

# **RULEMAKING ISSUE**

## **(Information)**

December 4, 2012

SECY-12-0162

FOR: The Commissioners

FROM: J. E. Dyer  
Chief Financial Officer

SUBJECT: PROPOSED CHANGES FOR THE FISCAL YEAR 2013 PROPOSED  
FEE RULE

### PURPOSE:

To inform the Commission of staff plans to proceed with the proposed fiscal year (FY) 2013 fee rule. This memorandum also identifies administrative changes the staff plans to include in the proposed rule (Enclosure 1) and provides the fee rule schedule (Enclosure 2).

### BACKGROUND:

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires that the U.S. Nuclear Regulatory Commission (NRC) recover approximately 90 percent of its budget authority<sup>1</sup> each year. To meet the requirements of OBRA-90, the NRC publishes a rule each year that establishes two types of fees: (1) fees for specific services under Part 170 of Title 10 of the Code of Federal Regulations (10 CFR), "Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services under the Atomic Energy Act of 1954, as Amended," to recover the cost of special benefits to identifiable applicants and licensees, and (2) annual fees under 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," to recover generic and other regulatory costs not otherwise recovered under 10 CFR Part 170.

CONTACT: Arlette Howard, OCFO/DPB  
(301) 415-1481

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<sup>1</sup> The 90 percent requirement is applied to the NRC's budget authority, not including any amounts appropriated for activities related to high-level waste, waste incidental to reprocessing and generic homeland security.

In accordance with the staff requirements memorandum dated October 11, 2005, on SECY-05-0164, "Annual Fee Calculation Method," the staff will use the rebaselining method of calculating fees for FY 2013. The staff will continue to keep the Commission fully informed of proposed changes and resource allocations associated with the fee rule. Each year, before issuing the proposed fee rule, the staff sends a paper to the Commission with any recommended policy changes and current fee administrative changes to the rule. The staff plans no policy changes for FY 2013.

#### DISCUSSION:

##### *2013 Fee Calculations*

Currently, the agency does not have a full-year appropriation for FY 2013. The agency is operating under a continuing resolution, Pub. L.112-175, which expires March 27, 2013. To comply with OBRA-90, as amended, the final FY 2013 fee rule must become effective no later than August 20, 2013, to allow the NRC to collect 90 percent of its FY 2013 budget authority by September 30, 2013.

It takes months to complete the budget allocation and fee calculation process, prepare the proposed rule, and publish the rule in the *Federal Register*. Therefore, the staff must begin developing the fee rule now. The fees will be based on the FY 2013 NRC Congressional Budget Justification (CBJ) submitted to Congress in February 2012. If the NRC receives an Appropriation different from the CBJ request, the staff will adjust the fee amounts.

#### SCHEDULE:

Enclosure 2 contains the estimated schedule for the FY 2013 fee rule. Additionally, the NRC staff will continue to work on the rulemaking for "Variable Annual Fee Structure for Small and Medium Size Reactors," within the work priorities established for FY 2013.

#### COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection. 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 2013 fee rulemaking. The NRC will release it upon the publication of the FY 2013 proposed fee rule.

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

#### Enclosures:

1. Administrative Changes to the FY 2013 Proposed Fee Rule
2. Estimated Schedule - FY 2013 Fee Rule

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D. Sollenberg, FSME	C. Regan, NRR	S. Jefferson, OI	P. W.-Johnson, OCFO

ADAMS ACCESSION NO: ML12328A093

\*via email

\*\*see email

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## Administrative Changes to the Fiscal Year 2013 Proposed Fee Rule

### 1. Direct Hours per Full-Time Equivalent in the Hourly Rate Calculation

The hourly rate in Part 170 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services under the Atomic Energy Act of 1954, as Amended," is calculated by dividing the cost per direct full-time equivalent (FTE) by the number of direct hours per direct FTE in a year. The fiscal year (FY) 2012 final fee rule used 1,371 hours per direct FTE in the hourly rate calculations. The staff of the U.S. Nuclear Regulatory Commission (NRC) has reviewed and analyzed the latest time and labor data to determine if it should revise the direct hours per FTE for FY 2013. The NRC staff has determined that the direct hours per FTE for hourly rate calculations will remain unchanged for FY 2013.

