



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20565-0001

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AE49-2

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JUL 07 1993

MEMORANDUM FOR: Jesse L. Funches
Deputy Controller

FROM: Lee Hiller, Director
Division of Accounting & Finance
Office of the Controller

SUBJECT: COMMENTS ON FINAL FEE RULE

Attached is a copy of the latest version of the final FY 1993
fee rule annotated with our comments.

A handwritten signature in cursive script, appearing to read "Lee Hiller".

Lee Hiller, Director
Division of Accounting & Finance
Office of the Controller

Attachment:
As stated

the NRC published for public comment a separate notice in the Federal Register on April 19, 1993 (58 FR 21116-21121). The 90-day public comment period for this notice expires on July 19, 1993.

On April 23, 1993 (58 FR 21662), the NRC published the proposed ~~version of a rule~~ for FY 1993 establishing the licensing, inspection, and annual fees necessary for the NRC to recover approximately 100 percent of its budget authority for FY 1993 less the appropriation received from the NWF. The basic methodology used in the proposed rule was unchanged from that used to calculate the 10 CFR Part 170 professional hourly rate, the specific materials licensing and inspection fees in 10 CFR Part 170, and the 10 CFR Part 171 annual fees set forth in the final rules published July 10, 1991 (56 FR 31472) and July 23, 1992 (57 FR 32691). Because of the need to collect annual fees for FY 1993 prior to October 1, 1993, the Commission is promulgating this final rule before it completes the user fee review mandated by the Energy Policy Act. ~~Only~~ changes in Commission policy resulting from that review will be incorporated in fee schedules promulgated in future years. The NRC placed a copy of the workpapers relating to the proposed rule in its Public Document Room at 2120 L Street, NW, Washington, D.C., in the lower level of the Gelman building. Workpapers relating to this final rule will also be placed in the Public Document Room.

II. Responses to comments.

The NRC received more than 500 public comments on the proposed rule. Although the comment period expired on May 24, 1993, the NRC reviewed and evaluated all comments received prior to June 25, 1993. Copies of all comment letters received are available for inspection in the NRC Public Document Room, 2120 L Street, NW (lower level) Washington, D.C.

Many of the comments were similar in nature. For evaluation purposes, these comments have been divided into two groups. The first group deals with the two remand issues of the U.S. Court of Appeals for the District of Columbia circuit case decided on March 16, 1993. The second group deals with the remaining comments on the FY 1993 proposed rule. The comments are as follows:

- A. Comments Regarding U.S. Court of Appeals for the District of Columbia Circuit Remand Decision -- FY 1991 -- FY 199² Fee Schedules.
1. Taking Account of Licensees' Ability to Passthrough Fee Costs to Customers.

Comment. A number of comments were received on the question of setting NRC annual fees in part on the basis of whether the licensee can pass through the costs of those fees to its customers. The NRC had proposed abandoning the passthrough concept, which it previously had used in part to justify its fee exemption for certain nonprofit educational institutions, on the grounds that to evaluate each licensee's passthrough ability was an impossible

Commission has stated above, that argument was not based on empirical data. Passthrough ability in any event is an unworkable standard for setting annual fees. Without either the passthrough rationale or a persuasive "externalized benefits" rationale, the Commission has no choice but to charge colleges and universities fees appropriate to their status as licensees.

The Commission cannot conclude on the current record that education generically produces benefits that to a unique degree are undervalued in the market place -- i.e., "exceptionally large externalized benefits". As the comments and court decision indicated, many other licensees can and do claim that they provide important benefits to society that are worthy of fee exemptions.⁷ Without a means of differentiating these groups of licensees from one another, any rationale for singling out education for fee-exempt status would almost surely fail if challenged.

The Commission acknowledges the seeming paradox in charging fees to a program that receives support from other agencies of the Federal government. However, it believes that it has no choice, given 100 percent recovery requirements and fairness and equity, but to charge all licensees whenever possible. For instance, the NRC levies both annual and user fees on all other NRC licensees including nonprofit, tax-exempt entities such as hospitals, museums, and institutes. Furthermore, the NRC also directly charges annual fees to other Federal agencies such as the Department of Veterans Affairs, the National Institutes of Health and the Department of Defense. Charging annual fees to colleges and universities is consistent with the

Commission's preferred approach to fee recovery and Congressional guidance that NRC establish a schedule of annual charges that fairly and equitably allocates the aggregate amount of the charges among licensees and, to the maximum extent practicable, reasonably reflects the cost of providing services to such licensees or classes of licensees.

The Commission was also struck by the comments that attacked the educational exemption and urged its abandonment. Because those arguments were made by organizations such as hospitals, utilities and fuel facilities that presumably benefit from an educated nuclear workforce, the Commission read these comments as an indication that at least some assumed beneficiaries of education do not view it quite as positively as the Commission had believed. This in turn strengthened the Commission's view that the benefits of education to society alone are not enough to support a generic exemption.

None to not by

The Commission, however, is not unsympathetic to the problems this new course of action is likely to cause many formerly exempt nonprofit educational institutions. Because this is a change in policy, the Commission would like to call to the attention of affected licensees the possibility of paying the annual fee on an installment basis under 10 CFR 15.35(b), subject to the agency approval and demonstrated need on the part of the requesting licensee.¹

¹Requests to pay fees on an installment basis must be submitted in writing to the NRC, Office of the Controller, Division of Accounting and Finance, Washington, D.C. 20555. All requests must furnish satisfactory evidence of inability to pay the debt in one lump sum.

Some commenters expressed particular concern over the fate of research reactors. The Commission also notes that, like all other licensees, affected nonprofit educational licensees can request individual exemptions, under 10 CFR 171.11(b) or (d) for university research reactors or materials licensees respectively. Any research reactor seeking an exemption under the "public interest" standard in § 171.11(b) would be expected to demonstrate severe financial hardship as a result of the newly imposed annual fees as well as a significant externalized benefit provided by that reactor to other NRC licensees.

* add language from
Pg 33, 34

The Commission will be examining the general issue of exempting nonprofit educational institutions as part of its Energy Policy Act-mandated review, and ~~may choose~~ following that review, ^{may choose} to modify further its policy in this area or to recommend Congressional action. For FY 1993, however, formerly exempt nonprofit educational institutions must pay annual fees based on the preexisting fee categories into which they fall.

> used from pg 16

On a practical note, the Commission has concluded that by eliminating the exemption for past years, it must refund the money paid by those licensees charged fees that would otherwise have been paid by the colleges and universities. The Commission will not (and by law cannot) retroactively collect these fees from the educational institutions for FY 1991 and FY 1992. As a result, the Commission, upon request, will refund to power reactor licensees portions of those fees paid by them in FY 1991 and FY 1992 to cover the annual fees of the exempted nonprofit educational institutions.

Finally, the Commission recognizes that its action in

the current volume of LLW disposed of by each class is the best gross indicator of the relative future benefit of LLW disposal sites to licensees. Other commenters preferred Alternative 2 because it is the clearest and most predictable to the waste generator and easiest for the NRC to administer. These commenters also noted that calculating the annual LLW surcharge based on individual licensees' current volume of waste (Alternative 3) would be administratively burdensome and might not bear a close relationship to the amount of waste those licensees will generate in the future.

Several commenters supported Alternative 3 which would base the LLW surcharge on the amount of waste generated or disposed by each individual licensee. These commenters believe that Alternative 3 should be adopted since the NRC has not provided sufficient reasons to deviate from the individualized approach suggested in the decision by the U.S. Court of Appeals. They state that the other three alternatives are unfair.

One commenter supported Alternative 4 which would base the LLW surcharge on the curies of waste generated. Other commenters, however, indicated that curies generated is not a good indicator of the regulatory benefits of the NRC regulatory program. One commenter suggested a combination of Alternatives 1, 3 and 4 such that the fee assessment for LLW would include a minimum fee for all users with the largest portion of the fee being calculated based on volume generated with an additional assessment for activity (Class B and C waste) which would require stricter long term monitoring at any storage facility.

Response. Based on a careful evaluation of the comments, the Commission concludes that, on balance, a variant of Alternative 1 provides a fair and equitable allocation of the NRC LLW costs to the various NRC licensees. The Commission has concluded that there should be two LLW surcharges -- one for large waste generators and another for small waste generators. This conclusion reflects (1) the purpose of NRC activities whose costs are included in the surcharge; (2) existing data on which to base the fees; and (3) the Commission's duty to allocate fee burdens fairly and equitably.

The purpose of FY 1991 - FY 1993 LLW waste activities is to implement ^{the} Low Level Radioactive Waste Policy Amendments Act of 1985, and the Atomic Energy Act, which requires the NRC to perform certain generic activities. These activities include developing rules, policies and guidance, performing research, and providing advice and consultation of LLW compacts and Agreement States who will license some of the future LLW disposal sites. The budgeted costs for most types of NRC generic activities are generally recovered in annual fees from the class of licensees to whom the activities directly relate. (For example, reactor research is recovered from reactor licensees, and guidance and rule development for regulation of uranium producers is recovered from uranium recovery licensees.) However, for LLW generic activities, there is no disposal site licensed by the NRC from whom to recover the generic budgeted costs that must be incurred. Since there is no LLW disposal site licensee, these costs must be allocated to other NRC licensees in order to recover 100 percent of the NRC budget as required by ~~ORER-90~~ OBRA-90. In addition, the LLW

data would result in the significant administrative burden of "translating" raw and coded disposal data into usable licensee-by-licensee bills. 7

Some commenters point out that although the use of disposal data could result in some licensees paying no fees, they would be charged disproportionately high annual fees in the future when they do dispose of their LLW. This is not necessarily true, since many of the ongoing LLW generic activities are not recurring-type activities. For example, once the research, performance assessment, or development of rules and regulatory guides is completed, the staff does not expect to perform that work again in the future. Therefore, if licensees pay in the future they would not be required to pay for these generic regulatory costs.

Alternative 2's class-based approach would eliminate the major negative associated with Alternative 3. That is, each licensee that generates waste would pay an annual fee to recover the NRC costs that are necessary to establish and maintain a regulatory program for LLW disposal. The annual fee would be based on the average amount of waste disposed per licensee in a class. Stated another way, the average LLW disposed per class of licensees would be used as a proxy for generation. Alternative 2, however, has drawbacks for those classes with a relatively small number of licensees, such as the fuel facilities. With a small number of licensees in a class, abnormally high or low LLW disposal by one or two licensees can skew the average so that it is no longer a good proxy for LLW generation for that class.

As several commenters noted, Alternative 1's flat fee

approach is consistent with the purpose of the FY 1991-1993 LLW activities. However, the guidance from the Congress of fairness and equity dictates that the NRC not charge the same fee for those groups of licensees that are likely to generate significantly different amounts of LLW. Because the NRC does not have sufficient data on LLW generated to make a refined differentiation by individual licensee or small groups, the Commission believes that fairness and equity can best be accomplished by creating two groups and charging each a flat fee -- large generators and small generators. This would eliminate the problem caused by using groups with a small number of licensees. This approach will result in all LLW-producing licensees paying a fairly determined fee, and avoid the gross inequities of total fee avoidance or disproportionately large fees for smaller licensees that would have resulted under the other alternatives and their variations put forth for comment in the proposed rule.

