

REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act (RFA), as amended at 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 Nuclear Regulatory Commission (NRC or the Commission) has established standards for determining which NRC licensees qualify as small entities (Title 10 of the *Code of Federal Regulations* (10 CFR) 2.810). These standards were based on the Small Business Administration's most common receipts-based size standards and provides 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 proposed rule are based on the NRC's size standards.

The NRC is required each year, under the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to recover approximately 90 percent of its budget authority (less amounts appropriated from the Nuclear Waste Fund (NWF) and for other activities specifically removed from the fee base), through fees to NRC licensees and applicants. The OBRA-90 requires that the schedule of charges established by rulemaking should fairly and equitably allocate the total amount to be recovered from the NRC's licensees based on the principle that licensees who require the greatest expenditure of agency resources pay the greatest annual charges. Since FY 1991, the NRC has complied with OBRA-90 by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by the NRC in identifying and determining the fees to be assessed and collected in any given FY.

The Commission is proposing to rebaseline its 10 CFR Part 171 annual fees in FY 2013. As compared with FY 2012 annual fees, the FY 2013 proposed rebaselined fees are higher for

spent fuel storage facilities, research and test reactors, fuel facilities, most uranium recovery and material licensees while annual fees decrease for operating reactors and U.S. Department Energy (DOE) transportation.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) provides Congress with the opportunity to review agency rules before they go into effect. Under this legislation, the NRC annual fee rule is considered a "major" rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective.

The SBREFA also requires that an agency prepare a written compliance guide to assist small entities in complying with each rule for which a Regulatory Flexibility Analysis (RFA) is prepared. As required by law, this analysis was prepared for the FY 2013 fee rule and the small entity compliance guide is publicly available in ADAMS (Accession No. ML13046A282) For the FY 2013 fee rule, the small entity fees increase to \$2,800 for the upper-tier fee and \$600 for the lower-tier fee. The next regulatory flexibility analysis will be performed during the next small entity biennial review scheduled for FY 2015.

II. Impact on Small Entities.

The fee rule results in substantial fees charged to those individuals, organizations, and companies licensed by the NRC, including those licensed under the NRC materials program. Comments received on previous proposed fee rules and the small entity certifications in response to previous final fee rules indicate that licensees qualifying as small entities under the NRC's size standards are primarily materials licensees. Therefore, this analysis will focus on the economic impact of fees on materials licensees. In FY 2013, about 32 percent of these licensees (approximately 959 licensees) qualified as small entities.

Commenters on previous fee rulemakings consistently indicated that the following would occur if the proposed annual fees were not modified:

1. Large firms would gain an unfair competitive advantage over small entities.

Commenters noted that small and very small companies ("Mom and Pop" operations) would find it more difficult to absorb the annual fee than a large corporation or a high-volume type of operation. In competitive markets, such as soil testing, annual fees would put small licensees at an extreme competitive disadvantage with their much larger competitors because the proposed fees would be identical for both small and large firms.

2. Some firms would be forced to cancel their licenses. A licensee with receipts of less than \$500,000 per year stated that the proposed rule would, in effect, force it to relinquish its soil density gauge and license, thereby reducing its ability to do its work effectively. Other licensees, especially well-loggers, noted that the increased fees would force small businesses to abandon the materials license altogether. Commenters estimated that the proposed rule would cause roughly 10 percent of the well-logging licensees to terminate their licenses immediately and approximately 25 percent to terminate before the next annual assessment.

3. Some companies would go out of business.

4. Some companies would have budget problems. Many medical licensees noted that, along with reduced reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Others noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship difficult for some facilities to meet.

Over 3,000 licenses, approvals, and registration terminations have been requested since the NRC first established annual fees for materials licenses. Although some terminations were requested because the license was no longer needed or could be combined with registrations, indications are that the economic impact of the fees caused other terminations.

To alleviate the significant impact of the annual fees on a substantial number of small entities, the NRC considered the following alternatives in accordance with the RFA in developing each of its fee rules since FY 1991.

