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June 9, 1994

BY HAND
DELIVERY

(15)

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
11155 Rockville Pike
Rockville, MD 20855

Re: Proposed Revision of Fee Schedules - FY 1994

Dear Mr. Chilk:

The American Mining Congress (AMC) submits these comments in response to the Nuclear Regulatory Commission's (NRC) proposed rule to amend the licensing, inspection, and annual fees charged to its applicants and licensees for Fiscal Year (FY) 1994. 59 Fed. Reg. 24065 (May 10, 1994). While AMC supports NRC's proposed first time assessment of an annual fee on the Department of Energy (DOE), AMC continues to have serious concerns and questions about certain fundamental premises and aspects of the fee structure as proposed. In particular, AMC believes that the 60 percent increase in annual license fees for Class I and Class II uranium recovery facilities is entirely unwarranted.

AMC is a national trade association of mining and mineral processing companies whose membership encompasses: (1) producers of most of the United States' metals, uranium, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies;

and (3) engineering and consulting firms and financial institutions that serve the mining industry. These comments are submitted by AMC on behalf of its member companies who are NRC licensees and who are adversely affected by the NRC fee regulations. These members include the owners and operators of uranium mills and mill tailings sites and in situ uranium production facilities.

AMC has commented extensively in the past on NRC's fee allocation system.[1] Recently, AMC wrote Senators Lieberman and Simpson urging legislative changes to remedy the inequities of the present NRC fee structure. (See Attachment B.) AMC fully agrees with the recommendation of NRC's report to Congress[2] that the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) should be modified to relax the 100 percent budget recovery requirement and remove certain costs from NRC's fee base (such as costs for Agreement State oversight), thereby eliminating many of the inequitable burdens imposed on NRC licensees.

The proposed rule, with the one notable exception of assessing an annual fee on DOE for the first time, follows the same path as the other fee rules over the last several years. In its report to Congress, NRC acknowledges the problems, both real and perceived, with its present fee structure and proposes several concrete ways to address the problems. While NRC's report demonstrates that the Commission recognizes the inequities in its current fee system, the Commission claims it is not authorized to undertake the changes noted in its report to Congress without express modification to OBRA-90 or the Atomic Energy Act (AEA). It is time, therefore, for NRC to actively pursue a legislative agenda with Congress by drafting specific language to modify OBRA-90 or the AEA. AMC is committed to assisting NRC in this endeavor.

NRC is well aware of AMC's concerns with the present fee structure. These concerns also apply to the proposed

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[1] AMC incorporates by reference herein its prior comments on NRC's fees dated May 13, 1991, May 29, 1992, February 4, 1993, May 24, 1993, July 19, 1993, and August 18, 1993. (See Attachment A - copies of AMC's prior comments on NRC's fee regulations.)

[2] NRC, "Report to Congress on the U.S Nuclear Regulatory Commission's Licensee Fee Policy Review Required by the Energy Policy Act of 1992," February 1994 (NRC Report).

rule which makes few modifications to the Commission's basic fee policy. These comments, therefore, address two primary points of concern with this specific proposal that NRC can, and should, address without waiting for modifications to OBRA-90 or the AEA.

Increase in Fees for Class I and Class II Facilities

NRC proposes to increase fees for Class I and Class II uranium recovery licensees from $58,100 to $94,300 for Class I facilities and from $25,400 to $41,200 for Class II facilities. These fees represent approximately a 60 percent increase over annual fees for FY 1993. AMC strongly objects to the proposed annual fees for uranium recovery licensees.

As an initial matter, the large increase in fees from FY 1993 demonstrates once again the inconsistent and fluctuating nature of the fee system for NRC's uranium recovery licensees. The fees have ranged from $100,100 (1991) to $167,000 (1992) to $58,100 (1993) to the present proposal of $94,300. AMC is still unclear why there have been such wide fluctuations in fees over the past several years. Indeed, licensees have no means of anticipating or budgeting for these fees with any degree of certainty. These circumstances are unacceptable for uranium recovery licensees and represent an irresponsible position for a significant federal agency to take.

Moreover, the justification for increasing the annual fee makes little sense. As part of its rationale, NRC claims that fees for Class I and Class II uranium recovery facilities must be increased because the licensing of Envirocare's 11.e(2) facility is complete. This argument is without merit.

First, the status of Envirocare's license should be irrelevant to the fees imposed on Class I and Class II uranium recovery facilities, as Envirocare is neither a Class I or Class II facility, but rather is a Category 4D byproduct disposal facility. Indeed, the NRC proposal indicates that Envirocare, an active, commercial byproduct disposal facility anticipating some significant portion of 150 million dollars in disposal costs for more than 300,000 tons of Kerr-McGee's West Chicago soil contaminated with thorium wastes is only paying an annual fee of $8,700 -- this is little short of scandalous.

