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Michael H. Gibson
Vice President

Kennecott Energy

(12)

9 June 1994

Secretary
U.S. Nuclear Regulatory Commission
ATTN: Docketing and Service Branch
Washington, D.C. 20555

Gentlemen:

Re: Comments on the Proposed Revisions to 10 CFR Parts 170 and 171 on License, Inspection and Annual Fees for FY 1994

Kennecott Uranium Company is the operator and manager of the Sweetwater Uranium Project, which is licensed under Source Material License SUA-1350. The Sweetwater Mill is considered to be a Class I facility and, as such, the proposed annual license fee for the facility is $94,300.00. Kennecott Uranium Company has the following comments concerning these proposed fees:

1. **Assessment of Full Fees for Non-Operating Facilities**
The NRC has stated, in the **Proposed Rule Revising Fee Schedules**:

> *"Whether or not a licensee is actually conducting operations using the material is a matter of licensee discretion. The NRC cannot control whether a licensee elects to possess and use radioactive material once it receives a license from the NRC. Therefore, the NRC reemphasizes once again that annual fees will be assessed based on whether a licensee holds a valid license with the NRC that authorizes possession and use of radioactive material".*

The possession of a valid NRC license does not necessarily allow a licensee to conduct operations at it's discretion. Kennecott Uranium Company's license, SUA-1350, (License Condition 9.18) states:

> *"At least 6 months prior to the resumption of milling operations, the licensee shall submit for NRC review and approval, in the form of a license amendment, an updated quality assurance program and a revised effluent and environmental monitoring program."*

In spite of the fact that Kennecott Uranium Company possesses a valid NRC license, operations at the Sweetwater Uranium Project cannot be resumed at the licensee's discretion. In fact, the licensee is prevented by the NRC, in the form of a license condition, from resuming operations at the licensee's discretion. Therefore, conducting operations under a valid NRC license in this instance is not entirely a matter of licensee discretion but

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is also subject to NRC control. Given this situation, the assessment of fees based on the supposed ability of the licensee to resume operations at its "discretion" is unfair.

Non-operating facilities possessing a valid NRC license require less regulatory oversight than fully operational facilities. If fees are to be tied to the costs of regulation, then licensed but non-operating facilities should be charged lower annual fees. The Conference Report of Congress states:

> "....*annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and the annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment*."

Kennecott Uranium Company suggests that a two (2) tiered fee structure be established. The two (2) tiered structure should consist of a "**licensed and operating tier**" and a lower cost "**licensed but not operating tier**". This structure would better meet the requirements of the Conference Report.

2. **Capriciousness of Fees**

Public Law 101-508, enacted November 5, 1990 mandates that the NRC recover approximately 100 percent of its budget by assessing fees. Since the enactment of this legislation, annual fees for uranium recovery licensees have fluctuated from $100,100.00 (1991) to $167,000.00 (1992) to $58,100.00 (1993) to $94,300.00 (Proposed 1994). The annual fee has fluctuated widely over the past years. Kennecott Uranium Company does not believe that the costs of regulating uranium mills has varied that much over the past four (4) years. Kennecott Uranium Company believes that these fees vary capriciously, and that future fees should be no more than those paid in Fiscal Year 1993 at $58,100.00. Additionally, it is very difficult for licensees to budget for and meet these changing fees when the changes occur well into the calendar year.

Annual fees are supposed to have a reasonable relationship to the cost of regulatory services provided. The costs of regulating the source material licensees can vary, but should not vary to the extent reflected by the annual changes in the fee structure, unless these changes reflect changes in the way costs are attributed within the agency. If this is the case, then a consistent method of attributing costs must be developed and used consistently from year to year.

3. **Number of Licensees**

The number of licensees is continuing to decrease, yet the staffing/costs of the NRC remain at unchanged levels. This results in greater costs to licensees which are unjustified.

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4. **Hourly Charges**

In the proposed fee structure hourly charges are set at $133.00 per hour. This hourly charge exceeds the rates charged for senior personnel at many national consulting firms. Kennecott Uranium Company believes that these hourly charges are excessive and beyond the normal ranges of hourly fees charged for similarly trained personnel in the private sector. The proposed rule (Section 170.20) attempts to offer some justification for these hourly charges. The proposed rule lists the following charges as entering into the calculation of hourly rates:

- Salaries and benefits
- Administrative support
- Travel
- Program support

Major national consulting organizations have similar costs as are listed above and yet they are able to cover these costs (with the exception of travel, which is usually billed at cost) through hourly fees which are less than the NRC's. Furthermore, the national consulting organizations do not have the added revenue stream of annual licensee fees.