The large generators ^{in this group,} ~~are~~ comprised of power reactors and large fuel facilities ~~waste generators,~~ ^{those} ~~in this~~ group are expected to generate more than 1,000 cubic feet of LLW per year. The small generators consist of all other LLW-producing licensees. The amount of the costs allocated to the two groups would be based on the historical average of the amount of waste disposed over a two year period. Within these two groups, each licensee would pay the same LLW fee (surcharge). In FY 1993 that amount is \$61,100 for large generators and \$1,100 for small generators.

On remand from the Court of Appeals, the Commission also adopts this approach for FY 1991 and FY 1992. The small generator LLW surcharge, \$1,400 and \$1,600 in FY

in the publication Energy and Water Development Appropriations for FY 1993 -- Hearings before a Subcommittee on Appropriations, House of Representatives, One Hundred Second Congress, Second Session, Part 6." The resources resulting from this review and decision process are those necessary for NRC to implement its statutory responsibilities. Questions relating to the NRC budget approval process were also addressed in the final rules published on July 10, 1991 (56 FR 31482) and July 23, 1992 (57 FR 32696). Given the increase in the budget for the fuel cycle class of licensees, it is necessary to increase the fees to recover the cost for these activities in accordance with OBRA-90. Contrary to some commenters suggestions, this increase is not attributable to NRC activities related to USEC. With regard to USEC, the NRC has adjusted its budgeted allocation for this new and unique added responsibility to reflect planned FY 1993 USEC activities and the fact that USEC will be assessed fees for these activities. The NRC expects to bill USEC for all costs incurred after July 1, 1993, the formation date of USEC. The billings will begin during the first quarter of FY 1994.

3. Comment. Another fuel facility licensee indicated that based on the Court's decision to grant Combustion Engineering an exemption from fees for one of its two low enriched uranium plants located in Hematite, Missouri and Windsor, Connecticut, then it too deserves to be considered for an exemption because it is not operationally equivalent to the plants run by the full scope fuel fabricators since it purchases finished fuel

pellets from another company and loads them into fuel rods for assembly into fuel elements. Therefore, the commenter requests that the NRC reconsider the implication of the Court's holding with respect to the disproportionate allocation of its costs under 10 CFR 171.11(d), especially as the allocation of these costs adversely impacts the licensee.

Response. The D.C. Circuit Court of Appeals decision of March 16, 1993, directed the NRC to grant an exemption from annual fees to Combustion Engineering (CE) for one of its two low enriched uranium facilities. The NRC had previously denied the exemption request from CE. The Court concluded that "the argument that the "equal fee per license" rule is "unfair and inequitable" is persuasive only on the ground that the rule produced troubling results when applied to Combustion's circumstances." The Court saw no reason for requiring the NRC to attend to that rather rare situation in the rule itself. Thus, consistent with the Court decision and 10 CFR Part 171, if licensees feel that based on the circumstances of their particular situation they can make a strong case to the NRC for an exemption from the FY 1993 annual fees then they should do so. The NRC will consider such requests for exemption under the provisions of 10 CFR 171.11(d). /In accordance with 10 CFR Part 171.11(b), such requests for exemption must be filed within 90 days from the effective date of this final rule. The filing of an exemption request does not extend the date on which the bill is payable. Only the timely payment in full

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ensures avoidance of interest and penalty charges. If a partial or full exemption is granted, any overpayment will be refunded.

4. Comment. Some uranium recovery licensees questioned and requested clarification concerning the purpose of the new categories in 10 CFR Parts 170.31 and 171.16(d) (Category 4D) as many mill tailings facilities are already licensed to accept byproduct material for possession and disposal pursuant to NRC's Criteria 2 of 10 CFR Part 40, Appendix A. These licensees believe that mill tailings facilities should not be assessed the additional fees as these charges are already included and factored into Category 2.A.(2) annual fees. Assessing additional fees for licensees already paying an annual fee under Category 2.A.(2) is double charging according to the commenters. One uranium recovery licensee questioned the revision of Footnotes 1 and 7 to 10 CFR 171.16(d) contending that as presently written there is no ambiguity or question. Other uranium recovery licensees indicated that they need more information concerning the method used to establish the annual fees because of the wide fluctuations in these fees during the past three fiscal years. Others stated that while the proposed fees for FY 1993 represented a relief from the high fees of the previous two years the proposed rule does not provide a means of reimbursement for overpayment of FY 1993 annual fees that have already been paid to the NRC by the first three quarterly billings.

Response. The NRC explained in the proposed rule

its reasons for establishing a new Category 4D in its two fee regulations, 10 CFR Parts 170 and 171. The new category will allow the NRC to specifically segregate and identify those licenses which authorize the receipt, possession, and disposal of byproduct material from other persons as defined by Section 11.e.(2) of the Atomic Energy Act. This change is based on NRC's recognition of potential increased activity related to the disposal of 11.e.(2) byproduct material and to better distinguish this unique category of license (58 FR 21670).

The costs allocated to the uranium recovery class of licensee are for safety generic and other regulatory activities that are attributable to this class of licensees and that are not recovered by 10 CFR Part 170 license and inspection fees. With respect to mill licensees in fee Category 2.A.(2) that authorize both milling operations and the disposal of Section 11.e.(2) byproduct material, the same NRC regulations, (e.g., 10 CFR 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 and the license that only authorizes disposal of 11.e.(2) byproduct material. The 10 CFR 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 licenses. Therefore, mill licenses subject to the fees in fee Category 2A of 10 CFR 170.31 and fee Category 2.A.(2) of 10 CFR 171.16 will not be assessed fees under fee Category 4D. All other licenses X

~~including mill licenses that authorize decommissioning, decontamination, reclamation or site restoration activities (fee Category 14),~~
that authorize the receipt, from other persons, of Section 11.e(2) byproduct materials for possession and disposal will be subject to the Category 4D fees, *including mill licenses that authorize decommissioning, decontamination, reclamation or site restoration activities since they are not*
Although 10 CFR Part 171.19(b) specifies that the Commission will adjust the fourth quarter bill to recover the full amount of the revised annual fee, *assessed annually fees under fee Category 14,* the NRC agrees that this section should be modified to more specifically cover overpayments. Accordingly, in this final rule the Commission has revised 10 CFR Part 171.19(b) to specifically state NRC's policy for handling those situations where the amounts collected in the first three quarters exceed the amount of the annual fee published in the final rule.

With respect to footnotes 1 and 7 in 10 CFR Part 171.16, the NRC indicated in the proposed rule that during the past two years many licensees have stated that although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were in fact either not using the material to conduct operations or had disposed of the material and no longer needed the license. In particular, this issue was raised by certain uranium mill licensees who have mills not currently in operation. In responding to licensees about this matter, the NRC has stated that annual fees are assessed based on whether a licensee holds a valid NRC license that authorizes possession and use of radioactive

material. 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 ^{that} the 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 (58 FR 21667-21668). To remove any uncertainty, the NRC is making minor clarifying amendments to 10 CFR 171.16, footnotes 1 and 7.

5. Comment. One commenter indicated that the methodology used in the current rule to determine inspection fees (routine and nonroutine) in 10 CFR Part 170 should remain the same and that by proposing a uniform fee for both routine and non-routine inspections NRC believes they are equivalent. The commenter feels that the burden for inspection fees should be placed on licensees facing nonroutine inspections and that by creating a uniform fee for both types of inspections the NRC, in turn, burdens those licensees who do not require nonroutine inspections and who are unlikely to in the future. The commenter suggests that NRC create a lower fee schedule for routine inspections and make up the difference with higher fees for nonroutine inspections.

Response. NRC indicated in the proposed rule the reason for combining the current routine and nonroutine inspection fees into a single inspection fee. NRC's review of the inspection

over the FY 1992 levels, the NRC could not meet the statutory mandate requirement of OBRA-90 to recover approximately 100 percent of the NRC budget authority through fees.

8. Comment. As in FY 1991 and FY 1992, commenters suggested that the NRC fee proposals violate the public trust and demean the intent of Congress. Commenters indicate that the NRC should assess fees based on the amount of throughput of material, the size of the facility, the amount or type of material possessed, the sales generated by the licensed location, the competitive condition of certain markets including the assessment of fees to Agreement States and the effect of fees on domestic and foreign competition. One commenter suggested that because the NRC has authority to allow a State to become an Agreement State, the NRC could also charge a fee to either the Agreement State or to individual firms. Another commenter indicated that the requirement that NRC recover 100 percent of its budget is wrong. It allows budgets to grow more irresponsibility than they usually do because no legislator or executive office needs to face a consequent tax problem. Another commenter suggested that it is imperative for NRC to closely examine what its regulatory program provides and how it can be provided more effectively.

Response. The issue of basing fees on the amount of material possessed, the frequency of use of the material, and the size of the facilities, ^{and} market competitive positions, ~~and the assessment of fees~~

Not in Budget

~~to Agreement States~~ were addressed by the NRC in the Regulatory Flexibility Analysis in Appendix A to the final rule published July 10, 1991 (56 FR 31511-31513). The Commission did not adopt that approach, and continues to believe that uniformly allocating the generic and other regulatory costs to the specific licensee to determine the amount of the annual fee is a fair and equitable way to recover its costs and that establishing reduced annual fees based on gross receipts (size) is the most appropriate approach to minimize the impact on small entities. Therefore, NRC finds no basis for altering its approach at this time. This approach was upheld by the D.C. Circuit in its March 16, 1993 decision in Allied Signal.

With respect to Agreement States, the Agreement States themselves and the firms licensed by the Agreement States are not NRC licensees and therefore are not covered by OBRA-90.

see attached

With respect to the amount of the budget, the requirement for NRC to recover 100 percent of its budget does not exempt the NRC from the normal Government review and decisionmaking process. The NRC must first submit its budget to the Office of Management and Budget. The NRC budget is then sent to Congress for review and approval. The budget process, along with the internal NRC review process, helps ensure that the NRC budget is the minimum necessary to carry out an effective regulatory program.

- 9. Comment. The American College of Nuclear Physicians/Society of Nuclear Medicine (ACNP/SNM) commented that it had submitted a petition for rulemaking to the NRC to review the FY 1991 methodology so that medical licensees could be treated like nonprofit educational institutions. The commenter believes the NRC is obligated to

With respect to Agreement states since ~~they~~
neither the Agreement States ~~themselves~~ nor the
firms issued licenses by the
Agreement states are NRC licensed
they ~~are not covered by~~ ^{cannot be assessed annual fees under} OSHA-90.

resolution of the petitions prior to the fee policy review would be premature given the Congressional request for future evaluation of the fee policy. The NRC expects the study to be completed by the end of calendar year 1993.

The Commission also notes that some of the medical commenters have asked that they be exempted from fees just like the Commission has previously done for nonprofit educational institutions. As the Commission has explained earlier, the record before the Commission cannot support the continuation of the nonprofit educational exemption for FY 1993. Similarly, the Commission cannot adopt such an exemption for the medical community.

Commissioners
Statements by Remick and DePlanque
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For the reasons given below, we believe that the exemption for educational institutions, be they reactor licensees or materials licensees, should have been continued for the present on the basis of the approach suggested by the Court, and reconsidered thoroughly in the context of our response to Section 2903(c) of the Energy Policy Act of 1992.