Moreover, NRC has failed to explain how Class I and Class II uranium recovery facilities can be assessed a fee of $94,300 and Category 4D facilities which dispose of the same byproduct material be assessed a fee of only $8,700. NRC regulates these two categories in the same manner. NRC has stated:

> The costs allocated to uranium recovery class of licensee are for safety generic and other regulatory activities that are attributable to this class of licensee and that are not recovered by 10 C.F.R. Part 170 license and inspection fees. With respect to mill operations and the disposal of Section 11.e.(2) byproduct material, the same NRC regulations (e.g., 10 C.F.R. Part 40), guidance (e.g., Regulatory Guides) and policies are applicable to both the license which authorizes milling and disposal of Section 11.e.(2) byproduct material [Class I] and the license that only authorizes disposal of 11.e.(2) byproduct material [Category 4D]. The 10 C.F.R. Part 40 generic safety regulations are applied in the same manner to each license in the class independent of the source material activities authorized by the licensee. 58 Fed. Reg. 38673 (July 20, 1993). (Emphasis added).

NRC has not justified an $85,600 difference in the proposed license fees. This disparity is so great that it cannot be explained as anything short of arbitrary and capricious.

Second, it is unconscionable for NRC to use the completion of work on Envirocare's 11e.(2) license as the basis for increasing AMC members' fees when Envirocare causes NRC and AMC members to expend additional time and money to resolve challenges Envirocare makes, or pays others

to make, with respect to amendments to licenses sought by AMC members. See 59 Fed. Reg. 25507 (May 16, 1994). Envirocare regularly disputes the right of AMC member company licensees to dispose of material, which according to Criterion 2 of 10 CFR Part 40, Appendix A and basic common sense, should be disposed in uranium mill tailings facilities. The status of Envirocare's license has nothing to do with Class I and Class II uranium recovery licensee fees or the base fee for NRC services to those facilities. Indeed, the current NRC fee proposal appears to provide preferential treatment and active support for a single licensee's (Envirocare) commercial marketing strategy by charging increased fees to the victims of Envirocare's predatory marketing practices. Not only is this an entirely inappropriate course of action for NRC to take, it is particularly outrageous given the serious questions that have arisen over Envirocare's safety record and NRC's conditional approval of certain aspects of Envirocare's license application. Under such circumstances, it would appear to call for a significant allocation of NRC resources for oversight of a major commercial disposal facility.

Finally, it is remarkable that the annual fees have increased so dramatically in the year in which NRC closed the Denver Uranium Recovery Field Office (URFO). Allegedly, URFO was closed primarily to lower NRC expenditures. NRC estimated the cost savings from closure of the Denver URFO to be $420,000. NRC's budget for FY 1993 or Sections 170 and 171 fees for uranium recovery facilities was $465,000. The proposed FY 1994 budget for these same fees is $2,100,000 - an increase of more than 350 percent. The Denver URFO was closed because, according to a memorandum from James M. Taylor, Executive Director for Operations, greater efficiency and consistency would be realized and because the total (Title I and Title II) uranium recovery program is relatively small (i.e., [1994] Title I 5.8 FTE/Title II 3.6 FTE; [1995] Title I 5.9 FTE and Title II 2.6 FTE). (See Attachment C). How can it be, therefore, that NRC can now justify such an increased budget and claim that costs for uranium recovery facilities have increased by 60 percent? It is apparent that NRC grossly underestimated the resources needed to address uranium recovery licensees, particularly Title II facilities, and grossly overstated the savings to be derived from closing URFO.

AMC believes that DOE should be assessed annual fees for all NRC oversight of the Title I site closure program and not just for licensed sites. This is particularly compelling since, as noted in Executive Director Taylor's memorandum, NRC planned to allocate more FTE's to DOE's Title I sites than to fee paying Title II sites. Nevertheless, even the current limited proposal (that relates to one licensed facility) should have resulted in lower annual fees for Title II uranium recovery licensees, and not doubled fees. Indeed, in its report to Congress, NRC notes that "to address the fairness and equity concerns related to licensees paying fees for activities not benefiting them, either (1) laws and NRC fee policy must be changed to assess all beneficiaries of NRC activities that are commensurate with the cost of those NRC activities; or (2) the requirement to collect 100 percent of the budget by fees must be relaxed." (NRC Report, p. 9) Since it appears that the fees collected from DOE will not be used to decrease NRC licensee's fees, NRC's proposal conspicuously fails to address the "fairness and equity concerns" related to the prior exclusion of DOE from annual fees. This budgetary slight of hand makes the NRC report to Congress appear somewhat disingenuous. The Commission's credibility cannot help but suffer from the thoughtless treatment of this issue in the proposal.

AMC believes that the increased fees are entirely disproportionate to the degree of NRC involvement for Class I uranium recovery sites. Most of these sites require a minimum amount of NRC supervision as opposed to an active commercial disposal site accepting hundreds of thousands of tons of 11e.(2) byproduct material for disposal like Envirocare. While under OBRA-90 NRC may have to recover 100 percent of its costs, it still must do so in a manner that "the charges shall have a reasonable relationship to the cost of providing regulatory services." The continued depressed state of the market for uranium and the decrease in the number of active uranium recovery facilities suggest that NRC's costs should decline. Once again, NRC has failed to explain how annual fees of $94,300 and $41,200 can be warranted.

As noted, the proposed fees represent a 60 percent increase over the fees for FY 1993. They will impose a significant financial burden on uranium recovery facilities

that are suffering from the demise of domestic uranium production. The proposed fees will make it even more difficult for active participants in the uranium industry to become viable again.