1. Base fees on some measure of the amount of radioactivity possessed by the licensee (e.g., number of sources).
2. Base fees on frequency of use of licensed radioactive material (e.g., volume of patients).
3. Base fees on the NRC size standards for small entities.

The NRC has reexamined its previous evaluations of these alternatives and continues to believe that a maximum fee for small entities is the most appropriate and effective option for reducing the impact of fees on small entities.

III. Maximum Fee.

The SBREFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity. In developing the maximum small entity annual fee in FY 1991, the NRC examined 10 CFR Part 170 licensing and inspection fees and Agreement State fees for fee categories which were expected to have a substantial number of small entities. Six Agreement States (Washington, Texas, Illinois, Nebraska, New York, and Utah) were used as benchmarks in the establishment of the maximum small entity annual fee in FY 1991.

The NRC maximum small entity fee was established as an annual fee only. In addition to the annual fee, NRC small entity licensees were required to pay amendment, renewal and inspection fees. In setting the small entity annual fee, NRC ensured that the total amount small entities paid would not exceed the maximum paid in the six benchmark Agreement States.

Of the six benchmark States, the NRC used Washington's maximum Agreement State fee of \$3,800 as the ceiling for total fees. Thus, the NRC's small entity fee was developed to ensure that the total fees paid by NRC small entities would not exceed \$3,800. Given the NRC's FY 1991 fee structure for inspections, amendments, and renewals, a small entity annual

fee established at \$1,800 allowed the total fee (small entity annual fee plus yearly average for inspections, amendments, and renewal fees) for all categories to fall under the \$3,800 ceiling.

In FY 1992, the NRC introduced a second, lower tier to the small entity fee in response to concerns that the \$1,800 fee, when added to the license and inspection fees, still imposed a significant impact on small entities with relatively low gross annual receipts. For purposes of the annual fee, each small entity size standard was divided into an upper and lower tier. Small entity licensees in the upper tier continued to pay an annual fee of \$1,800, while those in the lower tier paid an annual fee of \$400.

Based on the changes that had occurred since FY 1991, the NRC reanalyzed its maximum small entity annual fees in FY 2000 and determined that the small entity fees should be increased by 25 percent to reflect the increase in the average fees paid by other materials licensees since FY 1991, as well as changes in the fee structure for materials licensees. The structure of fees NRC charged its materials licensees changed during the period between 1991 and 1999. Costs for materials license inspections, renewals, and amendments, which were previously recovered through Part 170 fees for services, are now included in the Part 171 annual fees assessed to materials licensees. Because of the 25 percent increase, in FY 2000 the maximum small entity annual fee increased from \$1,800 to \$2,300. However, despite the increase, total fees for many small entities were reduced because they no longer paid Part 170 fees. Costs not recovered from small entities were allocated to other materials licensees and to power reactors.

While reducing the impact on many small entities, the NRC determined that the maximum annual fee of \$2,300 for small entities could continue to have a significant impact on materials licensees with relatively low annual gross receipts. Therefore, the NRC continued to provide the lower-tier small entity annual fee for small entities with relatively low gross annual receipts, manufacturing concerns, and for educational institutions not State or publicly supported with fewer than 35 employees. The NRC also increased the lower-tier small entity

fee by 25 percent, the same percentage increase to the maximum small entity annual fee, resulting in the lower-tier small entity fee increasing from \$400 to \$500 in FY 2000.

The NRC stated in the RFA for the FY 2001 final fee rule that it would reexamine the small entity fees every 2 years, in the same years in which it conducts the biennial review of fees as required by the Chief Financial Officers Act. Accordingly, the NRC examined the small entity fees again in FY 2003 and FY 2005, determining that a change was not warranted to those fees established in FY 2001.