First, we do not believe that the notice of proposed rulemaking was adequate. Although the notice invited comments on the Court's "externalized benefits" approach, and on whether the exemption should be continued, the notice argued vigorously for continuing the exemption and therefore did not convey that the agency was, in effect, depending almost entirely on comments from affected licensees to provide a rationale for the exemption in FY 1993. It will be extremely difficult for many educational institutions to adjust this late in their budget cycles to what in

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many cases will be unexpected and significant fees.

Second, it is not entirely clear how the agency will apply the majority's two-part test for case-by-case exemptions, or what criteria will be used to determine whether a request satisfies the two-part test.

Third, no matter how the two-part test is interpreted and applied, we believe that a generic exemption based on the Court's suggested approach would be preferable to the two-part test for a number of reasons: (1) The Court's suggested approach takes into consideration externalized benefits to a larger group than just NRC licensees and thus makes it possible for the agency to consider exemptions for education licensees whose externalized benefits flow principally to persons and organizations other than NRC licensees; (2) the Court's suggested basis for the generic exemption would avert a situation in which granting an exemption would cause the U.S. Treasury to lose fee income and in which denial of an exemption could force closure of a facility or termination of licensed activities of wide benefit; and (3) the generic exemption envisioned by the Court would obviate the need for a case-by-case, year-by-year expenditure of resources on a multitude of exemption requests.

In essence, the agency missed an opportunity to consider seriously the classic "externalized benefits" argument suggested by the Court. A general argument like the one the Court invited us to make has a long history, and the "law and economics" scholars on the Court are no doubt familiar with the argument. It is, first, that education, like national defense, the administration of justice, and a few other activities, provides large and indispensable benefits to the whole society, not just to purchasers (in this case students) of the activity, and, second, that the market cannot be expected to supply the necessary amount of education, either because the "buyers" in the education market will not know enough to put the "right" price on education, or because

they will not be able to pay that price. Consistent with this argument, education in free-market economies relies to a great extent on extra-market financial support from philanthropy and government.

This general argument would have to be adapted to the specific circumstances of our licensees to justify a generic exemption. It is clear that the argument requires more than a demonstration of hardship, and more than what the Court called the "quite vague" reference to the "externalized benefits" of education. Also, the Court would have required a showing that those benefits were "exceptionally large" and that they could not be "captured in tuition or other market prices." Nevertheless, the agency, and the commenters if given reasonable notice, might have been able to build an administrative record to support a generic exemption based on the argument. The effort the agency has saved by not looking further into the issue may turn out to be a fraction of the effort the agency will expend on responding to requests for case-by-case exemptions and permission to pay in installments.

We fear the ultimate effects the majority's action may have. To take research and training reactors alone, an annual fee of about \$65,000 may prove to be a very substantial addition to, and possibly an unbearable burden for, the operating budgets of many of these reactors. Similar consequences may befall formerly exempt materials licensees. Consequently, the country may lose the considerable benefits which the nuclear-related activities of educational institutions provide, benefits acknowledged by the agency in the Statement of Considerations accompanying the proposed rule.

III. Final Action -- Changes Included in the Final Rule

In addition to implementing the March 16, 1993, court decision, the NRC is also amending its licensing, inspection, and

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(2) The number of licenses in some classes ~~have~~ decreased due to license termination or consolidation resulting in fewer licensees to pay for the costs of regulatory activities not recovered under 10 CFR Part 170.

✓ The NRC contemplates that any fees to be collected as a result of this final rule will be assessed on an expedited basis to ensure collection of the required fees by September 30, 1993, as stipulated in the Public Law. Therefore, as in FY 1991 and FY 1992, the fees ⁶ become effective 30 days after publication of the final rule in the Federal Register. The NRC will send a bill for the amount of the annual fee to the licensee or certificate, registration, or approval holder upon publication of the final rule. Payment is due on the effective date of the FY 1993 rule.

A. Amendments to 10 CFR Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services.

Six amendments have been made to Part 170. These amendments do not change the underlying basis for the regulation -- that fees be assessed to applicants, persons, and licensees for specific identifiable services rendered. These revisions also comply with the guidance in the Conference Committee Report on OBRA-90 that fees assessed under the Independent Offices Appropriation Act (IOAA) recover the full cost to the NRC of all identifiable regulatory services each applicant or licensee receives.

First, the agency-wide professional hourly rate, which is used to determine the Part 170 fees, is increased about seven percent from \$123 per hour to \$132 per hour (\$229,912 per direct FTE). The rate is based on the FY 1993 direct FTEs and that portion of the FY 1993 budget that is not recovered through the appropriation from the NWF.

Second, the current Part 170 licensing and inspection fees in §§ 170.21 and 170.31 for all applicants and licensees are revised to reflect both the increase in the professional hourly rate and the results of the review required by the CFO Act. To comply with the requirements of the CFO Act, the NRC has evaluated historical professional staff hours used to process a licensing action (new license, renewal, and amendment) and to conduct routine and nonroutine inspections for those licensees whose fees are based on the average cost method (flat fees).

The evaluation of the historical data shows that the average number of professional staff hours needed to complete materials licensing actions has increased in some categories. The data for the average number of professional staff hours needed to complete licensing actions were last updated in FY 1990 (55 FR 21173; May 23, 1990). Therefore, the fees for these categories must be increased to reflect the costs incurred in completing the licensing actions. For other categories, the revised fees reflect that the average number of professional staff hours per licensing action decreased. Thus, the revised average professional staff hours reflect the changes in the NRC licensing review program that have occurred since FY 1990. The licensing fees are based on the new average professional staff hours needed to process the licensing actions multiplied by the professional hourly rate for FY 1993 of \$132 per hour.

In the materials inspection area, the historical data for the average number of professional staff hours necessary to complete routine and nonroutine inspections show that inspection hours used to determine the amount of the inspection fees have increased and in many cases significantly, when compared to the hours currently used under 10 CFR Part 170. The data for the average number of professional staff hours necessary to conduct routine and nonroutine inspections were last updated in FY 1984 (49 FR 21293; May 21, 1984). As a result, the average number of professional

Fourth, irradiator fee Categories 3F and 3G in 10 CFR Part 170.31 are broadened to include underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes.

Fifth, a new section, 170.8, is added which provides that 10 CFR Part 170 does not contain any information collection requirements falling within the purview of the Paperwork Reduction Act.

Sixth, the definition of materials license in section 170.3 is being revised to clarify that the term license, for fee purposes, includes a license, certificate, approval, registration, or other form of permission issued by the NRC.

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Operating Licenses, and Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals and Government Agencies Licensed by NRC.

Seven amendments have been made to 10 CFR Part 171. First, §§ 171.15 and 171.16 are amended to revise the annual fees for FY 1993 to recover approximately 100 percent of the FY 1993 budget authority less fees collected under 10 CFR Part 170 and funds appropriated from the NWF.

Second, § 171.11 is amended to revise paragraphs (a), (b), and (d). Paragraph (a) is revised to revoke the current exemption from annual fees for nonprofit educational institutions. A detailed discussion of this change in fee policy is found in Section II of this final rule. Other changes to paragraph (a) incorporate the specific statutory exemption provided in the Energy Policy Act of 1992 for certain nonpower (research) reactors. Section 2903(a)(4) of the Energy Policy Act, enacted October 24, 1992, amends Section

was unable to respond and take action on all of the requests prior to the end of the fiscal year on September 30, 1992. Footnote 1 of 10 CFR 171.16 provides that the annual fee is waived where a license is terminated prior to October 1 of each fiscal year. However, based on the number of requests filed, the Commission, for FY 1993, is exempting from the FY 1993 annual fees those materials licensees, and holders of certificates, registrations, and approvals who either filed for termination of their license or approval or filed for a possession only/storage license prior to October 1, 1992, and were capable of permanently ceasing licensed activities entirely by September 30, 1992.

In addition, because nonprofit educational institutions will be billed for the first time for annual fees, they are being afforded the same opportunity to file requests for termination and avoid the FY 1993 annual fee as other licensees were given when annual fees were first assessed to them in FY 1991. The NRC wishes to emphasize that nonprofit educational institutions who hold licenses, certificates, registrations, and approvals and who wish to relinquish their license(s), certificate(s), or registration(s) or obtain a Possession Only License (POL), and who are capable of permanently ceasing licensed activities entirely by September 30, 1993, must, within the 30-day period before the effective date of the rule, notify the Commission, in writing, in accordance with 10 CFR 30.36, 40.42, 50.82, and 70.38, as appropriate. Nonprofit educational institutions who hold licenses, certificates, registrations and approvals must promptly comply with the conditions for license termination in those regulations in order to be considered by the NRC for a waiver of the FY 1993 annual fee. All other licensees and approval holders who held a license or approval on October 1, 1992, are subject to the FY 1993 annual fees.

See attached

Third, § 171.19 is amended to credit the quarterly partial

was unable to respond and take action on all of the requests prior to the end of the fiscal year on September 30, 1992. Footnote 1 of 10 CFR 171.16 provides that the annual fee is waived where a license is terminated prior to October 1 of each fiscal year. However, based on the number of requests filed, the Commission, for FY 1993, is exempting from the FY 1993 annual fees those materials licensees, and holders of certificates, registrations, and approvals who either filed for termination of their license or approval or filed for a possession only/storage license prior to October 1, 1992, and were capable of permanently ceasing licensed activities entirely by September 30, 1992.

*n. + for
reactors*

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Third, § 171.19 is amended to credit the quarterly partial

on nonprofit educational institutions who possess a license for a nuclear reactor must obtain a POL and be capable of ceasing licensed activities by September 30

All references are to Title 10, Chapter I, U.S. Code of Federal Regulations.

Part 170

Section 170.3 Definitions.

The definition of materials license is being revised to clarify that the term license, for fee purposes, includes a license, certificate, approval, registration or other form of permission issued by the NRC pursuant to the regulations in 10 CFR Parts 30, 32 through 36, 39, 40, 61, 70, 71 and 72. This definition is consistent with the definition of license in Section 551(8) of the Administrative Procedures Act.

Section 170.8 Information collection requirements: OMB approval.

This section, which is being added, provides that 10 CFR Part 170 does not contain any information collection requirements falling within the purview of the Paperwork Reduction Act.

Section 170.20 Average cost per professional staff hour.

This section is amended to reflect an agency-wide professional staff-hour rate based on FY 1993 budgeted costs. Accordingly, the NRC professional staff-hour rate for FY 1993 for all fee categories

budgeted costs and to more completely recover costs incurred by the NRC in providing licensing and inspection services to identifiable recipients. The fees assessed for services provided under the schedule are based on the professional hourly rate as shown in § 170.20 and any direct program support (contractual services) cost expended by the NRC. Any professional hours expended on or after the effective date of this rule will be assessed at the FY 1993 rate shown in § 170.20. The NRC is revising the amount of the import and export licensing fees in § 170.21, facility Category K to provide for the increase in the hourly rate from \$123 per hour to \$132 per hour.