Hourly Rate

NRC also proposes to increase the hourly charge for regulatory services from $132 to $133 per hour. AMC continues to believe that the hourly rate, whether it be $132 or $133, is too high for NRC staff and cannot be justified. This is particularly true given the fact that day-to-day regulatory oversight has been transferred to NRC headquarters staff that have very limited expertise in uranium recovery facilities regulatory issues. A $133 hourly rate equals or exceeds the hourly charges of senior consultants, principals or project managers at major consulting firms and exceeds the generally accepted rate for similar work in the private industry. NRC still has not adequately explained the hourly rate or how it relates to the services provided.

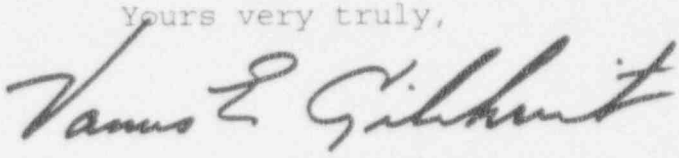
In addition, NRC has not addressed in the proposed rule AMC's prior requests that there be consistency in charges for similar work across the NRC staff, time limits for processing of amendment requests, and itemization of bills. It is entirely unacceptable for NRC to expect licensees to pay for services which are not described with some level of detail. The Federal government in general and NRC in particular require excruciating detail in licensees' regulatory compliance and environmental analyses submissions. Surely then, NRC bills should be itemized to show hours spent, hourly charges, description of the work, name of the individual who completed the work, and the dates on which the work was done. These changes to NRC's fee system can be implemented without any modifications to OBRA-90.

* * *

AMC urges the Commission to change its fee policy and work with Congress to modify OBRA-90 to make the assessment of fees by the NRC more equitable across the board. If you have any questions or if we can be of assistance, please contact me at (202) 876-2876, or AMC's counsel for this

matter, Anthony J. Thompson of Shaw, Pittman, Potts and Trowbridge at (202) 663-9198.

Yours very truly,



James E. Gilchrist
Vice President

Enclosures

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May 13, 1991

By Hand Delivery

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Office of the Secretary
Washington, D.C. 20555

Re: Proposed Revision of Fee Schedules, 56 Fed. Reg. 14,870-896 (April 12, 1991).

Dear Mr. Chilk:

On April 12, 1991, the U.S. Nuclear Regulatory Commission ("NRC") published a notice of proposed rulemaking to amend regulations governing the licensing, inspection and annual fees charged to its licensees. The proposed regulations are intended to implement Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), which requires NRC to recover 100 percent of its budget authority, except for specified allowances. NRC seeks to have final fee regulations become effective upon publication, on about August 1, 1991. Fees would be due, under NRC's proposal, 30 days later.

These comments are submitted by the American Mining Congress ("AMC") on behalf of its many member companies who are NRC licensees as a result of their involvement in the uranium fuel cycle. These members include the owners and operators of uranium mill and mill tailings sites, and in situ uranium production facilities. These companies would be required to pay excessive and unjustified fees under the proposed regulations. These comments set forth AMC's comments and recommendations on several aspects of the NRC proposal.

Legal Authority to Charge Fees. The notice of proposed rulemaking acknowledges that NRC's authority to prescribe fees for "regulatory services" under 10 C.F.R. Part 170 derives entirely from the Independent Offices Appropriations Act of 1952 ("IOAA"), 31 U.S.C. § 9701. Under the IOAA, a regulatory agency may assess fees only upon those individuals who receive a particularized benefit from the agency. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349-51, 94 S. Ct. 1151, 1154-55 (1974). In addition, the magnitude of the fee imposed must be commensurate with the size of the benefit received from the agency. National Cable Television Ass'n v. United States, 415 U.S. 336, 342-43, 94 S. Ct. 1146, 1150

(1974). Thus, to be valid under the IOAA, a fee must "be reasonably related to, and may not exceed the value of the service to the recipient, whatever the agency's costs may be." Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985). As discussed more fully below, the "regulatory services" fees proposed by NRC to be applicable to AMC members fail to satisfy these requirements.

NRC asserts that OBRA authorizes the Commission to levy the annual charges proposed under 40 C.F.R. Part 171. In contrast to the fees NRC proposes to assess under Part 170, the Part 171 annual charges amount to a "tax" rather than a "fee." NRC may permissibly collect a tax from licensees only if Congress has provided the Commission with intelligible standards and guidelines to govern the Commission's discretion in setting such charges. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 109 S. Ct. 1726, 1731 (1989). OBRA fails to set forth adequate standards to guide NRC's discretion in setting annual charges under Part 171. Therefore, NRC is precluded from assessing those charges.

Moreover, even if one assumes, arguendo, that Congress has set forth adequate standards to guide NRC's discretion in imposing charges under Part 171, the annual charges proposed

by NRC fail to comply with those standards. OBRA mandates that, "[t]o the maximum extent practicable, the charges [proposed under Part 171] shall have a reasonable relationship to the cost of providing regulatory services." Pub. L. No. 101-508, § 6101(c)(3). The Conference Report on OBRA reveals that in enacting this provision, Congress intended that "licensees who require the greatest expenditures of the agency's resources should pay the greatest annual charge." H.R. Rep. No. 964, 101st Cong., 2d Sess. 962 (1990). For the reasons described below, NRC has failed to follow these congressionally imposed standards in calculating the charges proposed under Part 171 as they apply to facilities owned and operated by AMC members. Therefore, those proposed charges are arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

Overhead Costs. Many of the "overhead" costs to be included in the hourly rate are not part of the services rendered to uranium producers. 56 Fed. Reg. 14,872. For example, AMC members receive no benefits from the "Advisory Committee on Reactor Safeguards," yet the costs of this body are included in the proposed hourly rate. Id.