This issue was discussed by Dale Alberts, President of the Wyoming Mining Association, in his testimony before the Senate Subcommittee on Clean Air and Nuclear Regulation. In his testimony he states:

> *"We find it difficult to justify the reasonableness of the annual license fee since most interactions between NRC and source material licensees are primarily associated with inspections, license amendments and license renewal applications. Each of these interactions are already being billed at full cost to the licensees as professional staff time under provisions of 10 CFR 170. The present professional staff hourly rate is $132 per hour, well beyond the costs our industry would typically associate with professional contractor services. The WMA cannot justify the annual fee charges when we are already being billed at full costs at professional hourly rates for services rendered. The annual fee has no reasonable relationship to the cost of regulatory services as set forth in subsection (c)(3) in the Conference Report."*

Kennecott Uranium Company agrees with the above testimony given by Dale Alberts. Kennecott Uranium Company believes that since the NRC is charging licensees hourly fees for its "services", the following standards should be set for the "services" provided:

a) **Consistency in Charges**

Similar types of work (i.e., processing a simple amendment request) submitted by different licensees to different NRC project managers should be completed in similar lengths of time resulting in similar hourly charges.

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b) **Deadlines for Completion**
Time limits for processing of amendment requests by the NRC should be established. When the NRC requests a submittal from a licensee, there is a deadline for response (usually 30, 60, or 90 days). The NRC should be held to a thirty (30) day response period for a simple amendment request. Other types of responses could be given other maximum time limits.

c) **Itemization of Invoices**
The NRC should provide itemized invoices for its work in the same manner as a consultant provides an itemized accounting of time and funds expended. The NRC's invoices should contain the following information:

- Hours spent (currently provided)
- Hourly charges (currently provided)
- Description of the work (not provided)
- Name of the individual(s) who performed the work (not provided)
- Dates on which the work was completed (currently only "period covered" is provided)

5. **Closure of URFO**
Uranium recovery licensees were regulated through the Uranium Recovery Field Office (URFO) in Denver, Colorado. The licensing function has now been transferred to NRC headquarters and the inspection function has been transferred to Arlington, Texas. URFO consisted of a small group of dedicated personnel (technical, administrative and support) who administered NRC uranium recovery licenses. A decision was made by the NRC to close this office as of August 1, 1994. The rationale for this decision was cost. The NRC stated that the closure of this office would result in cost savings. If this is indeed the case, then these saving should be reflected in the fees paid by the licensees as of the date of the closure of URFO.

6. **General Comments on NRC Licensing Fees**
It is in the national interest to have a domestic uranium industry capable of supplying U.S. nuclear power plants with fuel. A domestic uranium industry is needed to provide a secure energy supply in the event of future energy shortages due to disruptions in foreign supplies. Excessive licensing fees and charges run counter to the national interest of fostering domestic energy supplies to meet domestic needs. Dale Alberts, President of the Wyoming Mining Association discussed this issue in his testimony before the United States Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Regulation by stating:

> *"The increasing regulatory costs will only accelerate the demise of the domestic uranium mine and milling industry rather than support the industry's effort to become a viable entity in today's world economy. Further damage to this industry will result in an ever increasing dependence on foreign*

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> *energy supplies while decreasing our domestic ability to sustain vital national security interests."*

In addition, Kennecott Uranium Company supports the position stated by Dale Alberts in his testimony that, given the fact that in each year since 1984 the Secretary of Energy has determined, in the annual report to Congress, that the domestic uranium producing industry has been non-viable and the fact that the Atomic Energy Act (AEA) requires that this country maintain a viable domestic uranium producing industry, excessive licensing fees are contrary to the spirit of the AEA.

In his testimony Dale Alberts states:

> *"It is WMA's belief that the present fee schedule weakens the viability potential of the domestic uranium producers. We believe that it is incumbent upon NRC to give full consideration to the effects of imposing significant annual fees on the domestic source material industry in view of the decisions made by the Secretary of Energy and the requirements of the Atomic Energy Act, that this country maintain a viable domestic uranium producing industry."*

Attached to these comments is a copy of Dale Alberts' testimony before the Senate Subcommittee on Clean Air and Nuclear Regulation. Kennecott Uranium Company is including them so they may be included in the docket as well. Kennecott Uranium Company supports the position of Dale Alberts, President, Wyoming Mining Association, in this included testimony.

In conclusion, Kennecott Uranium Company believes that the annual fees for Class I licensees be no more than $58,100.00, unless adequate justification is given that demonstrates the cost of regulating these licenses has increased.

