner will be copied to the PARS library and made available to the public on the specified release date.

A WordPerfect copy of this form is available in ADAMS (ML032310007). Additional information on making documents publicly available in ADAMS can be found on The NRC Rulemaker web page, under Procedures, at <http://www.internal.nrc.gov/ADM/DAS/cag/RM01/procedures.html>