To eliminate this inequity, the hourly rate must be adjusted to reflect the services actually rendered to each category of licensees. If this is not done, NRC will violate the requirement that the charges to be assessed "have a reasonable relationship to the cost of providing regulatory services" to classes of licensees. Id. at 14,871. NRC pays lipservice to this requirement in principle, but then violates it in practice by charging the same amount for so-called "professional staff hours" for all applicants and licensees. The final regulation should establish a licensee class-specific hourly rate, which will be much lower for AMC members than other licensees by virtue of the minimal level of technical proficiency and oversight required of NRC to regulate AMC members, compared to more highly complex licensed facilities such as power reactors.

In this regard, we note that federal agencies, such as the Departments of Defense and Energy ("DOD" and "DOE"), receive substantial benefits from NRC programs outside of their licensed activities. Accordingly, they should, in return, bear a greater portion of the financial burden of NRC's cost recovery. For example, DOE sites subject to Title I of the Uranium Mill Tailings Radiation Control Act

("UMTRCA") require considerable NRC oversight and, even though not currently licensed, eventually will be granted licenses in perpetuity. There is no reason DOE should not share the burden with NRC licensees in light of the substantial oversight of DOE radiological operations by NRC. This is particularly obvious in the context of the Title I sites because DOE may spend as much as $2 billion to reclaim those sites that eventually will be licensed in perpetuity by NRC.

Lack of Justification for Fees Charged to Tailings Sites Undergoing Reclamation. According to the proposed schedule of annual fees, there is no charge for "byproduct, source or special nuclear licenses" authorizing site reclamation. Id. at 14,895 (category 14). The apparent reason for this is that these facilities "are charged an annual fee in other categories while they are operating." Id. at 14,896, n.7. This is a valid conclusion, which recognizes that there are no benefits derived from sites under reclamation; they are only cost centers. NRC should confirm this reasoning in the final regulation rather than making it an obscure footnote to the fee schedule.

Although NRC's reasoning is valid in reaching this conclusion, it fails to extend the rationale to its logical outcome as applied to a site that is also not producing and is merely a cost center while awaiting NRC approval of its final reclamation plan. NRC has a dismal record on providing timely review and approval of these plans; many have been under review for up to five to seven years. Delays in approval are not the fault of the licensee; the problems are, for the most part, attributable to NRC. Thus, NRC delays prevent these sites from shifting into a category where no annual fee would be assessed.

These delays will cost AMC members money, and the fee regulations should recognize NRC's own failure to complete review as the only reason these sites are in an annual fee category. To compensate for this problem, the fee schedule should either exempt these facilities or establish a credit that allows for a rebate upon ultimate approval of the proposed plan.

Power Reactors Should Be Charged for UMTRCA Title II Sites. The proposal states that the costs for NRC review of DOE UMTRCA activities at Title I sites will be charged off

against nuclear power reactors because they "indirectly benefited" by those sites. The same rationale argues for charging the NRC costs for UMTRCA Title II sites to these reactors. These sites all "indirectly," if not directly, benefit civilian nuclear power reactors by generating the fuel for those facilities. Because uranium is bought and sold as an international commodity, uranium producers cannot pass the incremental costs of final reclamation on to their customers. Thus, if the costs of Title I sites are charged to nuclear power reactors, then an appropriate portion of the fees for Title II sites, particularly where there are "commingled" tailings present, also should be charged to reactors. GAO has consistently acknowledged the government's moral obligation to pay for its share of the reclamation costs at these sites. Significant portions of the tailings at these sites were created and are under the complete control of the Atomic Energy Commission contracts under which such reactors similarly benefited. Accordingly, the final regulations should include a fee shifting requirement for these sites.

Effective Date/Schedule for Payment. NRC intends to make these rules, if they are adopted, effective upon publication. This action would violate section 553(d) of the Administrative

Procedure Act, which requires a 30 day waiting period between publication and the effective dates. 5 U.S.C. § 553(d).

Although in some circumstances the 30 day time period may be waived for "good cause" under section 553(d)(3), NRC does not have a sufficient reason for invoking this exception. Congress intended for this provision to apply to a relatively limited set of factual situations, and agencies cannot arbitrarily find "good cause." The burden is upon the agency to make a showing of need after weighing the "necessity for immediate implementation against principles of fundamental fairness, which require that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling." United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977).

Generally, the courts have interpreted "good cause" narrowly to apply only to emergency situations involving public health and safety. See, e.g., Reeves v. Simon, 507 F.2d 455, 458 (Emer. Ct. App. 1974), cert. denied, 420 U.S. 991 (1975); U.S. Steel Corp. v. U.S. Envtl. Protection Agency, 605 F.2d 283, 286-290 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980), reh'g denied, 445 U.S. 939 (1980).