Kennecott Uranium Company appreciates the opportunity to comment on the proposed fee structure. If you have any questions please do not hesitate to contact me.

Sincerely yours,

Michael H. Gibson

Kennecott Uranium Company /ss
Michael H. Gibson
Vice President

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UNITED STATES SENATE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON
CLEAN AIR AND NUCLEAR REGULATION

STATEMENT OF DALE L. ALBERTS
PRESIDENT
WYOMING MINING ASSOCIATION

Regarding U.S. Nuclear Regulatory Commission User Fees

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TESTIMONY OF MR. DALE L. ALBERTS
PRESIDENT OF WYOMING MINING ASSOCIATION

Mr. Chairman and members of the Subcommittee on Clean Air and Nuclear Regulation, my name is Dale Alberts. I am the current President of the Wyoming Mining Association and I thank you for the opportunity to provide the Wyoming Mining Association's (WMA) comments on this important topic.

The Wyoming Mining Association represent 39 mining companies producing coal, bentonite, trona, and uranium in Wyoming. The Association includes 10 uranium mining companies that are in various stages of production, development, or reclamation. The WMA also represent 105 service and supply companies making all or at least a part of their living from the mining industry.

The WMA agrees with the basic premise that the Nuclear Regulatory Commission (NRC) should be reimbursed by the collection of reasonable fees commensurate with services provided. However, it is our belief that the fees are not reasonable and commensurate with the services provided the regulated community. Nor has the fee system been implemented in a fair and equitable manner.

NRC states that it can give consideration to the effects of the imposition of annual fees only when it is required by law to consider these effects (i.e. the Atomic Energy Act, the Energy Reorganization Act, and the Regulatory Flexibility Act).[1] Contrary to this statement, NRC has not considered the effects of the imposition of annual fees on domestic uranium producers.

Section 170B of the Atomic Energy Act of 1954, as amended by Public Law 97-415, requires the Secretary of Energy to annually assess the viability of the domestic uranium mining and milling industry. Since 1984, the Secretary of Energy has determined in each of the annual reports to Congress that the uranium producing industry has been non-viable.[2] This fact is

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readily apparent by comparing the number of licensed mills in operation in the late 1970's and early 1980's to those in operation today. A decade ago there were twenty-six (26) active and licensed mills[3]. Today there are no active conventional mining and milling operations in the United States.

A majority of these 26 mills are now being decommissioned and reclaimed to comply with applicable NRC regulations.[4] As each of these sites enter decommissioning and reclamation, their is a decrease in the number of source material licensees available to fund NRC regulatory oversight. The financial burden on the remaining source material licensees has continued to increase putting additional financial strains on an already hard pressed industry. The increasing regulatory costs will only accelerate the demise of the domestic uranium mine and milling industry rather than support the industry's effort to become a viable entity in today's world economy. Further damage to this industry will result in an ever increasing dependance on foreign energy supplies while decreasing our domestic ability to sustain vital national security interests.

It is WMA's belief the present fee schedule further weakens the viability potential of the domestic uranium producers. We believe that it is incumbent upon NRC to give full consideration to the effects of imposing significant annual fees on the domestic source material industry in view of the decisions made by the Secretary of Energy, and the requirements of the Atomic Energy Act that this country maintain a viable domestic uranium producing industry.

This Committee and NRC need to be aware that our domestic mining and milling industry, in its attempt to become viable, is competing with foreign uranium producers including those primarily or partially owned by their respective governments. Some of these entities include non-market economy governments where the sales price of natural uranium appears to bears little relationship to the costs of its production. Foreign governments may not require similar licensing fees of their producers or they may simply pass the additional cost on to their citizens. For the U.S. uranium except for a very few cases where there are special provisions within current purchase contracts, domestic producers cannot pass through the added regulatory costs and licensing fees.

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The Conference Report of Congress states that the "*annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and the annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.*"[5] The WMA does not believe the fees have been reasonable or commensurate with services rendered, nor have they been assessed in a fair and equitable manner.