Footnote 2 of § 170.21 is revised to provide that for those applications currently on file and pending completion, the professional hours expended up to the effective date of this rule will be assessed at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, ~~July 10,~~ ^{August 9,} 1991, and ~~July~~ ^{August 24,} 1992, rules as appropriate. For topical report applications currently on file which are still pending completion of the review, and for which review costs have reached the applicable fee ceiling established by the July 2, 1990, rule, the costs incurred after any applicable ceiling was reached through August 8, 1991, will not be billed to the applicant. Any professional hours expended for the review of topical report applications, amendments, revisions or supplements to a topical report on or after August 9, 1991, are assessed at the applicable rate established by § 170.20.

have not changed significantly for most categories. For new license applications, approximately 60 percent of the materials license population have increases of less than 25 percent, with some having slight decreases. For license renewals, approximately 85 percent have increases of less than 25 percent, with some having decreases; and for amendments, approximately 90 percent have increases of less than 25 percent with some having decreases. Only 2 percent of the materials license population have increases of 100 percent or greater, for example, ~~in the renewal~~ ^{fees for} irradiation licenses (fee Categories 3F and 3G) and licenses authorizing distribution of items containing byproduct material to persons generally licensed under 10 CFR Part 31 (fee Category 3J).

For materials inspections, a distribution of the changes to the inspection fees shows that inspection fees increased by at least 100 percent for 19 percent of the licenses. The largest increases are for inspections conducted of those licenses authorizing byproduct material for 1) broad scope processing or manufacturing of items for commercial distribution (fee category 3A); 2) broad scope research and development (fee category 3L); and 3) broad scope medical programs (fee category 7B). Over 50 percent of the licenses have increases of more than 50 percent. The primary reason for these relatively large increases is that the average number of hours on which inspection fees are based has not been updated since 1984 (49 FR 21293; May 21, 1984). As a result, the average number of professional hours used in the current fee

The revised fees are applicable to fee categories 1.C and 1.D; 2.B and 2.C; 3.A through 3.P; 4.B through 9.D, 10.B, 15A through 15E and 16. The fees will be assessed for applications filed or inspections conducted on or after the effective date of this rule.

↑ ↑
For those licensing, inspection, and review fees assessed that are based on full-cost recovery (cost for professional staff hours plus any contractual services), the revised hourly rate of \$132, as shown in § 170.20, applies to those professional staff hours expended on or after the effective date of this rule.

✓
Additional language has been added to irradiator fee Categories 3F and 3G in 10 CFR Part 170.31 to clarify that those two fee categories include underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes. Although the sources are not removed from their shielding for irradiation purposes, underwater irradiators are not self-shielded as are the small irradiators in fee Category 3E. The underwater irradiators are large irradiators and possession limits of thousands of curies are authorized in the licenses. The design of the facility is important to the safe use of both exposed source irradiators and underwater irradiators and 10 CFR 36 applies the same requirements to the underwater irradiators where the source is not exposed for irradiation as to the exposed source irradiators. ✓
The average costs of conducting license reviews and performing

inspections of the underwater irradiators where the source remains shielded during irradiation are similar to the costs for irradiators where the source is exposed during irradiation.

Category 4D in 10 CFR Part 170.31 is added to specifically segregate and identify those licenses authorizing the receipt, from other persons, of byproduct material as defined in Section 11.e.(2) of the Atomic Energy Act for possession and disposal. Section 11.e.(2) byproduct material is the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content. This change is based on the NRC's recognition of increased activity related to disposal of 11.e.(2) byproduct material and to better distinguish this unique category of license. Mill licenses subject to the fees in fee Category 2A of 10 CFR 170.31 will not be assessed fees under fee Category 4D. All other licenses, ~~including mill licenses that authorize decommissioning, decontamination, reclamation or site restoration activities (fee Category 14)~~ that authorize the receipt, from other persons, of Section 11.e(2) byproduct material for possession and disposal will be subject to the Category 4D fees. --- *supp 36*

Part 171

Section 171.3 Definitions.

The definition of materials license is being revised to clarify that the term license, for fee purposes, includes a license, certificate, approval, registration or other form of permission issued by the NRC pursuant to the regulations in 10 CFR Parts 30, 32 through 36, 39, 40, 61, 70, 71 and 72. This definition is consistent with the definition of license in Section 551(8) of the Administrative Procedures Act.

Section 171.8 Information collection requirements: OMB approval.

This section (i) which is being added (ii) provides that 10 CFR Part 171 does not contain any information collection requirements falling within the purview of the Paperwork Reduction Act.

Section 171.11 Exemptions.

Paragraph (a) of this section is amended to revoke the current exemption from annual fees for nonprofit educational institutions. The NRC is changing its previous policy decision because of the U.S. Court of Appeals decision on fees and the current administrative record that would comprise the basis for a continued exemption. A detailed discussion of this change in fee policy is found in Section II of this final rule.

A new paragraph is added which incorporates the specific statutory exemption provided in the Energy Policy Act of 1992 for

certain nonpower (research) reactors, and paragraphs (b) and (d), the exemption section for materials licensees, have been revised. Section 2903(a)(4) of the Energy Policy Act amends Section 6101(c) of OBRA-90 to specifically exempt from 10 CFR Part 171 annual fees certain Federally owned research reactors if--

(1) The reactor is used primarily for educational training and academic research purposes; and

(2) The design of the research reactor satisfies certain technical specifications set forth in the legislation. For purposes of this exemption the term "research reactor" means a nuclear reactor that--

(i) Is licensed by the Nuclear Regulatory Commission under section 104 c. of the Atomic Energy Act of 1954 (42 U.S.C. 2134(c)) for operation at a thermal power level of 10 megawatts or less; and

(ii) If so licensed for operation at a thermal power level of more than 1 megawatt, does not contain--

(A) A circulating loop through the core in which the licensee conducts fuel experiments;

(B) A liquid fuel loading; or

- (C) An experimental facility in the core in excess of 16 square inches in cross-section.

The NRC, in implementing this provision of the Energy Policy Act, is limiting the exemption in 10 CFR Part 171 only to Federally owned research reactors.

The NRC, in making this required change, is not changing its exemption policy. As in FY 1991 and FY 1992, the NRC will continue a very high eligibility threshold for exemption requests and reemphasizes its intent to grant exemptions sparingly. Therefore, the NRC strongly discourages the filing of exemption requests by licensees who have previously had exemption requests denied unless there are significantly changed circumstances.

Earlier in this notice, the NRC discussed its decision to revoke the current exemption from ~~a~~ annual fees for nonprofit educational institutions. Nonprofit educational institutions will be subject to annual fees in FY 1993.

Exemption requests, or any requests to clarify the bill, will not, per se, extend the interest-free period for payment of the bill. Bills are due on the effective date of the final rule. Therefore, only payment will ensure avoidance of interest, administrative, and penalty charges. Any requests for exemption from the annual fees should be addressed to the USNRC, ATTN:

Executive Director for Operations, Washington, D.C. 20555.

The NRC is revising § 171.11(b) to not only require that requests for exemption be filed with the NRC within 90 days from the effective date of the final rule establishing the annual fees but also to require that clarification of or questions relating to annual fee bills must also be filed within 90 days from the date of the invoice.

Experience in considering exemption requests under §171.11 has indicated that § 171.11(d) is ambiguous regarding whether an applicant must fulfill all, or only one, of the three factors listed in the exemption provision in order to be considered for an exemption. The NRC is ^{amending}~~clarifying~~ the section to ^{clarify}~~indicate~~ that the three factors should not be read as conjunctive requirements but rather as independent considerations which can support an exemption request.

The NRC notes that Section 2903(c) of the Energy Policy Act requires the NRC to review its policy for assessment of annual fees, under Section 6101(c) of OBRA-90, solicit comment on the need for changes to this policy, and recommend changes in existing law to the Congress the NRC finds are needed to prevent the placement of an unfair burden on certain NRC licensees, particularly those who hold licenses to operate Federally owned research reactors used primarily for educational training and academic research purposes.

The NRC published for public comment a separate notice in the Federal Register on April 19, 1993 (58 FR 21116-21121). The 90-day public comment period for this notice expires on July 19, 1993.

Should this be "expired" rule is argued after 7/19?

The NRC also notes that since the FY 1992 final rule was published in July 1992, licensees have continued to file requests for termination with the NRC. Other licensees have either called or written to the NRC since the final rule became effective requesting further clarification and information concerning the annual fees assessed. The NRC is responding to these requests as quickly as possible but it was unable to respond and take appropriate action on all of the requests before the end of the fiscal year on September 30, 1992. Footnote 1 of 10 CFR 171.16 provides that the annual fee is waived where a license is terminated prior to October 1 of each fiscal year. However, based on the number of requests filed, the NRC is exempting from the FY 1993 annual fees those licensees, and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage only licenses prior to October 1, 1992, and were capable of permanently ceasing licensed activities entirely by September 30, 1992. In addition, because nonprofit educational institutions will be billed for the first time for annual fees the NRC wishes to emphasize that nonprofit educational institutions who hold licenses, certificates, registrations, and approvals and who wish to relinquish their license(s), certificate(s), or registration(s)

Beaver Valley 1, for example, would pay a base annual fee of \$2,972,000 and an additional charge of \$223,000 for a total annual fee of \$3,195,000 for FY 1993.

Paragraph (d) is revised to show, in summary form, the amount of the total FY 1993 annual fee, including the surcharge, to be assessed for each major type of operating power reactor.

Paragraph (e) is revised to show the amount of the FY 1993 annual fee for non-power (test and research) reactors. This includes nonpower reactor licenses issued to nonprofit educational institutions. In FY 1993, \$2,669,000 in costs are attributable to those commercial, nonprofit educational, and non-exempt Federal government organizations that are licensed to operate test and research reactors. Applying these costs uniformly to those nonpower reactors subject to fees results in an annual fee of \$62,100 per operating license. The Energy Policy Act provided for an exemption for certain Federally owned research reactors that are used primarily for educational training and academic research purposes where the design of the reactor satisfies certain technical specifications set forth in the legislation. The NRC has granted an exemption from annual fees for FY 1992 and FY 1993 to the Veterans Administration Medical Center, Omaha, Nebraska, the U.S. Geological Survey for its reactor in Denver, Colorado and the Armed Forces Radiobiological ^{Research} Institute, Bethesda, Maryland for its research reactor.

Section 171.16 Annual fees: Materials Licensees, Holders of Certificates of Compliance, Holders of Sealed Source and Device

Check
before
J. Neal

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UF₆ ConversionSafeguards and Safety

Allied Signal Corp.	\$619,000
Sequoyah Fuels Corp.	<u>619,000</u>
Subtotal	\$1,238,000
Other fuel facilities (5 facilities at \$111,000 each)	<u>\$555,000</u>
Total	\$13,636,000

One of Combustion Engineering's (CE) low enriched uranium fuel facilities has not been included in the fee base because of the D.C. Circuit Court of Appeals decision of March 16, 1993, that directed the NRC to grant an exemption for FY 1991 to Combustion Engineering for one of its two facilities^{*}. As a result of the Court's decision, the NRC grants an exemption for one of CE's low enriched uranium fuel facilities for FY 1993. The NRC therefore has calculated the FY 1993 annual fees for the low enriched fuel category by dividing its budgeted costs among five licenses rather than six licenses as done previously.

