RULEMAKING ISSUE
(Information)

November 7, 2008 SECY-08-0174

FOR: The Commissioners

FROM: J. E. Dyer ***/RA/***
Chief Financial Officer

SUBJECT: FISCAL YEAR 2009 PROPOSED FEE RULE AND ADVANCE RULEMAKING FOR GRID-APPROPRIATE REACTORS FEES

PURPOSE:

To inform the Commission of staff plans to (1) proceed with the proposed fiscal year (FY) 2009 fee rule based on the bill reported by the House Appropriations Committee on June 25, 2008, (2) clarify the uses of the 10 percent NRC appropriation excluded from fee recovery, and (3) publish an Advance Notice of Proposed Rulemaking (ANPRM) for a possible variable fee structure for power reactors based on licensed power limits. Additionally, this memorandum identifies administrative changes (Enclosure 1) the staff plans to include in the proposed rule and provides the fee rule schedule (Enclosure 2).

BACKGROUND:

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires that the NRC recover approximately 90 percent of its budget authority[1] each year prior to the end of the fiscal year. To meet the requirements of OBRA-90, each year, the NRC publishes a rule that establishes two types of fees: (1) fees for specific services under 10 CFR Part 170 to recover special benefits to identifiable applicants and licensees, and (2) annual fees under 10 CFR Part 171 to recover generic and other regulatory costs not otherwise recovered under Part 170.

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[1] The 90 percent is applied to the NRC's budget authority less amounts appropriated for the following activities that are off the fee base: High Level Waste (HLW), Waste Incidental to Reprocessing, and generic homeland security.

In accordance with the staff requirements memoranda (SRM) dated October 11, 2005, on SECY-05-0164, "Annual Fee Calculation Method," approving the use of the rebaselining method of calculating fees each year, the staff will use the rebaselining method for FY 2009. The staff will continue to keep the Commission fully informed of proposed changes and resource allocations associated with the fee rule.

Each year prior to the issuance of the proposed fee rule, the staff sends a paper to the Commission on any recommended policy changes to the fee rule and any other current fee policy issues. There are no policy changes for FY 2009.

DISCUSSION:

2009 Fee Calculations

To allow NRC to collect 90 percent of its FY 2009 budget authority by September 30, 2009, the final FY 2009 fee rule must become effective no later than late August 2009. This means that the proposed fee rule must be published in the *Federal Register* by late March 2009, and the final fee rule must be published by late June 2009, to become effective no earlier than 60 days after publication pursuant to the requirements of the Congressional Review Act.

It takes several weeks to complete the budget allocation and fee calculation process, prepare the proposed rule, and publish it in the *Federal Register*. Therefore, the staff has to begin the process of developing the fee rule now. The NRC is currently operating under a Continuing Resolution (H.R. 2638) which will provide funding at the FY 2008 level for the agency ending on March 6, 2009.

Therefore, in the absence of an enacted appropriation for the full fiscal year, the NRC plans to issue the FY 2009 proposed fee rule based on the bill reported by the House Appropriations Committee ($1,069.8 million). Although, neither the House nor the Senate Appropriations Committees' bills have been brought to the floor of the chamber for approval, the NRC will use the House bill since it has a higher NRC Appropriation amount. If the actual Appropriation signed by the President is lower than this bill, the fee amounts in the final rule will be lower than the proposed rule amounts.

During a similar situation in FY 2007, the fees for the FY 2007 proposed rule were based on the Appropriations bill passed by the full House. At the time the FY 2007 proposed fee rule was published, the NRC was operating under a continuing resolution that also limited the FY 2007 funding to the NRC's prior year funding level which was $83 million lower than what the President eventually signed into law for FY 2007. The final Revised Continuing

Appropriation Resolution signed by the President in FY 2007 was $8.3 million higher than the House passed bill used for the proposed rule. The final Appropriation, therefore, resulted in smaller changes to the final rule fee amounts compared to the changes that would have resulted if NRC had used the continuing resolution in effect at the time the proposed rule was published. We also discussed the issue in the Statement of Considerations of the FY 2007 proposed fee rule.

If the Congress has not enacted a budget for the NRC by the time the proposed rule is issued, the staff will describe the budget situation in the Statement of Considerations accompanying the FY 2009 proposed rule. The rule will explain that, as a result of Congressional action, the fees set forth in the final rule could differ from the proposed fees.

Uses of the 10 percent NRC Appropriation Excluded from Fee Recovery

The NRC receives 10 percent of its budget authority each year as "fee relief"[2] to address fairness and equity concerns related to charging NRC license holders for the cost of the activities that do not provide a direct benefit to the licensees. Like last year, the NRC is not required to recover 10 percent of its budget authority in FY 2009. A description of the fee-relief activities is enclosed in Appendix A.

For FYs 2001 through 2006, the fee relief amount was insufficient to cover the fee-relief activities and was therefore recovered through an increase to the fee assessments based on the percentage of the budget attributable to a class of licensees. The fee relief in FY 2007 and FY 2008 was in excess of the cost of the fee-relief activities. The SRM – SECY-06-0232 approved the allocation of this excess fee relief to all licensees' annual fees, again based on their percent of the budget.