As part of the small entity review in FY 2007, the NRC also considered whether it should establish reduced fees for small entities under Part 170. The NRC received one comment requesting that small entity fees be considered for certain export licenses, particularly in light of the recent increases to Part 170 fees for these licenses. Because the NRC's Part 170 fees are not assessed to a licensee or applicant on a regular basis (i.e., they are only assessed when a licensee or applicant requests a specific service from the NRC), the NRC does not believe that the impact of its Part 170 fees warrants a fee reduction for small entities, in addition to the Part 171 small entity fee reduction. Regarding export licenses, the NRC notes that interested parties can submit a single application for a broad scope, multi-year license that permits exports to multiple countries. Because the NRC charges fees per application, this process minimizes the fees for export applicants. Because a single NRC fee can cover numerous exports, and because there are a limited number of entities who apply for these licenses, the NRC does not anticipate that the Part 170 export fees will have a significant impact on a substantial number of small entities. Therefore, the NRC retained the \$2,300 small entity annual fee and the \$500 lower-tier small entity annual fee for FY 2007 and FY 2008.

The NRC conducted an in-depth biennial review of the FY 2009 small entity fees. The review noted significant changes between FY 2000 and FY 2008 in both the external and internal environment which impacted fees for NRC's materials users' licensees. Since FY 2000, small entity licensees in the upper tier had increased approximately 53 percent. In addition, due

to changes in the law, NRC is now required to recover only 90 percent of its budget authority compared to 100 percent recovery required in FY 2000. This 10 percent fee-relief has influenced the materials users' annual fees. A decrease in the NRC's budget allocation to the materials users also influenced annual fees in FY 2007 and FY 2008.

Based on the review, the NRC changed the methodology for reviewing small entity fees. The NRC determined the maximum small entity fee should be adjusted each biennial year using a fixed percentage of 39 percent applied to the prior 2-year weighted average of materials users fees for all fee categories which have small entity licensees. The 39 percent was based on the small entity annual fee for FY 2005, which was the first year the NRC was required to recover only 90 percent of its budget authority. The FY 2005 small entity annual fee of \$2,300 was 39 percent of the 2-year weighted average for all fee categories in FY 2005 and FY 2006 that had an upper-tier small entity licensee. The new methodology allows small entity licensees to be able to predict changes in their fee in the biennial year based on the materials users' fees for the previous 2 years. Using a 2-year weighted average smoothes the fluctuations caused by programmatic and budget variables and reflects the importance of the fee categories with the majority of small entities. The agency also determined the lower-tier annual fee should remain at 22 percent of the maximum small entity annual fee. In FY 2009, the NRC decreased the maximum small entity fee from \$2,300 to \$1,900 and decreased the lower-tier annual fee from \$500 to \$400.

In FY 2011, the NRC reexamined the small entity fee, including the new methodology developed in FY 2009. Per the methodology used in FY 2009, the agency computed the small entity fee by using a fixed percentage of 39 percent applied to the prior 2-year weighted average of materials users' fees. This resulted in an upper-tier small entity fee amount that was 7 percent higher than the current fee of \$1,900, a reflection of the increase in annual fees for the materials users' licensees for the past 2 years. Implementing this increase would have a disproportionate impact upon small NRC licensees. In FY 2011, NRC limited the increase for

upper tier fees to \$2,300, a 21 percent increase, and the lower tier fee to \$500, a 25 percent increase. This increase in the small entity fee partially reflects the changes to the annual fee for the materials users for the previous 2 years.

In FY 2013 and 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.

IV. Summary.

The NRC has determined that the 10 CFR Part 171 annual fees significantly impact a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to recover 90 percent of the NRC budget and the requirement to consider means of reducing the impact of the fee on small entities. Based on its RFA, the NRC concludes that a maximum annual fee of \$2,800 for small entities and a lower-tier small entity annual fee of \$600 for small businesses and not-for-profit organizations with gross annual receipts of less than \$450,000, small governmental jurisdictions with a population of fewer than 20,000, small manufacturing entities that have fewer than 35 employees, and educational institutions that are not State or publicly supported and have fewer than 35 employees, reduces

the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA-90. Thus, the fees for small entities maintain a balance between the objectives of OBRA-90 and the RFA.