The allocation of the costs attributable to uranium recovery is also based on the conferees' guidance that licensees who require the greatest expenditure of NRC resources should pay the greatest annual fee. It is estimated that approximately 50 percent of the \$465,000 for uranium recovery is attributable to uranium mills (Class I facilities). Approximately 27 percent of the \$465,000 for uranium recovery is attributable to those solution mining licensees who do not generate uranium mill tailings (Class II facilities).

Add: and April 30, 1993 per curiam⁹² order which directed the Commission to grant an exemption for FY 1992 for one of the facilities.

The remaining 23 percent is allocated to the other uranium recovery facilities (e.g. extraction of metals and rare earths). The resulting annual fees for each class of licensee are:

Class I facilities	\$58,000
Class II facilities	\$25,400
Other facilities	\$21,100

For spent fuel storage licenses, the generic costs of \$681,000 have been spread uniformly among those licensees who hold specific or general licenses for receipt and storage of spent fuel at an *independent spent fuel storage installation* (ISFSI). This results in an annual fee of \$136,200.

To equitably and fairly allocate the \$38.6 million attributable to the approximately 6,800 diverse material users and registrants, the NRC has continued to base the annual fee on the Part 170 application and inspection fees. Because the application and inspection fees are indicative of the complexity of the license, this approach continues to provide a proxy for allocating the costs to the diverse categories of licensees based on how much it costs NRC to regulate each category. The fee calculation also continues to consider the inspection frequency because the inspection frequency is indicative of the safety risk and resulting regulatory costs associated with the categories of licensees. In summary, the annual fee for these categories of licenses is developed as follows:

Annual Fee = (Application Fee + Inspection Fee/Inspection

Priority) x Constant + (Unique Category Costs).

The constant is the multiple necessary to recover \$38.6 million and is 2.3 for FY 1993. The unique costs are any special costs that the NRC has budgeted for a specific category of licensees. For FY 1993, unique costs of approximately \$1.9 million were identified for the medical improvement program which is attributable to medical licensees; about \$115,000 in costs were identified as being attributable to radiography licensees; and about \$115,000 was identified as being attributable to irradiator licensees. The changes to materials annual fees for FY 1993 varies compared to the FY 1992 annual fees. Some of the annual fees decrease while other annual fees increase. There are three reasons for the changes in the fees compared to FY 1992. First, the FY 1993 budgeted amount attributable to materials licensees is about 12 percent higher than the FY 1992 amount. Second, the number of licensees to be assessed annual fees in FY 1993 has decreased about 4 percent below the FY 1992 levels (from about 7,100 to about 6,800). Third, the changes in the 10 CFR Part 170 license application and inspection fees cause a redistribution of the costs on which the annual fees are based, since these Part 170 fees are used as a proxy to determine the annual fees. The materials fees must be established at these levels in order to comply with the mandate of OBRA-90 to recover approximately 100 percent of the NRC's FY 1993 budget authority. A materials licensee may pay a reduced annual fee if the licensee qualifies as a small entity under the NRC's size standards and certifies that it is a small entity on NRC Form 526.

being broadened to include underwater irradiators for irradiation of materials when the source is not exposed for irradiation purposes. Although the sources are not removed from their shielding for irradiation purposes, underwater irradiators are not self-shielded as are the small irradiators in fee Category 3E. The underwater irradiators are large irradiators and possession limits of thousands of curies are authorized in the licenses. The design of the facility is important to the safe use of both exposed source irradiators and underwater irradiators and 10 CFR 36 applies the same requirements to the underwater irradiators where the source is not exposed for irradiation as to the exposed source irradiators.

A new Category 4D is added to 10 CFR Part 171.16(d) to specifically segregate and identify those licenses which authorize the receipt, possession and disposal of byproduct material, as defined by Section 11.e.(2) of the Atomic Energy Act, from other persons. This proposed change is based on the NRC's recognition of potential increased activity related to disposal of 11.e.(2) byproduct material and to better distinguish this unique category of license. Mill licenses subject to the fees in fee Category 2.A.(2) of 10 CFR 171.16 will not be assessed fees under fee Category 4D. All other licenses, including mill licenses that authorize decommissioning, decontamination, reclamation or site restoration activities (fee Category 14) that authorize the receipt, from other persons, of Section 11.e(2) byproduct material for possession and disposal will be subject to the Category 4D fees.

Paragraph (e) is amended to establish the additional charge which is added to the base annual fees shown in paragraph (d) of this final rule. The alternative selected by the NRC for the allocation of LLW costs is discussed at some length in Section II of this notice. The Commission has modified its approach so as to access the budgeted LLW costs to two broad categories of licensees (larger LLW generators and small LLW generators) based on historical disposal data. This surcharge, however, continues to be shown, for convenience, with the applicable categories in paragraph (d). Although these NRC LLW disposal regulatory activities are not directly attributable to regulation of NRC materials licensees, the costs nevertheless must be recovered in order to comply with the requirements of OBRA-90. For FY 1993 the additional charge recovers approximately 18 percent of the NRC budgeted costs of \$9.2 million relating to LLW disposal generic activities from small generators which are comprised of materials licensees ^{except for fuel facilities} that dispose of LLW. The percentage distribution for FY 1993 has been refined compared to FY 1991 and FY 1992 to delete LLW disposed by Agreement State licensees from the base. The FY 1993 budgeted costs related to the additional charge for LLW and the amount of the charge are calculated as follows:

<u>Category of Costs</u>	FY 1993 Budgeted Costs (\$ In Millions)
1. Activities not attributable to an existing NRC licensee or class of licensee, i.e., LLW disposal generic activities.	\$9.2 ^{1/}

^{1/} \$6.7 million of total is allocated to power reactors.

received for those three quarters toward the total annual fee to be assessed. The NRC will adjust the fourth quarterly bill in order to recover the full amount of the revised annual fee or to make refunds, if necessary. As in FY 1992, payment of the annual fee is due on the effective date of the rule and interest accrues from the effective date of the rule. However, interest will be waived if payment is received within 30 days from the effective date of the rule.

Because nonprofit educational institutions will be required to pay annual fees for the first time, the NRC notes two of its regulations relating to payment. The first regulation is 10 CFR Part 171.19(a) which indicates that the fee payment shall be made by check, draft, money order or electronic fund transfer made payable to the U.S. Nuclear Regulatory Commission. Bills of \$5,000 or more will indicate payment by electronic fund transfer. Payment is due on the effective date of the rule and interest shall accrue from the effective date of the rule. However, interest will be waived if payment is received within 30 days from the effective date of the rule. The second regulation relating to payments is 10 CFR Part 15.35. This regulation provides for payments of debts in installments provided the debtor furnishes satisfactory evidence of inability to pay a debt in one lump sum. In accordance with these regulations, all installment payment arrangements must be in writing and require the payment of interest and administrative charges.

V. Environmental Impact: Categorical Exclusion

schedule that are initially issued for less than full power are based on review through the issuance of a full power license (generally full power is considered 100 percent of the facility's full rated power). Thus, if a licensee received a low power license or a temporary license for less than full power and subsequently receives full power authority (by way of license amendment or otherwise), the total costs for the license will be determined through that period when authority is granted for full power operation. If a situation arises in which the Commission determines that full operating power for a particular facility should be less than 100 percent of full rated power, the total costs for the license will be at that decided lower operating power level and not at the 100 percent capacity.

2' Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For those applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of this rule will be determined at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, ~~July 10,~~^{August 9,} 1991, and ~~July 23,~~^{August 24,} 1992, rules as appropriate. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20 1984, and July 2, 1990, rules but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those

Application	\$125,000
License, Renewal, Amendment	Full Cost
↑ Inspections	↑ Full Cost

2. Source material:

A. Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, refining uranium mill concentrates to uranium hexafluoride, ore buying stations, ion exchange facilities and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode:

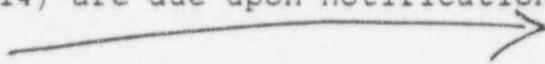
License, Renewal, Amendment	Full Cost
Inspections	Full Cost

B. Licenses for possession and use of source material for shielding:

Amendment	N/A
Inspections	§/

^{1/}Types of fees - Separate charges as shown in the schedule will be assessed for preapplication consultations and reviews and applications for new licenses and approvals, issuance of new licenses and approvals, amendments and renewals to existing licenses and approvals, safety evaluations of sealed sources and devices, and inspections. The following guidelines apply to these charges:

(a) Application fees - Applications for new materials licenses and approvals; applications to reinstate expired licenses and approvals except those subject to fees assessed at full cost; and applications filed by Agreement State licensees to register under the general license provisions of 10 CFR 150.20, must be accompanied by the prescribed application fee for each category, except that: 1) applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category; and 2) applications for licenses under Category 1E must be accompanied by an application fee of \$125,000.

(b) License/approval/review fees - Fees for applications for new licenses and approvals and for preapplication consultations and reviews subject to full cost fees (fee Categories 1A, 1B, 1E, 2A, 4A, 4D, 5B, 10A, 11, 12, 13A, and 14) are due upon notification by the Commission in accordance with 

added. Licenses covering more than one category will be charged a fee equal to the highest fee category covered by the license. Inspection fees are due upon notification by the Commission in accordance with § 170.12(g). See Footnotes 5 and 6 for other inspection notes.

^{2/}Fees will not be charged for orders issued by the Commission pursuant to 10 CFR 2.202 or for amendments resulting specifically from the requirements of such Commission orders. However, fees will be charged for approvals issued pursuant to a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 30.11, 40.14, 70.14, 73.5, and any other sections now or hereafter in effect) regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9A through 9D.

^{2/}Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For those applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of this rule will be determined at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, ~~July 10,~~ ^{August 3,} 1991, and ~~July 23,~~ ^{August 24,} 1992, rules, as

appropriate. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990 rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by

\$170.20, as appropriate, except for topical reports whose costs exceed \$50,000. Costs which exceed \$50,000 for each topical report, amendment, revision, or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in § 170.20. In no event will the total review costs be less than twice the hourly rate shown in § 170.20.

⁴/Licensees paying fees under Categories 1A, 1B, and 1E are not subject to fees under Categories 1C and 1D for sealed sources authorized in the same license except in those instances in which an application deals only with the sealed sources authorized by the license. Applicants for new licenses or renewal of existing licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application or renewal fee for fee Category 1C only.

more than 1 megawatt, does not contain--

(A) A circulating loop through the core in which the licensee conducts fuel experiments;

(B) A liquid fuel loading; or

(C) An experimental facility in the core in excess of 16 square inches in cross-section.

(b) The Commission may, upon application by an interested person or on its own initiative, grant an exemption from the requirements of this part that it determines is authorized by law or otherwise in the public interest. Requests for exemption must be filed with the NRC within 90 days from the effective date of the final rule establishing the annual fees for which the exemption is sought in order to be considered. Absent extra~~x~~ordinary circumstances, any exemption requests filed beyond that date will not be considered. The filing of an exemption request does not extend the date on which the bill is payable. Only timely payment in full ensures avoidance of interest and penalty charges. If a partial or full exemption is granted, any overpayment will be refunded. Requests for clarification of or questions relating to an annual fee bill must also be filed within 90 days from the date of the initial invoice to be considered.