We find it difficult to justify the reasonableness of the annual license fee since most interactions between NRC and source material licensees are primarily associated with inspections, license amendments, and license renewal applications. Each of these interactions are already being billed at full cost to the licensees as professional staff time under provisions of 10 CFR §170. The present professional staff hourly rate is $132 per hour, well beyond the costs our industry would typically associate with professional contractor services. The WMA cannot justify the annual fee charges when we are already being billed at full costs at professional hourly rates for services rendered. The annual fee has no reasonable relationship to the cost of regulatory services as set forth in subsection (c)(3) in the Conference Report.[6]

It is especially difficult to justify the fees when considering that since 1991, the number of NRC licensees has significantly decreased from approximately 9000[7] to 6800.[8] This is a decrease of almost 25%. During this same period, the number of NRC Direct Full Time Employees (FTE) has increased nearly 6% from 1530 FTE's[9] in 1991 to 1619 FTE's today[10] with the profession staff hourly rate increasing from $92 to $132 per hour, an increase of over 30%. While we recognize that NRC's professional staff hourly rates are the result of the review required by the Chief Financial Officers Act of 1990 (CFO), it does not explain or justify the increase in total costs, increase of direct FTEs and the resulting professional staff hourly rates when the number of licensees and the associated regulatory oversight requirements have significantly decreased.

The continued increase in professional hour rates and total FTE's at a time when the number of licensees have significantly decreased was a primary concern expressed by the industry when the current fee system was being implemented. These increases clearly

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demonstrate that any program which collects its budget from a regulated community must be subject to some outside control or review if costs are to be controlled. Without independent oversight, continued increases in costs and staff size will occur without regard to the benefits and services received by the regulated community.

In another area to make the fee structure more equitable, the WMA strongly believes governmental agencies such as the U.S. Department of Energy and the U.S. Environmental Protection Agency should billed for their fair share of regulatory services rendered by NRC.

NRC's previous response to this issue regarding the billing of DOE was that all substantive NRC review on DOE Title I uranium sites, both site specific and generic, are essentially completed prior to the issuance of a general license to DOE. Thus, the DOE cannot be billed since DOE has not been issued a NRC license pursuant to 10 CFR §171.[11] WMA does not agree with these reasoning. NRC itself states that the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, allows the *"collection of fees from 'any person'"* and that *"any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's cost in providing any such service or thing of value."*[12] Further, Section 11(s) of the Atomic Energy Act defines "person" as:

> *"The term 'person' means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or political subdivision ...."* [emphasis added][13]

Because these governmental agencies receive a service from NRC, we believe they also should be billed for their use of NRC resources. This is especially true in the case of the burdensome and duplicate regulations resulting from newly promulgated provisions by EPA. In December 1989, EPA promulgated radionuclide emission standards within the National Emission Standards for Hazardous Air Pollutants (NESHAP) under Section 112 of the Clean Air Act.[14]

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These regulations became codified as 40 CFR §61, Subpart T (National Emission Standards for Radon Emissions From the Disposal of Uranium Mill Tailings) and Subpart W (National Emission Standards for Radon Emissions From Operating Mill Tailings). Due to the dual regulatory status created by this promulgation, and ongoing NRC and EPA discussions to resolves the dual regulatory issues, we believe substantial costs are being incurred to resolve these differences, and these costs should be borne by EPA, not the NRC licensees. The Omnibus Budget Reconciliation Act of 1990 and the Atomic Energy Act clearly provides NRC the necessary authority to assess these governmental agencies for their fair share of NRC services.

To meet the responsibility entrusted to NRC and to fulfill its responsibilities to assure equitable assessment of fees to all entities, the Commission needs to carefully examine and appropriately consider the consequences of its actions, as the power to impose fees is analogous to the power to tax. Although there may be technical arguments differentiating between fees and taxes, the consequences of each action cannot be argued, for the power to impose unreasonable fees, like taxes, creates the power to destroy. With such powers, NRC must judiciously impose such fees.

NRC has the authority under the OBRA-90 to consider cost and competition factors in assessing its fees as the Conference Report of Congress states that *"annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment."*[15] To be consistent with this intent, NRC needs to consider the pass through ability of an entity so that annual fees can be assessed in a fair and equitable manner.

This could perhaps be accomplished by the licensee filing for such relief by completing a certified affidavit or form similar to NRC's Form 526, "Certification of Small Entity Status For Purposes of Annual Fees Imposed Under 10 CFR Part 171", documenting the entity's inability to pass through the regulatory burden. NRC could then assess the pass through capability for a licensee and a licensee's ability to "practicably contribute to their payment". This would provide other classes of NRC licensees the same treatment as already provided for

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educational institutions who are exempted from the annual fees due to their inability to pass through the regulatory costs.

In addition to these potential solutions, the WMA believes specific legislative and NRC policy changes are necessary and should be combined with the regulated community's continued participation in assessment of those fees to ensure they are commensurate with regulatory services rendered.