The FY 2008 Congressional Appropriation included additional funds for Scholarships and Fellowships. This was a new fee-relief activity in FY 2008 since it did not provide a direct benefit to the NRC licensees. There are no changes to Appendix A from last year.

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[2] For FYs 1991 through 2000, OBRA-90, as amended, required that the NRC recover approximately 100 percent of its budget authority, less HLW, through fees. The FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee amount by two percent per year beginning in FY 2001, until the fee recovery amount was 90 percent in FY 2005.

Advance Notice of Proposed Rulemaking (ANPRM)

> The NRC expects to receive applications in the future for small grid-appropriate nuclear reactors defined as small and medium-sized commercial nuclear reactors with capacities ranging from 10 to 350 megawatts-electric. Per Commission paper SECY-08-0208 dated July 3, 2008 (ADAMS Accession ML081980044), NRC plans to limit all grid-appropriate reactors interactions with stakeholders to non-resource intensive activities for FY 2009 and 2010. However, the NRC does not want its current 10 CFR 171 annual fee structure that allocates agency costs to each power reactor equally to be a disincentive to future smaller and safer designs.
>
> In anticipation of greater interest in these grid-appropriate reactors in the future, the NRC plans to publish an ANPRM requesting comments from the public on a variable approach to charging 10 CFR 171 annual fees for power reactors. Although issuance of a license which triggers imposition of fees is several years ahead in the future, it will demonstrate NRC's proactive approach for working on this issue.
>
> The ANPRM will be published separately from the FY 2009 fee rule. We will refer to the rulemaking in the proposed FY 2009 fee rule, but any response to comments received on the ANPRM will be handled separately from the comments on the FY 2009 fee rule. We will provide the Commission an information copy of proposed language before issuance.

<u>SCHEDULE</u>:

The estimated schedule for the FY 2009 fee rule is included as Enclosure 2. To meet the enclosed schedule, the staff will proceed with the FY 2009 fee calculations based on the bill reported by the House Appropriations Committee.

<u>COORDINATION</u>:

The Office of the General Counsel has reviewed this paper and has no legal objections. The Executive Director for Operations has concurred on this paper.

This document is marked "Official Use Only" because it contains predecisional information about the NRC's FY 2009 fee rulemaking. It will be released upon the publication of the FY 2009 proposed fee rule.

/RA/
J. E. Dyer
Chief Financial Officer

Enclosures:
1. Administrative Changes to FY 2009 Proposed Fee Rule
2. Estimated Schedule - FY 2009 Fee Rule

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Administrative Changes to Fiscal Year (FY) 2009 Proposed Fee Rule

1. *Agreement State Activities*

The Commonwealth of Virginia has requested to become an Agreement State effective March 31, 2009. Materials licenses transferred to a new Agreement State are considered terminated by the U.S. Nuclear Regulatory Commission (NRC). NRC assesses one-half the annual fee to licensees for which applications for termination are filed during the period October 1 through March 31 of the fiscal year (FY).

Virginia will be assuming regulatory authority for approximately 386 current NRC licensees. The number of materials users licensees will be revised to reflect that NRC will still collect one-half of the annual fee from these licensees. A larger share of the budget resources for small materials licensees will be allocated to the Agreement States surcharge category. This will help mitigate the impact on the annual fee for the remaining small materials NRC licensees. Any other changes in the number of Agreement States, and the associated impacts on annual fees, will be discussed in the fee rule, based on the latest information available at that time.

2. *Adding New Fee Categories for Uranium Recovery Licensees*

The staff is exploring the possibility of replacing the existing single fee category for uranium recovery in-situ leach (ISL) facilities with four fee categories based on the type of ISL facilities. The addition of the new fee categories is needed to reflect the diverse types of uranium recovery facilities planned for construction and operation in the near future. Additionally, the new fee categories will better reflect the NRC's regulatory effort expended for the different types of facilities, both existing and planned.

One fee category would be for ISL Resin facility which performs ISL recovery operations and includes equipment for collection of dissolved uranium from onsite underground ore bodies onto ion exchange columns where resin beads selectively remove the uranium from solution. ISL resin facilities lack the equipment necessary to process the resins further and the resins are transported to another facility for further processing of the collected uranium into yellowcake.

A second fee category would be for an ISL yellowcake facility with zero to three satellites. These facilities include a central processing plant (CPP) with all the equipment necessary to collect uranium on resin, strip uranium from the resin, and process the uranium into a yellowcake slurry or dried yellowcake powder. These facilities may also receive resins from up to three satellite facilities for further processing of the contained uranium into yellowcake. In this regard, a satellite facility includes the same equipment and performs the same functions as an ISL resin facility where uranium-loaded resins are transported to a CPP operated by the same company or licensee for further processing of the contained uranium into yellowcake.

A third ISL fee category would be for an ISL yellowcake facility with more than three satellites. These facilities have a CPP with the same equipment as the second fee category above, but have four or more satellite facilities, which necessitate a correspondingly greater allocation of the staff's budgeted resources for oversight.