These regulations do not meet the rationale established in these cases for waiving the 30-day waiting period. Clearly, the proposed fee regulations do not qualify as emergency situations affecting public health or welfare, nor do they provide any analogous justification for immediate implementation upon publication.

NRC could have avoided this problem had it published the proposed rule earlier. The only ostensible reason for this immediate effective date is to compensate for NRC's failure to publish the proposed rules more expeditiously. However, a delay within the agency is not a sufficient basis for waiving the waiting period. Ngou v. Schweiker, 535 F.Supp. 1214, 1216-17 (D.D.C. 1982). Nor is a tight time schedule imposed by Congress a justification for waiving requirements under the Administrative Procedure Act. State of New Jersey v. U.S. EPA, 626 F.2d 1038, 1041-45 (D.C. Cir. 1980). NRC must either publish the final rule earlier, in accordance with the August 31 payment date, or provide licensees an additional month to pay these fees after retaining the 30 day waiting period.

In addition, the proposed payment schedule imposes substantial burdens on licensees. Under NRC's proposal, the FY 1991 payment is due on August 31. This payment must be followed by quarterly payments for FY 1992 one month later on October 1. Bunching these payment dates so close together imposes an unreasonable burden on licensees. At least for FY 1992, this schedule should be spread out so that the burden of making two payments during a 30 day period is relieved.

Licensees Covered. NRC asserts that, under the guidance set forth in the OBRA Conference Report, it is required to "recover the full cost to the NRC of all identifiable regulatory services each applicant or licensee receives." 56 Fed. Reg. 14,872. To comply with this directive, the proposal would levy fees against a wide variety of licensees, including operating power reactors, nonpower reactors, fuel cycle and materials licensees, federal agency licensees, state agency licensees, local agency licensees, and Indian tribes and organizations. However, the proposal also recognizes that NRC has discretion to waive these fees for certain licensees by exempting non-profit educational institutions. Id. at 14,873. AMC agrees that NRC may waive fees for certain categories of licensees and believes that this should be extended beyond

educational institutions to cover any licensed facility that is serving solely as a cost center and not generating revenues, such as non-operational uranium fuel cycle facilities undergoing reclamation.

There is no basis for excluding non-profit educational institutions without doing so for other licensees as well. NRC should articulate standards under which it has determined that educational institutions can be exempted, and then apply exemptions to other similarly situated licensees. As noted above, uranium fuel cycle facilities owned and operated by AMC members that are non-operational or undergoing reclamation should qualify for fee waivers.

Similarly, while OBRA purports to grant NRC the authority to impose annual charges on all licensees, Congress, in enacting OBRA, clearly anticipated that non-power-reactor licensees would largely be exempt from such charges. For example, the Conference Report on OBRA specifically notes that NRC has, in the past, "found that 'the large number of small licensees, the relatively small fees that would be collected, and the costs of administering such a collection program,' make imposition of an annual charge on all of NRC's

approximately 8,000 non-power reactor licensees impractical." H.R. Conf. Rep. No. 964, supra, at 961. In addition, "[t]he conferees also understand that the direct cost of regulating non-power-reactor licensees amounts to approximately three percent of NRC's cost and that a substantial percentage of the cost of providing regulatory services to non-power-reactor licensees are recovered through fees assessed under the [IOAA]." Id. Thus, Congress obviously contemplated that annual charges would be imposed primarily on power reactor licensees. The annual charges NRC proposes to levy upon AMC's members violate the spirit of Congress' intent in enacting OBRA.

Civil Penalties Should Be Credited Against Fees. The proposal incorrectly asserts that amounts paid by licensees as fines and penalties should not be credited against the annual charges. Id. at 14,871. These penalties are revenue-producing payments to the United States. As such, any fines or penalties paid by licensees should be offset against the total costs that NRC must recover under these regulations. The licensee need not receive an individual "credit" for penalties it pays, but certainly the total budgeted amount to be collected from all licensees should be reduced to account

for this revenue. The decision in Florida Power & Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988), cert. denied 490 U.S. 1045 (1989), which prohibits such fines from being treated as a credit to the licensee who paid them, does not preclude such a result.

Thank you for considering these comments. If you have any questions or require assistance, please contact me or AMC's counsel, Anthony J. Thompson of Perkins Coie at (202) 628-6600.

Very truly yours,

James E. Gilchrist
Vice President for Environmental Affairs

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May 29, 1992

By Hand Delivery

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Office of the Secretary
Washington, D.C. 20555

Re: Proposed Revision of Fee Schedules, 57 Fed. Reg. 18,095-118 (Apr. 29, 1992)

Dear Mr. Chilk:

On April 29, 1992, the U.S. Nuclear Regulatory Commission ("NRC") published a notice of proposed rulemaking to amend regulations governing the licensing, inspection and annual fees charged to its licensees. The proposed regulations are intended to implement Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), which requires NRC to recover 100 percent of its budget authority, except for specified allowances. NRC seeks to have final fee regulations become effective upon publication, on about August 1, 1992. Fees would be due on that date.