### 2. Modification of Small Entities Language to Include Part 72 Licenses under 10 CFR 171.16

The NRC proposes to modify 10 CFR Part 171.16 to allow consideration of 10 CFR Part 72, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste", licensees to qualify as small entities. Currently, 10 CFR Part 72 licensees' annual fees are covered by 10 CFR Part 171.16 which does not allow consideration for small business entity fee treatment of otherwise qualified licensees. The existing 10 CFR Part 171.15 rule does allow the following licensees to qualify as small entities:

- 10 CFR Part 30, "Rules of General Applicability to Domestic Licensing of Byproduct Material"
- 10 CFR Part 40, "Domestic Licensing of Source Material"
- 10 CFR Part 70, "Domestic Licensing of Special Nuclear Material"
- 10 CFR Part 71, "Packaging and Transportation of Radioactive Material"
- 10 CFR Part 76, "Certification of Gaseous Diffusion Plants"

Prior to 1999, 10 CFR Part 72 licensees' annual fees were addressed under 10 CFR Part 171.16 and licensees could apply for treatment as a small business entity. In 1999, a new category of "spent fuel storage decommissioning" was created under 10 CFR Part 171.15 to more equitably distribute the costs of spent fuel regulation to both 10 CFR Part 72 and 10 CFR Part 50 licensees. The staff believes that an unintended consequence of this consolidation was the exclusion of 10 CFR Part 72 licensees from consideration for treatment as a small business entity for fee purposes. The proposed administrative change would remedy this inadvertent exclusion.

The current language for 10 CFR Part 171.16(c) reads as follows:

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification along with its annual fee payment, then the licensee may pay a reduced annual fee as shown in the following table. Failure to file small entity certification in a timely manner could result in the receipt of a delinquent invoice requesting the outstanding balance due and/or denial of any refund that might otherwise be due.

The amended language for 10 CFR Part 171.16(c) reads as follows:

(c) A licensee who is required to pay an annual fee under this section, in addition to 10 CFR Part 72 licenses, may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification along with its annual fee payment, then the licensee may pay a reduced annual fee as shown in the following table. Failure to file small entity certification in a timely manner could result in the receipt of a delinquent invoice requesting the outstanding balance due and/or denial of any refund that might otherwise be due.

### 3. Biennial Review of Fees

To comply with the Chief Financial Officers Act of 1990, the NRC evaluates on a biennial basis the 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 impact 10 CFR Part 170 flat fees for the small materials users and import and export licensees.

The program offices have completed the biennial review for the FY 2013 fees. The Office of Federal and State Materials and Environmental Management Programs has recommended changes to the professional staff hours for most of the small materials users. The Office of International Programs also recommended changes to the hours for some import and export licenses fee categories. The 10 CFR Part 170 fees for the material users licenses as well as import and export applications are calculated by multiplying the estimated average number of professional staff hours by the hourly rate. Therefore, the FY 2013 fees will be impacted by changes in the professional staff hours in addition to any changes to the hourly rate.

### 4. Change in Small Entity Fees

In accordance with NRC policy, the staff conducted a biennial review of the small entity fees to determine if the fees should be changed. The small entity fees primarily impact NRC's small materials licensees. In FY 2013, the NRC staff performed a biennial review using the fee methodology developed in FY 2009 that applies a fixed percentage of 39 percent to the prior 2-year weighted average of materials users' fees. The result is an upper tier small entity fee increase from \$2,300 to \$3,500 and a lower-tier fee increase from \$500 to \$800, which is a 52 percent and 60 percent increase, respectively. Implementing this increase would have a disproportionate impact upon NRC's small licensees compared to other licensees. Therefore, the staff is proposing to limit the increase to 21 percent which is the same limit applied in the FY 2011 biennial review. This change results in a fee of \$2,800 for an upper-tier small entity fee and \$600 for the lower-tier small entity fee for FY 2013.

The NRC staff believes these fees are reasonable and provide relief to small entities while at the same time recovering from those licensees some of the NRC's costs for activities that benefit them.

### 5. Change NRC's Small Business Lower Receipts-Based Threshold

The NRC staff recommends increasing the lower-tier receipts-based threshold of \$450,000 to \$485,000 to reflect approximately the same percentage adjustment as NRC's upper tier

receipts-based standard adjustment from \$6.5 to \$7 million which was published as a final rule in the *Federal Register* (77 FR 39385) and effective August 22, 2012.