The fourth fee category would be for a Resin Toll Milling Facility. These facilities do not conduct any onsite recovery of uranium but consist of a CPP for the purpose of processing resins from other ISL facilities into yellowcake. Resource allocation for resin toll milling facilities would be less than that required for the other categories of ISL facilities.

3. Biennial Review of Fees

To comply with the Chief Financial Officers Act of 1990, on a biennial basis the NRC evaluates historical professional staff hours used to process a new license application of those material users fee categories that are subject to flat application fees. This review also includes new license and amendment applications for import and export licenses. Changes resulting from this biennial review impacts 10 CFR Part 170 flat fees for the small materials users and import and export licensees.

The program offices have completed this review for the FY 2009 fees. The Office of Federal and State Materials and Environmental Management Programs (FSME) has recommended changes to the professional staff hours for a majority of small materials users. The Office of International Operations (OIP) did not recommend any changes to the hours for the import and export licenses. Since the 10 CFR Part 170 fees for the material users license application is calculated by multiplying the professional staff hours times the hourly rate, the FY 2009 fees will be impacted by changes in the professional staff hours in addition to any changes to the hourly rate.

4. Change Small Entity Fees and Threshold

In accordance with its policy of reviewing the small entity fees biennially, the staff reviewed the small entity fees this year to determine if the fees should be changed. The small entity fees primarily impacts NRC's small materials licensees. FY 2000 was the last time that an in-depth analysis of the small entity fees was conducted. Based on an in-depth analysis conducted this year (see Appendix B), we will use alternative 3 which results in reducing the maximum small entity fee from $2,300 to $1,900 and the lower tier fee from $500 to $400. This reduction reflects the decrease in annual fees for the small materials licensees in past two years.

In addition, we are changing the methodology for reviewing small entity fees every two years. To determine the small entity annual fee, a fixed percentage of 39 percent will be applied to the prior two-year weighted average of small materials users fees in the biennial review fiscal year. This gives the small entities advance notice of a possible adjustment in fees in the biennial review year. An analysis of the method is included in Appendix B.

In 2007, the NRC revised its receipts-based size standards (72 FR 44951, August 10, 2007) to conform to the Small Business Agency standards. The maximum average gross annual receipts (upper tier) to qualify as a small entity were changed to $6.5 million from $5 million. The NRC is now proposing to revise the small entity lower tier receipts-based threshold to $450,000 from $350,000. This change is approximately the same percentage adjustment as the change in the upper tier receipts-based standard.

5. Changes to 10 CFR 170.11 Exemptions

In response to number of questions on specific sub-sections related to fee exemptions for special projects, the staff is simplifying the language such that the stakeholders are clear about when a special project is exempt from NRC fees. The section has also been re-numbered for ease of reading.

6. Direct Hours per Full Time Equivalent (FTE) in the Hourly Rate Calculation

The Part 170 hourly rate is calculated by dividing the cost per direct FTE by the number of direct hours per direct FTE in a year. The FY 2008 Fee Rule used 1,371 hours per direct FTE in the hourly rate calculations. The FY 2007 fee rule used 1,287 direct hours. The change to the 1,371 hours per direct FTE to develop the hourly rate in FY 2008 was consistent with the Office of the Chief Financial Officer's (OCFO's) response to an Office of the Inspector General recommendation that actual cost and labor data be used to develop and refine future rate calculations.

For FY 2009, we are looking at the latest time and labor data to determine if the direct hours per FTE should be revised. A revision in the direct hours per FTE may also result in a change to the hourly rate.

Estimated Schedule – Fiscal Year (FY) 2009 Fee Rule

Action	Date
FY 2009 Proposed Fee Rule SECY Paper to Commission	November 14, 2008
Complete fee calculations	December 15, 2008
Draft proposed rule to offices for review	December 22, 2008
Office concurrences on proposed rule due, send to DCFO	January 16, 2009
DCFO concurrence due, send to EDO	January 20 2009
EDO concurrence on proposed rule due	January 26, 2009
Proposed rule to CFO for signature	January 28, 2009
Proposed rule to ADM to forward to Federal Register	February 11, 2009
Publish proposed rule	February 23, 2009
30-day public comment period ends	March 25, 2009
Draft final rule to offices for review	April 17, 2009
Office concurrences on final rule due, send to DCFO	May 1, 2009
DCFO concurrence due, send to EDO	May 4, 2009
EDO concurrence on final rule due	May 11, 2009
Final rule to CFO for signature	May 12, 2009
Final rule to Commission for review	May 21, 2009
Final rule to ADM to forward to Federal Register	May 29, 2009
Publish final rule	June 12, 2009
Final rule effective (60 days after publication)	August 11, 2009

NOTES:

1) This is an estimated schedule and subject to change, in particular due to unexpected changes in the FY 2009 budget.

2) This schedule is based on no Commission paper accompanying the final fee rule because all fee rule changes are addressed in the “FY 2009 Proposed Fee Rule” paper.

Enclosure 2

Attached List:

Distribution:

OCFO/DFM RF
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