These comments are submitted by the American Mining Congress ("AMC") on behalf of its member companies who are NRC licensees as a result of their involvement in the uranium fuel cycle. These members include the owners and operators of uranium mills and mill tailings sites, and in situ uranium production facilities. These companies would be required to pay excessive and unjustified fees under the proposed regulations. In particular, AMC objects to the proposal to increase the fee for Category 2(A), Class I facilities (uranium mills) by 139% from $100,100 to $238,700. AMC also objects to the proposed fees on the grounds that they would not be implemented in a fair and equitable manner. These comments set forth AMC's comments and recommendations on this proposed increase and several other aspects of the NRC proposal.

Lack of Legal Authority to Charge Part 171 Fees. The notice of proposed rulemaking acknowledges that NRC's authority to prescribe fees for "regulatory services" under 10 C.F.R. Part 170 derives entirely from the Independent Offices Appropriations Act of 1952 ("IOAA"). 31 U.S.C. § 9701. Under the IOAA, a regulatory agency may assess fees only upon those individuals who receive a particularized benefit from the

agency. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349-51 (1974). In addition, the magnitude of the fee imposed must be commensurate with the size of the benefit received from the agency. National Cable Television Ass'n v. United States, 415 U.S. 336, 342-43 (1974). Thus, to be valid under the IOAA, a fee must "be reasonably related to, and may not exceed the value of the service to the recipient, whatever the agency's costs may be." Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985). As discussed more fully below, the "regulatory services" fees proposed by NRC to be applicable to AMC members fail to satisfy these requirements.

NRC asserts that OBRA authorizes the Commission to levy the annual charges proposed under 40 C.F.R. Part 171. In contrast to the fees NRC proposes to assess under Part 170, the Part 171 annual charges amount to a "tax" rather than a "fee." NRC may permissibly collect a tax from licensees only if Congress has provided the Commission with intelligible standards and guidelines to govern the Commission's discretion in setting such charges. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 216 (1989). OBRA fails to set forth adequate standards to guide NRC's discretion in setting annual charges

under Part 171. Therefore, NRC is precluded from assessing those charges.

Moreover, even if one assumes, arguendo, that Congress has set forth adequate standards to guide NRC's discretion in imposing charges under Part 171, the annual charges proposed by NRC fail to comply with those standards. OBRA mandates that, "[t]o the maximum extent practicable, the charges [proposed under Part 171] shall have a reasonable relationship to the cost of providing regulatory services." Pub. L. No. 101-508, § 6101(c)(3). The Conference Report on OBRA reveals that in enacting this provision, Congress intended that "licensees who require the greatest expenditures of the agency's resources should pay the greatest annual charge." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 962 (1990). For the reasons described below, NRC has failed to follow these congressionally imposed standards in calculating the charges proposed under Part 171 as they apply to facilities owned and operated by AMC members. Therefore, those proposed charges are arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

Failure to Provide Adequate Explanation for Fees. In addition to lacking legal authority to promulgate the Part 171

charges, the NRC has violated the Administrative Procedure Act ("APA") by failing to provide any explanation of how it arrived at its final determination of the annual fee for uranium recovery facilities. Under the APA, NRC is required to publish a notice that includes the "terms or substance of the proposed rule." 5 U.S.C. § 553(b)(3). This notice must provide the factual detail and rationale for the proposal to provide interested parties with a sufficient basis to comment in a meaningful way. Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). As stated in Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 530-31 (D.C. Cir. 1982):

> To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it emplcys, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.

This is precisely what the NRC is doing in this rulemaking.

In the proposed rulemaking, NRC has failed to satisfy these requirements for adequate rulemaking. Rather than providing any explanation for its cost estimates or fees, NRC merely makes bald assertions that it has determined certain

fees must be paid. For example, no explanation is provided for the following determinations made by NRC:

1. $2.7 million must be recovered to pay the costs of uranium fuel recovery facilities, 57 Fed. Reg. 18,096, 18,103;

2. A 42% increase in the uranium recovery budget is required from last year ($1.9 million to 2.7 million);

3. Class I facilities (uranium mills) represent the "licensees who require the greatest expenditure of NRC resources," id. at 18,103;

4. Class I facilities account for approximately 60 percent of the $2.7 million for uranium recovery, id. at 18,104; and

5. It is necessary to raise the Class I fee to $238,700 from $100,100, a 139% increase over one year.

AMC and its affected members cannot be expected to accept these assertions on faith, especially because they appear to lack any rational basis. AMC is aware of no reason the overall budget for this class of facilities should be increased 42%. Indeed, the continued depressed state of the market for uranium and the absence of any increase in the

number of facilities or expansion of facility operations for uranium recovery facilities suggests that NRC's costs should decline, or at least remain stable. To the extent it is possible to discern the basis for the excessive Part 171 fees (the same is true for the Part 170 fees), it is clear to AMC that the NRC is relying on incorrect and unreasonable assumptions and information. See pp. 8-9, 12-15, infra.

Moreover, the need to increase the annual fee to $238,700 appears grossly out-of-line with the degree of NRC involvement for Class I uranium recovery sites. Such an amount of time is clearly excessive for the degree of supervision required at most of these sites, especially those that have ceased operations and are awaiting NRC approval of reclamation plans or are on standby. In these cases, very little NRC supervision is required.

All of these examples demonstrate why the NRC's proposed fee increase for uranium recovery facilities violates the OBRA directive that "the charges shall have a reasonable relationship to the cost of providing regulatory services." Pub. L. No. 101-508, § 6101(c)(3). The unlawful and arbitrary nature of this fee increase is compounded by the failure of the NRC to provide any explanation for its proposed actions.