#### 6. Proposes to Examine Fee Methodology Used to Determine Annual Fees for 10 CFR Part 171.16 Licenses

The NRC staff is examining the methodology used to determine annual fees for 10 CFR Part 171.16 licensees to ensure the fees assessed to individual licensees accurately recover the costs of regulation provided by the NRC within a given category. Currently, under 10 CFR Part 171.16, licensees who have multiple sites are assessed the same annual fees as licensees with a single site for a given fee category. The NRC staff believes this fee methodology does not always promote fair and equitable distribution of regulatory costs and is exploring alternatives for assessing different fees to licensees within a category based on the number of sites. The NRC staff will complete its assessment of alternatives and include its recommendation to the Commission as part of the FY 2013 Proposed Fee Rule.

#### 7. Amend Description of Fee Category 2.A.1. under 10 CFR Part 170.31, "Schedule of Fees for Materials Licenses and Other Regulatory Services, Including Inspections, and Import and Export Licenses and 10 CFR Part 171.16 to Include Deconversion Uranium Hexafluoride Activities"

The NRC proposes to amend fee category 2.A.1. to include uranium deconversion facilities which deconvert uranium hexafluoride (UF<sub>6</sub>) into uranium oxides for disposal and commercial sale of the fluoride byproducts. Since the processes, hazards, and security requirements are similar for both UF<sub>6</sub> conversion and deconversion facilities, the NRC staff believes that both types of facilities should be under the same category.

The current fee category 2.A.1. description reads as follows:

- 1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride.

The revised fee category 2.A.1. description reads as follows:

- 1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride or for deconverting uranium hexafluoride in the production of uranium oxides for disposal.

#### 8. Amend Descriptions for Fee Categories 1.C., 1.D. Including Two Footnotes, One and Four and Create a New Fee Category 1.F. under 10 CFR Part 170.31 and 10 CFR Part 171.16

The NRC proposes to amend fee categories 1.C. and 1.D. descriptions to provide clarity and create a new fee category 1.F. to address licenses authorizing greater than critical quantities as defined by under 10 CFR 150.11, "Critical Mass".

The current fee category descriptions for 1.C. and 1.D., including footnotes, one and four reads as follows:

1.C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers.<sup>4</sup>

1.D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those under Category 1.A.<sup>4</sup>

<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 FY. 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, 2011, and permanently ceased licensed activities entirely before this date. Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession-only license during the FY and for new licenses issued during the FY 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 1.A.(1) are not subject to the annual fees for Categories 1.C. and 1.D. for sealed sources authorized in the license.

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

The revised descriptions of fee categories 1.C. and 1.D, the new fee category 1.F. and revised footnotes, one and four read as follows:

1.C. Licenses for possession and use of special nuclear material of less than a critical quantity as defined in 150.11 of this chapter in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers.<sup>4</sup>

1.D. For special nuclear materials licenses of less than a critical quantity as defined in § 150.11 of this chapter.<sup>4</sup>

1.F. For special nuclear materials licenses in sealed or unsealed form of greater than a critical quantity as defined in § 150.11 of this chapter.<sup>4</sup>

<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 FY. 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, 2011, and permanently ceased licensed activities entirely before this date.

Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession-only license during the FY and for new licenses issued during the FY 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 1.A.(1) are not subject to the annual fees for Categories 1.C. , 1.D., and 1.F. for sealed sources authorized in the license.

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



Estimated Schedule - Fiscal Year 2013 Fee Rule

<u>Action</u>	<u>Date</u>
Completed fee calculations	November 2, 2012
FY 2013 Proposed Fee Rule SECY paper to Commission	December 5, 2012
Draft proposed rule for offices to review	December 20, 2012
Office concurrences on proposed rule due to OCFO/DPB	January 14, 2013
OCFO/DPB&DOC concurrence due to send to EDO	January 25, 2013
EDO concurrence on proposed rule due	January 31, 2013
Proposed rule to CFO for signature	February 11, 2013
Proposed rule to ADM to forward to <i>Federal Register</i>	February 28, 2013
Publish proposed rule	March 14, 2013
30-day public comment period ends	April 12, 2013
Draft final rule to offices for review	April 18, 2013
Office concurrences on final rule due to OCFO/DPB	April 26, 2013
OCFO/DPB concurrence due to send to EDO	May 13, 2013
EDO concurrence on final rule due	May 20, 2013
Final rule to CFO for signature	May 23, 2013
Final rule to Commission for review	May 28, 2013
Final rule to ADM to forward to <i>Federal Register</i>	June 4, 2013
Publish final rule	June 21, 2013
Final rule effective (60 days after publication)	August 20, 2013

NOTES:

- (1) This is an estimated schedule and is subject to changes in the FY 2013 budget.
- (2) This schedule assumes that no Commission paper will accompany the final fee rule because the FY 2013 proposed fee rule paper addresses all fee rule changes.