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification, the licensee may pay reduced annual fees for FY 1993 as follows:

<u>Small Businesses and Small Not-For-Profit Organizations (Gross Annual Receipts)</u>	<u>Maximum Annual Fee Per Licensed Category</u>
\$.50,000 to \$3.5 million	\$1,800
Less than \$250,000	\$400
<u>Private Practice Physicians (Gross Annual Receipts)</u>	
\$250,000 to \$1.0 million	\$1,800
Less than \$250,000	\$400
↑	↑
<u>Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population)</u>	
20,000 to 50,000	\$1,800
Less than 20,000	\$400
<u>Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Less.</u>	\$1,800

(4) The maximum annual fee (base annual fee plus surcharge) a small entity is required to pay for FY 1993 is \$1,800 for each category applicable to the license(s).

chapter for processing or manufacturing
of items containing byproduct material
for commercial distribution. \$17,200

Surcharge \$1,220

B. Other licenses for possession and use
of byproduct material issued pursuant
to Part 30 of this chapter for
processing or manufacturing of items
containing byproduct material for
commercial distribution. \$5,100

Surcharge \$1,220

C. Licenses issued pursuant to §§ 32.72,
32.73, and/or 32.74 of this chapter
authorizing the processing or
manufacturing and distribution or
redistribution of radiopharmaceuticals,
generators, reagent kits and/or sources
and devices containing byproduct material.
This category also includes the possession
and use of source material for shielding
authorized pursuant to Part 40 of this
chapter when included on the same
license. \$10,600

Fix

Surcharge \$1,220

- D. Licenses and approvals issued pursuant to §§ 32.72, 32.73, and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material. This category also includes the possession and use of source material for shielding authorized pursuant to Part 40 of this chapter when included on the same license. \$5,300

Surcharge \$120

- E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units). \$3,500

Surcharge \$120

- F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of

have been authorized for distribution to persons exempt from the licensing requirements of Part 30 of this chapter. \$6,000

Surcharge \$120

I. Licenses issued pursuant to Subpart A of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of Part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of Part 30 of this chapter. \$11,100

Surcharge \$120

J. Licenses issued pursuant to Subpart B of Part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under Part 31 of this chapter, except

also includes the possession and use of source material for shielding authorized pursuant to Part 40 of this chapter when authorized on the same license. \$17,400

Surcharge \$120

P. All other specific byproduct material licenses, except those in Categories 4A through 9D. \$2,000

Surcharge \$120

4. Waste disposal and processing:

A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low-level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other

dispose of the material. \$6,700

Surcharge \$1,220

D. Licenses specifically authorizing the receipt, from other persons, of byproduct material as defined in Section 11.e.(2) of the Atomic Energy Act for possession and disposal, except those licenses subject to the fees in Category 2.A.(2). \$7,700

Surcharge \$1,220

5. Well logging:

A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies. \$11,300

Surcharge \$120

B. Licenses for possession and use of byproduct material for field flooding tracer studies. \$13,700

unique specifications of, and for use
by, a single applicant, except reactor
fuel devices. \$4,200

Surcharge \$120

C. Registrations issued for the safety
evaluation of sealed sources
containing byproduct material, source
material, or special nuclear material,
except reactor fuel, for commercial
distribution. \$1,800

Surcharge \$120

D. Registrations issued for the safety
evaluation of sealed sources
containing byproduct material, source
material, or special nuclear material,
manufactured in accordance with the
unique specifications of, and for use
by, a single applicant, except reactor
fuel. \$920

Surcharge \$120

10. Transportation of radioactive material:

Annual fees will be assessed based on whether a licensee holds a valid license with the NRC which authorizes possession and use of radioactive material. If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration or approval held by that person. For those licenses that authorize more than one activity on a single license (e.g., human use and irradiator activities), annual fees will be assessed for each category applicable to the license. Licensees paying annual fees under Category 1.A.(1)X are not subject to the annual fees of category 1.C and 1.D for sealed sources authorized in the license.

^{2/} Payment of the prescribed annual fee does not automatically renew the license, certificate, registration, or approval for which the fee is paid. Renewal applications must be filed in accordance with the requirements of Parts 30, 40, 70, 71, or 72 of this chapter.

^{3/} For FYs 1994 and 1995, fees for these materials licenses will be calculated and assessed in accordance with § 171.13 and will be published in the Federal Register for notice and comment.

^{4/} A Class I license includes mill licenses issued for the extraction of uranium from uranium ore. A Class II license includes solution mining licenses (in-situ and heap leach) issued for the extraction of uranium from uranium ores including research and development licenses. An "other" license includes licenses for extraction of metals, heavy metals, and rare earths.

2/ Two licenses have been issued by NRC for land disposal of special nuclear material. Once NRC issues a LLW disposal license for byproduct and source material, the Commission will consider establishing an annual fee for this type of license.

5/ Standardized spent fuel facilities, Part 71 and 72 Certificates of Compliance and special reviews, such as topical reports, are not assessed an annual fee because the generic costs of regulating these activities are primarily attributable to the users of the designs, certificates, and topical reports.

2/ Licensees in this category are not assessed an annual fee because they are charged an annual fee in other categories while they are licensed to operate.

8/ No annual fee is charged because it is not practical to administer due to the relatively short life or temporary nature of the license.

9/ Separate annual fees will not be assessed for pacemaker licenses issued to medical institutions who also hold nuclear medicine licenses under Categories 7B or 7C.

10/ This includes Certificates of Compliance issued to DOE that are not under the Nuclear Waste Fund.

11/ No annual fee has been established because there are currently

no licensees in this particular fee category.

(e) A surcharge is added for each category for which a base annual fee is required. The surcharge consists of the following:

(1) To recover costs relating to LLW disposal generic activities, an additional charge of \$61,100 has been added to fee Categories 1.A.(1), 1.A.(2) and 2.A.(1); an additional charge of \$1,100 has been added to fee Categories 1.B, 1.D., 2.C., 3.A., 3.B., 3.C., 3.L., 3.M., 3.N., 4.A., 4.B., 4.C., 4.D., 5.B., 6.A., and 7.B.; and an additional charge of \$16,400 has been added to fee Category 17.

(2) To recoup those costs not recovered from small entities, an additional charge of \$120 has been added to each fee Category, except Categories 1^E, 10.A., 11., 12., 13.A., 14., 15. and 16., since there is no annual fee for these categories. Licensees who qualify as small entities under the provisions of § 171.16(c) and who submit a completed NRC Form 526 are not subject to the \$120 additional charge.

13. In Section 171.19, paragraphs (b) and (c) are revised to read as follows:

§ 171.19 Payment.

(b) For FY 1993 through FY 1995, the Commission will adjust

organizations with gross receipts of less than \$250,000 or for governmental entities in jurisdictions with a population of less than 20,000.

III. Summary.

The NRC has determined the annual fee significantly impacts a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to collect 100 percent of the NRC budget and the requirement to consider means of reducing the impact of the proposed fee on small entities. On the basis of its regulatory flexibility analyses, the NRC concludes that a maximum annual fee of \$1,800 for small entities and a lower tier small entity annual fee of \$400 for small businesses and non-profit organizations with gross annual receipts of less than \$250,000, and small governmental entities with a population of less than 20,000, will reduce the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA-90. Thus, the revised fees for small entities maintain a balance between the objectives of OBRA-90 and the RFA. The NRC has used the methodology and ~~procedures developed for the FY 1991 and FY 1992 fee rules in this final rule establishing the FY 1993 fees.~~ ~~Therefore, the analysis and conclusions established in the FY 1991 and FY 1992 rules remain valid for this final rule for FY 1993.~~

This is repeated on last page



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 2, 1993

OGC Comments
7/7/93

AE49-2
PDR

MEMORANDUM FOR: Patricia G. Norry, Director, ADM
Trip Rothschild, Deputy Assistant
General Counsel for Legal Counsel
Special Projects and Legislation, OGC

FROM: Ronald M. Scroggins
Deputy Chief Financial
Officer/Controller

SUBJECT: FINAL NOTICE OF RULEMAKING -- 10 CFR PARTS
170 AND 171 -- 100% FEE RECOVERY FOR FY 1993
AND U.S. COURT OF APPEALS REMAND DECISION

Enclosed, for your concurrence, is a final rule for the fees to be assessed to recover 100 percent of the NRC budget authority for FY 1993.

Please note that in order to meet the time schedule for this paper, we are providing each addressee a separate concurrence copy of the paper. Please provide your concurrence as quickly as possible, but not later than COB, Wednesday, July 7, 1993.

If you have any questions, please contact Jesse Funches on 492-7351 or Jim Holloway on 492-4301. Thank you for your continued cooperation on the NRC fee program.

Jesse Funches
for Ronald M. Scroggins
Deputy Chief Financial
Officer/Controller

Enclosure:
As stated

cc: D. Williams, IG

95042100222-2610

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AE

FY 1991 and 1992 Final Rule Implementing
the U.S. Court of Appeals Decision and
Revision of Fee Schedules; 100% Fee Recovery, FY 1993

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The amendments are necessary to implement Public Law 101-508, enacted November 5, 1990, which mandates that the NRC recover approximately 100 percent of its budget authority in Fiscal Year (FY) 1993 less amounts appropriated from the Nuclear Waste Fund (NWF). The amount to be recovered for FY 1993 is approximately \$518.9 million.

In addition, the NRC is implementing the March 16, 1993, U.S. Court of Appeals for the District of Columbia Circuit decision remanding to the NRC portions of the FY 1991 annual fee rule. The remanded portions pertain to: (1) the NRC's decision to exempt from annual fees nonprofit educational institutions, but not other enterprises, on the ground in part that educational institutions are unable to pass through the costs of annual fees to their customers; and (2) the Commission's decision to allocate

the NRC published for public comment a separate notice in the Federal Register on April 19, 1993 (58 FR 21116-21121). The 90-day public comment period for this notice expires on July 19, 1993.

On April 23, 1993 (58 FR 21662), the NRC published the proposed version of a rule for FY 1993 establishing the licensing, inspection, and annual fees necessary for the NRC to recover approximately 100 percent of its budget authority for FY 1993 less the appropriation received from the NWF. The basic methodology used in the proposed rule was unchanged from that used to calculate the 10 CFR Part 170 professional hourly rate, the specific materials licensing and inspection fees in 10 CFR Part 170, and the 10 CFR Part 171 annual fees set forth in the final rules published July 10 1991 (56 FR 31472) and July 23, 1992 (57 FR 32691). Because of the need to collect annual fees for FY 1993 prior to October 1, 1993, the Commission is promulgating this final rule before it completes the user fee review mandated by the Energy Policy Act. ~~Only~~ Changes in Commission policy resulting from that review will be incorporated in fee schedules promulgated in future years. The NRC placed a copy of the workpapers relating to the proposed rule in its Public Document Room at 2120 L Street, NW, Washington, D.C., in the lower level of the Gelman building. Workpapers relating to this final rule will also be placed in the Public Document Room.

II. Responses to comments.

The NRC received more than 500 public comments on the proposed rule. Although the comment period expired on May 24, 1993, the NRC reviewed and evaluated all comments received prior to June 25, 1993. Copies of all comment letters received are available for inspection in the NRC Public Document Room, 2120 L Street, NW (lower level) Washington, D.C.