NRC itself has identified several activities for which regulatory services are rendered by the Commission, but whose costs cannot be captured due to prohibitions from other legislative Acts and/or NRC policies. Modifications of these Acts and NRC policies would allow them to equitably assess charges for their services. These include; (1) activities not associated with an existing NRC licensee or class of licensee; (2) applicants not subject to fee assessment due to other Acts; (3) exemptions based on current Commission policies and; (4) activities that support both NRC and Agreement State applicants and licensees.

Regarding "activities not associated with an existing NRC licensee or class of licensee", the WMA believes the Commission should re-examine and propose language to modify OBRA-90 to clearly provide NRC the ability to bill entities who are rendered regulatory services but are not billed solely because they are not a NRC licensee.

This change would properly placed the cost burden of Commission services on those entities requesting such services, including government agencies and departments such as DOE, EPA, and DOD.

NRC has also asserted that the Independent Offices Appropriation Act (IOAA) precludes the charging of fees to other governmental agencies. We believe in conjunction with modifications to OBRA-90, the IOAA should also be modified to allow those exempt entities which receive services from the Commission, to be fairly and equitably assessed fees for identifiable services rendered by the Commission.

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In addition to allowing the NRC to recoup its costs on the domestic front, revision of the IOAA should also allow the Commission to appropriately bill and fund those necessary international activities including safety assistance to foreign counties and non-proliferation reviews. Since these items are typically channelled through and normally requested by the Federal Government, we believe these costs should be funded by the Treasury Department and excluded from the costs to be recovered from the licensees since the services are rendered on behalf of the Federal Government.

The WMA also believes that accessing fees for Agreement state programs is equitable when recognizing that NRC licensees represent only 30 percent of NRC's generic regulatory costs while the other 70 percent is attributable to support of NRC/Agreement State applicants and licensees."[16] The recovery of these costs when applied only to NRC licensees, are tantamount to a preferential tax and adversely impact interstate commerce due to the imposition of unevenly levied fees. As previously indicated, Section 11 (s) of the AEA already provides the NRC authority to assess fees to *"any State or political subdivision"* who receives a service or thing of value from the Commission.

In conclusion, the WMA believes NRC needs to examine the uranium mining industry viability question in the issuance of future annual license fees. Further, we support legislative changes such as modifying language within the AEA and IOAA to permit NRC to fairly assess 10 CFR §170 and §171 fees to other entities including other Federal agencies for regulatory services provided to those entities. This would be consistent with the intent of OBRA-90 which allows the collection of fees from any entity or person who receives a service from NRC. To help assure the benefits and services derived are commensurate with the imposed costs, the WMA supports independent oversight on regulatory programs which derive their budget from the collection of fees. For without such oversight and to address these other issues, the WMA believes the intent of Congress to assure fees are fair and equitable will not have been implemented to the detriment of the public and the regulated community.

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(1) U.S. Nuclear Regulatory Commission, Final Notice of Rulemaking, July 10, 1991, Page 26

(2) Energy Information Administration, "Domestic Uranium Mining and Milling Industry 1989", DOE/EIA-0477(89), 1990, Page ix

(3) U.S. EPA, "Draft Environmental Impact Statement for Proposed NESHAPS for Radionuclides", EPA 520/1-89-007, 1989, Page 4-21

(4) U.S. EPA, "Draft Environmental Impact Statement for Proposed NESHAPS for Radionuclides", EPA 520/1-89-007, 1989, Page 4-1

(5) 101st Congress, 2nd Session, 136 Congressional Record, at H12692-12693, October 26, 1990

(6) 101st Congress, 2nd Session, 136 Congressional Record, at H12692-12693, October 26, 1990

(7) Federal Register, Volume 57, Number 83, Wednesday, April 29, 1992, Page 18103

(8) Federal Register, Volume 58, Number 77, Friday, April 23, 1992, Page 21663

(9) NRC Notice, "Proposed Revision To 10 CFR 170 and 171 on License, Inspection and Annual Fees, Page 43

(10) Federal Register, Volume 58, Number 77, Friday, April 23, 1993, Page 21668

(11) U.S. Nuclear Regulatory Commission, Final Notice of Rulemaking, July 10, 1991, Page 17

(12) U.S. Nuclear Regulatory Commission, Final Notice of Rulemaking, July 10, 1991, Page 17

(13) Atomic Energy Act of 1954, Section 11(s)

(14) Federal Register, Volume 54, Number 240, Friday, December 15, 1989, Page 51654

(15) Federal Register, Volume 56, Number 71, Friday, April 12, 1991, Page 14496

(16) Federal Register, Volume 58, Number 73, Monday, April 19, 1993, Page 21118

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