At the very least, the NRC must republish these proposed rules with a complete explanation for its conclusions. If it is the case, as AMC believes is true, that there is no justification for NRC's increased fees, then the new proposed regulations should set forth more reasonable charges based upon realistic cost projections.

Double Charging. For Category 2(A), Class I sites that are undergoing reclamation, these fees amount to double-charging. These facilities are already charged with the full costs of regulatory services associated with the reclamation process under 10 C.F.R. Part 40, Appendix A pursuant to the Part 170 $123/hour charge. Thus, the proposed $238,700 would be added to those charges, even though all costs of services rendered would be recouped under the hourly fee. There is no justification for double-charging, and the annual fees have no "reasonable relationship to the cost of providing regulatory services."

Lack of Justification for Fees Charged to Tailings Sites Undergoing Reclamation. Under the 1991 regulations, there is no charge for "byproduct, source or special nuclear licenses" authorizing site reclamation. See 56 Fed. Reg. 31,481, 31,510 (category 14). The apparent reason for this is that these

facilities "are charged an annual fee in other categories while they are operating." Id. at 31,510, n.7. This is a valid conclusion, which recognizes that there are no benefits derived from sites under reclamation; they are only cost centers.

Although NRC's reasoning is valid in reaching this conclusion, it fails to extend the rationale to its logical outcome as applied to a site that is also not producing and is merely a cost center while awaiting NRC approval of its final reclamation plan. NRC has a dismal record on providing timely review and approval of these plans; many have been under review for as long as seven years. Delays in approval are not the fault of the licensee; the problems are, for the most part, attributable to NRC. Thus, NRC delays prevent these sites from shifting into a category where no annual fee would be assessed.

These delays will cost AMC members money, and the fee regulations should recognize NRC's own failure to complete review as the only reason these sites are in an annual fee category. To compensate for this problem, the fee schedule should either exempt these facilities or establish a credit

that allows for a rebate upon ultimate approval of the proposed plan.

Indeed, NRC has already recognized this distinction by segregating Class II facilities which do not generate tailings (i.e., in situ and heap leach facilities) for lower fees. Mills on standby or undergoing reclamation also "do not generate tailings" and involve lower costs. Hence, because these facilities are now included under Class I for the $238,700 fee, it is clear that the NRC has overstated the costs for this entire category and appropriate adjustments must be made.

Impact on the Regulated Entities. The proposed fees are substantial. Without question, they will impose a significant financial burden on uranium recovery facilities. Since 1984, the Department of Energy has determined that the domestic uranium industry is economically "non-viable." Ten years ago, there were 26 active, licensed uranium mills. Today, there are no active conventional mining and mills operations in the United States. These costs will add to the financial burdens that have resulted in the demise of domestic uranium production and will make it even more difficult for this industry to once again become viable.

Licensees Covered. The proposal would levy fees against a wide variety of licensees, including operating power reactors, nonpower reactors, and fuel cycle and materials licensees. However, the proposal also recognizes that NRC has discretion to waive these fees for certain licensees. Id. at 18,098-99. AMC agrees that NRC may waive fees for certain categories of licensees and believes that this should be extended to cover any licensed facility that is serving solely as a cost center and not generating revenues, such as non-operational uranium fuel cycle facilities undergoing reclamation.

Similarly, while OBRA purports to grant NRC the authority to impose annual charges on all licensees, Congress, in enacting OBRA, clearly anticipated that non-power reactor licensees would largely be exempt from such charges. For example, the Conference Report on OBRA specifically notes that NRC has, in the past, "found that for 'the large number of small licensees, the relatively small fees that would be collected, and the costs of administering such a collection program,' make imposition of an annual charge on all of NRC's approximately 8,000 non-power reactor licensees impractical." H.R. Conf. Rep. No. 964, supra, at 961. In addition, "[t]he

conferees also understand that the direct cost of regulating non-power-reactor licensees amounts to approximately three percent of NRC's cost and that a substantial percentage of the cost of providing regulatory services to non-power-reactor licensees are recovered through fees assessed under the [IOAA]." Id. Thus, Congress obviously contemplated that annual charges would be imposed primarily on power reactor licensees. The annual charges NRC proposes to levy upon AMC's members violate the spirit of Congress' intent in enacting OBRA.

Failure to Assess Costs to Department of Energy. In particular, AMC believes it is inequitable and improper for the Department of Energy's ("DOE") program under the Uranium Mill Tailings Radiation Control Act ("UMTRCA") to utilize the Commission's resources with respect to oversight and review (both specific and generic) of its mill tailing. site reclamation activities without contributing anything to the NRC budget.

NRC stated in the 1991 fee regulations that all substantive review at DOE sites is essentially completed prior to the application for a general license for the site. Id. at 31,481-82. NRC stated that the general license should be

issued only after the site enters the postclosure stage, and therefore as such, DOE is not yet an NRC licensee and thus cannot be billed under these regulations. AMC disagrees.