Many of the comments were similar in nature. For evaluation purposes, these comments have been divided into two groups. The first group deals with the two remand issues of the U.S. Court of Appeals for the District of Columbia Circuit case decided on March 16, 1993. The second group deals with the remaining comments on the FY 1993 proposed rule. The comments are as follows:

A. Comments Regarding U.S. Court of Appeals for the District of Columbia Circuit Remand Decision -- FY 1991 -- FY 1993 Fee Schedules.

1. Taking Account of Licensees' Ability to Pass^Hthrough Fee Costs to Customers.

Comment. A number of comments were received on the question of setting NRC annual fees in part on the basis of whether the licensee can pass through the costs of those fees to its customers. The NRC had proposed abandoning ^{consideration of} ~~the~~ passthrough ^{capability a factor} ~~concept~~, which it previously had used in part to justify its fee exemption for certain nonprofit educational institutions, on the grounds that to evaluate each licensee's passthrough ability was an ^{extremely difficult} ~~impossible~~

administrative task ^{that} ~~and~~ required expertise and information unavailable to the agency.

Many commenters supported the NRC's approach of not setting any license fees on the basis of passthrough, due to the difficulties inherent in its use. One stated that to do otherwise would be cumbersome and subjective, and cause fees to vary in response to changing market conditions. Another commenter noted that if passthrough were used, the exempted fees would almost certainly be paid by power reactors, which have trouble passing on their costs due to fee schedules established by public utility commissions. One commenter stated that if foreign competition ^{Created a passthrough} ~~were the~~ problem, Congress and not the NRC was the proper forum in which to seek relief for passthrough considerations.

Another group of commenters disagreed with the NRC's suggested approach, and argued that passthrough should be considered when devising a fee schedule. Many domestic uranium producers told the NRC that their industry cannot pass through costs to customers due to foreign competition, lower demand and long-term fixed price contracts. Another commenter suggested that nuclear medicine departments should be eligible for exemption from fees due to passthrough considerations. They are often reimbursed for patient care by the Health Care Financing Administration, which does not take NRC fees into account. Commenters also claimed that, contrary to the NRC's stated position, the agency does have the necessary expertise to evaluate licensees' passthrough capacity and must do so under both OBRA-90 and the March 16, 1993, Court of Appeals decision. One commenter stated that the NRC could simply request an affidavit from the licensee

whole. ~~Moreover,~~ ^Q On further reflection, the Commission now acknowledges that these institutions ^{are not structurally incapable} can compensate ^{of compensating for increased costs, such as} ~~for the existence of~~ NRC fees, by means of higher tuition (prices) or budget cuts, in the same manner as profit-oriented licensees.

The Commission disagrees with those commenters who claim the NRC must ^{by law} set fees at least in part on the basis of passthrough considerations. In its decision, the D.C. Circuit clearly stated that "[t]he statutory language and legislative history [of OBRA-90] do not, in our view, add up to an inexorable mandate to protect classes of licensees with limited ability to pass fees forward." Allied-Signal at 5. The court went on to say that "[b]ecause [price] elasticities are typically hard to discover with much confidence, the Commission's refusal to read [OBRA-90] as a rigid mandate to do so is not only understandable but reasonable." Allied-Signal at 6-7. The Commission agrees with these observations, which defeat the suggestion that the Commission has a statutory obligation to exempt licensees who cannot pass through their fees to customers. ¶ After full consideration of the passthrough question, the Commission has concluded that ^{it cannot} ~~there is no~~ licensee for whom it can set fees using passthrough considerations with reasonable accuracy and at reasonable cost, ^{even for classes of licensees with few members.} ¶ If the Commission were to attempt such an endeavor, it would require a comprehensive, on-going audit of ^{each} ~~that~~ licensee's business and the industry of which it was a part. The Commission would have to examine tax returns, financial statements, and other commercial data that some licensees might be loath to reveal. The Commission could not simply rely on self-serving affidavits or statements by licensees themselves on passthrough problems, without

jeopardizing the integrity of the 100 percent fee recovery system mandated by the Congress. Instead, the Commission would have to independently verify its licensees' submissions.

Even if the Commission could obtain all the necessary information, it does not have the business expertise or the resources to accurately evaluate that information in order to make a passthrough determination. ~~If the Commission cannot do this for one licensee, it certainly cannot do it for nearly 7,000.~~ Because this is the case, the Commission will not establish fees or base any exemptions on the alleged inability of a licensee to pass through fee costs to its customers.

This policy applies to all licensees, including those companies with long-term, fixed price contracts. In that regard, the Commission notes that companies who do business using such contracts are continuously liable for changes in the tax codes and other Federal and State regulations that occur subsequent to the commencement of these contracts, like all other enterprises active in the American economy. The Commission believes the current situation is no different. The Commission is sympathetic to licensees' complaints on the passthrough issue, but believes that it has no other choice but to pursue the course of action it has chosen.

2. **Fee Exemption for Nonprofit Educational Institutions.**

Comment. The Commission solicited comments on whether to continue the exemption from fees for nonprofit educational institutions. The Commission had proposed continuing the exemption solely on the grounds that

Responding to the court's suggestion that educational ^{licenses} might be differentiated from profit-oriented ~~licenses~~ or other licenses;

nuclear-related education provides a benefit both to the nuclear industry and society at large. See Final FY 1991 Rule, 56 FR 31477 (1991). The Commission requested in particular comments on ~~the court's~~ whether ~~suggestion that~~ ^{nuclear} education might ^{"yield exceptionally large"} ~~provide~~ externalized benefits ^{-- i.e., benefits that} cannot be captured in tuition or other market prices." Allied-Signal at 8. The Commission also "invite[d] public comments on whether to discontinue the educational exemption" entirely. 58 FR 21664 (1993).

exceptional

Many of the comments received on this issue supported retaining the exemption for nonprofit educational institutions. These commenters, mostly colleges and universities, asserted that they provide a great benefit to society through nuclear-related education, and that they would be hardpressed to sustain their programs in the face of newly imposed fees. Some claimed that if the exemption were removed, they would be forced to shut down or drastically curtail their nuclear education programs. One commenter suggested that if fees were to be charged, that it be done on a graduated basis, presumably to lessen the burden on certain licensees. Another commenter made the point that fees should not be charged to programs receiving support from the Federal government in other ways. Some commenters urged not only keeping the exemption in place, but expanding it to include museums and other nonprofit institutes. No commenter, however, ^{addressed} ~~in any meaningful detail the~~ ^{question whether these activities yielded "exceptionally large externalized benefits," the distinction emphasized by the court as a possible alternative justification for special generic treatment of educational institutions.} ~~externalized benefits~~ ^{educational}

Other commenters instead argued that the ^{generic educational} exemption should be abandoned. A nonprofit institute asserted that if it had to pay fees to the NRC, others should as

well. It believed that if all nonprofit educational institutions paid "their fair share," the fee burden on those institutions would be lowered. Similarly, a nonprofit hospital called for ending the educational exemption, to create a more equitable fee schedule. The commenter also believed that the exemption penalized those nonprofit hospitals that were not covered by the educational exemption competing for scarce research funds and limited numbers of patients. Another commenter, a utility, made the argument that the NRC should only be concerned with guarding the public health and safety, not subsidizing colleges and universities. It too called for an end to the exemption. And a major fuel facility asserted that the NRC had no discretion to exempt colleges and universities from paying fees, and that the exemption should be discontinued.

[Response. The Commission is deeply troubled by the choices before it on this issue. On one hand, the Commission as a general principle believes that the most fair user fee schedule is one where each NRC licensee, including non-profit educational institutions, pays its fair share of NRC costs. Under such an approach, the NRC does not have to make difficult comparative judgments regarding the relative social value of benefits by the different classes of NRC licensees such as educational institutions, the medical community, and generators of electricity. On the other hand, the Commission does not question the value of education. The Commission is reluctant to impose fees that could result in a future diminution in the already dwindling number of university programs devoted to the nuclear sciences.]

[Substitute
insert A]

insert A (at p 13)

Response. The Commission finds the choice before it on this issue a difficult one. As a general principle, the Commission favors a fee schedule under which each NRC licensee, including non-profit educational institutions, pays its fair share of NRC costs in accordance with the mandate of Congress. Under such an approach, the NRC does not have to make difficult normative judgments regarding the relative social value of the benefits provided by the activities of NRC's licensees or equally difficult economic judgments regarding the impact of annual fees on the availability of those benefits. Nevertheless, the Commission recognizes that imposing fees on beneficial activities creates some risk, often very difficult to ascertain quantitatively, of cutting back on benefits. The Commission is reluctant, in particular, to impose fees that could result in diminishing the already dwindling number of university programs devoted to the the nuclear sciences. But the Commission is not in a position to analyze with any confidence the potential burden on educational benefits in comparison with the burdens that fees will impose on the beneficial activities of other licensees. ~~The comments have not provided the assistance needed for such an analysis.~~

In the wake of the court's decision, the Commission issued a proposed rule that would continue in place the educational exemption. The Commission now has reluctantly concluded that in view of the court decision and the administrative record developed during the comment period, it cannot justify a generic "educational" exemption for FY 1993. Nor can it adequately rationalize the generic exemption previously allowed in FY 1991 and FY 1992.

~~The Court's Allied Signal decision suggested that the NRC might be able to justify a generic exemption for educational institutions on the theory that "education yields exceptionally large externalized benefits that cannot be captured in tuition or other market prices." The Commission understands this to require a showing that nuclear education as a generic matter is much more valuable than what students or the private market are willing to pay for it.~~ ¶ Although the Commission had anticipated that colleges and universities benefitting from the exemption would take up the Commission's invitation to discuss and elaborate upon the "exceptionally large externalized benefits" point made by the court, they did not do so. Nor does the Commission have in hand sufficient economic data, analyses, or other support for issuing an across-the-board exemption to nonprofit educational institutions. As a result, the Commission lacks an adequate administrative record on which to base a continued generic exemption of all nonprofit educational institutions.

This is especially true in light of the court decision, which forced the Commission to acknowledge the serious weakness of, and abandon, the passthrough argument formerly made on behalf of these institutions. As the

Commission has stated above, that argument was not based on empirical data. Passthrough ability in any event is an unworkable standard for setting annual fees. Without either the passthrough rationale or a persuasive "^{exceptionally large}externalized benefits" rationale, the Commission has no choice but to charge colleges and universities fees appropriate to their status as licensees, just as it charges other classes of licensees who

~~The Commission cannot conclude on the current record that education generically produces benefits that to a unique degree are undervalued in the market place -- i.e., "exceptionally large externalized benefits". As the comments and court decision indicated, many other licensees can and do claim that they provide important benefits to society that are worthy of ^{generic} fee exemptions. ~~Without a means of differentiating these groups of licensees from one another, any rationale for singling out education for fee exempt status would almost surely fail if challenged.~~~~

The Commission acknowledges the seeming paradox in charging fees to a program that receives support from other agencies of the Federal government. However, it believes that it has no choice, given 100 percent recovery requirements and fairness and equity, but to charge all licensees whenever possible. For instance, the NRC levies both annual and user fees on all other NRC licensees including nonprofit, tax-exempt entities such as hospitals, museums, and institutes. Furthermore, the NRC also directly charges annual fees to other Federal agencies such as the Department of Veterans Affairs, the National Institutes of Health and the Department of Defense. Charging annual fees to colleges and universities is consistent with the

Commission's preferred approach to fee recovery and Congressional guidance that NRC establish a schedule of annual charges that fairly and equitably allocates the aggregate amount of the charges among licensees and, to the maximum extent practicable, reasonably reflects the cost of providing services to such licensees or classes of licensees.