The 1991 fee regulations admit that OBRA allows the "collection of fees from any person" and "all licensees." Thus, being a licensee is not a precondition for fee assessment. Instead, the test is whether "any person" receives a service or thing of value from the Commission. If so, that person, whether a licensee or not, shall pay fees to cover the Commission's costs in providing such service or thing of value. Further, section 111(s) of the Atomic Energy Act defines "person" as:

> any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission, any state or political subdivision . . . .

42 U.S.C. § 2014(s) (emphasis added).

If the NRC can provide valuable services to a government agency that will, by law, become a licensee for the UMTRCA Title I mill tailings reclamation program, there is no reason why that agency should not pay its fair share. The NRC has long taken the position that it has the authority under the

Atomic Energy Act to take enforcement actions against nonlicensees. That position is inconsistent with its position that it has no authority to charge the Department of Energy for its UMTRCA program. Indeed, the NRC provides extensive services to DOE through the review of its site reclamation plans. This service is provided before DOE becomes a licensee. Even though this occurs at the pre-license stage, these services value to DOE and are an integral part of the UMTRCA program. This cost should be passed on to DOE.

The dilution of NRC resources available to deal with the Title II private sites and their closure plans, which has resulted from NRC involvement in the DOE program, has undoubtedly contributed substantially to the delay in approval of proposed reclamation plans for those sites. This, in turn, has led those sites to become subject to higher annual fees as they do not qualify for the category of an inactive site with an approved reclamation plan. This cannot be justified on any affair and equitable basis.

Failure to Assess Costs to Agreement States. NRC's proposed fees are also inequitable as they provide unfair advantage to facilities located in agreement states which are not charged a similar annual fee. This results in

discriminatory treatment between licensees located in agreement and nonagreement states as a result of the uneven fee relationship. Also, NRC spends substantial resources on oversight and training for agreement state regulatory programs. These agreement state programs fall within the scope of OBRA and Atomic Energy Act. Indeed section 111(s) of the Atomic Energy Act includes "any state" within the definition of "person" subject to the Act. It is unreasonable for the NRC to spend resources on agreement state regulatory programs without charging agreement states appropriate fees. Failure to do so has imposed additional costs on the NRC licensees who are being asked to foot the bill for NRC's regulation of their facilities and NRC's oversight of agreement state programs. Given that the NRC is ultimately responsible for assuring that agreement state programs provide an equivalent level of protection to public health and safety, NRC must charge those states for its services.

Excessive and Unjustified Charges. The inordinate costs associated with the new NRC fee arrangements under the IOAA and OBRA can be demonstrated by one AMC member company licensee's experience. During the years between 1986 and 1991, bills from NRC were on the order of $15,000-$20,000 per

year for licensing oversight activities. In the first year after the implementation of this fee schedule, bills from NRC were on the order of $130,000. This demonstrates that incremental bureaucratic costs have become a self-fulfilling prophecy under the current legislative and regulatory regime at a time when uranium production activities (and presumably the need for more active oversight) have ceased. NRC's estimate that it costs $214,000 for a single FTE associated with its regulatory program is so excessive and out-of-line for what should be reasonable costs to fund government employee positions as to be shocking. This excessive FTE demonstrates that NRC is attempting to pass bloated costs on to licensees for which they do not receive anything remotely resembling commensurate benefit.

Effective Date/Schedule for Payment. NRC intends to make these rules, if they are adopted, effective upon publication. This action would violate section 553(d) of the APA, which requires a 30 day waiting period between publication and the effective dates. 5 U.S.C. § 553(d).

Although in some circumstances the 30 day time period may be waived for "good cause" under section 553(d)(3), NRC does not have a sufficient reason for invoking this exception.

Congress intended for this provision to apply to a relatively limited set of factual situations, and agencies cannot arbitrarily find "good cause." The burden is upon the agency to make a showing of need after weighing the "necessity for immediate implementation against principles of fundamental fairness, which require that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling." United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977).

Generally, the courts have interpreted "good cause" narrowly to apply only to emergency situations involving public health and safety. See, e.g., Reeves v. Simon, 507 F.2d 455, 458 (Emer. Ct. App. 1974), cert. denied, 420 U.S. 991 (1975); U.S. Steel Corp. v. U.S. Envtl. Protection Agency, 605 F.2d 283, 286-290 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980), reh'g denied, 445 U.S. 939 (1980).

These regulations do not meet the rationale established in these cases for waiving the 30-day waiting period. Clearly, the proposed fee regulations do not qualify as emergency situations affecting public health or welfare, nor do they provide any analogous justification for immediate implementation upon publication.

NRC could have avoided this problem had it published the proposed rule earlier. The only ostensible reason for this immediate effective date is to compensate for NRC's failure to publish the proposed rules more expeditiously. However, a delay within the agency is not a sufficient basis for waiving the waiting period. Ngou v. Schweiker, 535 F.Supp. 1214, 1216-17 (D.D.C. 1982). Nor is a tight time schedule imposed by Congress a justification for waiving requirements under the Administrative Procedure Act. State of New Jersey v. U.S. EPA, 626 F.2d 1038, 1041-45 (D.C. Cir. 1980). NRC must either publish the final rule earlier or provide licensees an additional month to pay these fees after retaining the 30 day waiting period.

Thank you for considering these comments. If you have any questions or require assistance, please contact me or AMC's counsel, Anthony J. Thompson of Perkins Coie at (202) 628-6600.

Very truly yours,

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