The Commission was also struck by the comments that attacked the educational exemption and urged its abandonment. Because those arguments were made by organizations such as hospitals, utilities and fuel facilities that presumably benefit from an educated nuclear workforce, the Commission read these comments as an indication that at least some assumed beneficiaries of education do not view it quite ~~as~~ ^{so} positively as the Commission had believed. This in turn strengthened the Commission's view that the ~~mere~~ ^{demonstration} ~~benefits of education to society~~ ^{that} ~~alone~~ ^{benefits} ~~are not~~ ^{is not} enough to support a generic exemption.

The Commission, however, is not unsympathetic to the problems this new course of action is likely to cause many formerly exempt nonprofit educational institutions. Because this is a change in policy, the Commission would like to call to the attention of affected licensees the possibility of paying the annual fee on an installment basis under 10 CFR 15.35(b), subject to ~~the~~ agency approval and demonstrated need on the part of the requesting licensee.¹

¹Requests to pay fees on an installment basis must be submitted in writing to the NRC, Office of the Controller, Division of Accounting and Finance, Washington, D.C. 20555. All requests must furnish satisfactory evidence of inability to pay the debt in one lump sum.

Some commenters expressed particular concern over the fate of research reactors. The Commission also notes

that, like all other licensees, affected nonprofit educational licensees can request individual exemptions, under 10 CFR 171.11(b) or (d) for university research reactors or materials licensees, respectively.

Any ~~research reactor~~^{licensee} seeking an individual exemption under the "public interest" standard in § 171.11(b) would be expected, ^{as part of its showing that exceptional treatment is justified,} to demonstrate severe financial hardship ~~as a~~^{no} result^{from} of the newly imposed annual fees as well as a significant "externalized benefits." ^{This could include benefits} ~~provided by that reactor~~ to other NRC licensees. The Commission will be examining the general issue of exempting nonprofit educational institutions as part of its Energy Policy Act-mandated review, and may choose following that review to modify further its policy in this area or to recommend Congressional action. For FY 1993, however, formerly exempt nonprofit educational institutions must pay annual fees based on the preexisting fee categories into which they fall.

On a practical note, the Commission has concluded that by eliminating the exemption for past years, it must refund the money paid by those licensees charged fees that would otherwise have been paid by the colleges and universities. The Commission will not (and by law cannot) retroactively collect these fees from the educational institutions for FY 1991 and FY 1992. As a result, the Commission upon request will refund to power reactor licensees portions of those fees paid by them in FY 1991 and FY 1992 to cover the annual fees of the exempted nonprofit educational institutions.

Finally, the Commission recognizes that its action in

this rule is limited only to revoking the exemption for nonprofit educational institutions from Part 171 annual fees. The decision leaves intact the nonprofit educational exemption contained in Part 170 (from IOAA fees). The Commission is not revoking that exemption at this time because it did not seek comments on that approach in this rulemaking.

The Commission intends to evaluate that issue, as well as the wisdom of its decision regarding Part 171 fees, as part of its Energy Policy Act review. Obviously, after that review, if the Commission continues to believe it is appropriate to charge nonprofit educational institutions Part 171 annual fees, there is a substantial likelihood that this approach will ~~also~~ be adopted with regard to Part 170 IOAA fees as well.

3. Allocation of Low-Level Waste Costs.

In FY 1991 and FY 1992, the NRC allocated low-level waste (LLW) costs by the amount of waste disposed per class of licensee, dividing the costs equally within each class. This method of cost allocation was challenged by the petitioners in Allied-Signal. In its decision, the court remanded the issue of LLW cost allocation to the Commission. The court stated that the NRC's class-based LLW approach required it to attempt to allocate those costs licensee-by-licensee. An integral part of the court's rationale was that it believed that NRC must have individual licensee data on LLW disposal, and if so there was no reason not to break down this cost allocation from the class level to the individual level.

In response to the court decision, the NRC in its

Response. Based on a careful evaluation of the comments, the Commission concludes that, on balance, a variant of Alternative 1 provides a fair and equitable allocation of the NRC LLW costs to the various NRC licensees. The Commission has concluded that there should be two LLW surcharges -- one for large waste generators and another for small waste generators. This conclusion reflects (1) the purpose of NRC activities whose costs are included in the surcharge; (2) existing data on which to base the fees; and (3) the Commission's duty to allocate fee burdens fairly and equitably.

The purpose of ^{the} FY 1991 - FY 1993 LLW waste activities is to implement ^{the} Low Level Radioactive Waste Policy Amendments Act of 1985, and the Atomic Energy Act, which require the NRC to perform certain generic activities. These activities include developing rules, policies and guidance, performing research, and providing advice ^{to} and consultation ^{of} LLW compacts and Agreement States who will license some of the future LLW disposal sites. The budgeted costs for most types of NRC generic activities are generally recovered in annual fees from the class of licensees to whom the activities directly relate. (For example, reactor research is recovered from reactor licensees, and guidance and rule development for regulation of uranium producers is recovered from uranium recovery licensees.) However, for LLW generic activities, there is no disposal site licensed by the NRC from whom to recover the generic budgeted costs that must be incurred. Since there is no LLW disposal site licensee, these costs must be allocated to other NRC licensees in order to recover 100 percent of the NRC budget as required by ORBR-90. In addition, the LLW

the agency's generic LLW costs.³ Each of the alternatives in the proposed rule which were endorsed by various commenters, supports, to varying degrees, this allocation concept and provides various degrees of fairness and equity because of available data and the inherent limitations of the allocation method.

Alternative 4's "curie" approach had little support from the commenters and the Commission believes it is the least preferable alternative since volume is at least as good of an indicator, indeed probably a better indicator, of the benefits of the NRC generic low level waste activities. In addition, cost allocation by volume is more practical to implement.

Alternatives 3 and 4, reallocating LLW disposal costs on an individual rather than class basis, may appear to some to be fairer than the current system, since each licensee would pay a fee more precisely tied to the amount of waste it currently generates or disposes of. The Commission, however, sees significant problems in an individualized approach, given the data the NRC has for Fy's 1991-1993. As indicated by some of the commenters, the NRC has data on the amount of LLW disposed of by individual licensees. However, currently the NRC does not have data on the amount of waste generated for each of the over 1,000 individual licensees that generate LLW.⁴ The Commission also

³Fees for the review of applications for LLW disposal sites that are submitted to NRC will be recovered under 10 CFR Part 170 from the specific applicant.

⁴The Commission is evaluating whether it would be beneficial to its LLW and other regulatory programs to obtain individual LLW generation data. If the Commission does acquire such data, then the Commission would evaluate whether such data could form the

approach is consistent with the purpose of the FY 1991-1993 LLW activities. However, the guidance from the Congress of fairness and equity dictates that the NRC not charge the same fee for those groups of licensees that are likely to generate significantly different amounts of LLW. Because the NRC does not have sufficient data on LLW generated to make a refined differentiation by individual licensee or small groups, the Commission believes that fairness and equity can best be accomplished by creating two groups and charging each a flat fee -- large generators and small generators. This would eliminate the problem caused by using groups with a small number of licensees. This approach will result in all LLW-producing licensees paying a fairly determined fee, and avoid the gross inequities of total fee avoidance or disproportionately large fees for smaller licensees that would have resulted under the other alternatives and their variations put forth for comment in the proposed rule.

The large generators are comprised of power reactors and large fuel facilities; waste generators in this group are expected to generate more than 1,000 cubic feet of LLW per year. The small generators consist of all other LLW-producing licensees. The amount of the costs allocated to the two groups would be based on the historical average of the amount of waste disposed over

each [?]

the ~~two-year~~ period. *This reflects an 80%/20% split between the large and small groups*
licensee would pay the same LLW fee (surcharge). In FY 1993 that amount is \$61,100 for large generators and \$1,100 for small generators. *These numbers are rest based on broad, rounded-off averages, do not make business adjustments.*

On remand from the Court of Appeals, the Commission also adopts this approach for FY 1991 and FY 1992. The small generator LLW surcharge, \$1,400 and \$1,600 in FY

1991 and FY 1992, respectively, would be unchanged ~~rate~~ since approximately 20 percent of the cost would continue to be allocated to these licensees. The large generator LLW surcharges for FY 1991 and FY 1992 are \$60,800 and \$60,200, respectively. These fees are lower than the \$143,500 and \$155,250 fees paid for FY 1991 and FY 1992 by some large fuel facilities. Thus, refunds are appropriate to these facilities. The NRC upon request will refund any overpayments made under the prior LLW fee schedule^s for FY 1991 and FY 1992, which are now withdrawn.

B. Other Comments.

1. Comment. Many commenters stated that they were concerned at the size of the fee increases, particularly the 10 CFR Part 170 inspection fees for well logging, radiography and broad scope medical programs. These commenters indicated that they believe the fees are grossly exorbitant, punitive, and self defeating and that they cannot afford to pay them. A large number of small gauge users commented that because of the fees they are unable to do the testing required to build highways and roads for Federal and State governments and urge a reconsideration of the fee structure. Other commenters stated the increased inspection fees are designed to circumvent the small entity two tiered annual fee system in 10 CFR Part 171 which allows small entities to either pay an annual fee of \$1,800 or \$400 depending on the gross annual receipts of the licensee. Several commenters stated that the increase in NRC fees is an inducement for Agreement States to raise their regulatory fees. One commenter

questioned whether or not the increases were due to the increased staff required to provide oversight of the newly formed United States Enrichment Corporation (USEC). One commenter stated that although the United States Enrichment Corporation (USEC) is neither a licensee nor license applicant, significant resources will be expended to certify the gaseous diffusion plants and it appears that no income has been attributed to the effort associated with this on-going certification process for FY 1993.

Response. The NRC believes that it has provided sufficient information concerning the FY 1993 budget to allow effective evaluation and constructive comment concerning the budgeted costs for fuel facility licensees. In Part III, the Section-by-Section Analysis, Table VI of the proposed rule published April 23, 1993 (58 FR 21675), the NRC provided a detailed explanation of the FY 1993 budgeted costs for the fuel facility class of licensees. Table VI of this final rule also shows a listing of the budgeted costs for this class of licensees. The FY 1993 resources are determined by the NRC and approved by the Congress as those necessary to carry out the health and safety activities for this class of licensees. The specific details regarding the budget for FY 1993 are documented in the NRC's publication "Budget Estimates, Fiscal Year 1993" (NUREG-1100, Volume 8), which is available to the public. The ~~bas~~is for the NRC resources are thoroughly addressed by the Congress through hearings and written questions and answers. The FY 1993 NRC hearings are documented, for example,

in the publication Energy and Water Development Appropriations for FY 1993 -- Hearings before a Subcommittee on Appropriations, House of Representatives, One Hundred Second Congress, Second Session, Part 6. The resources resulting from this review and decision process are those necessary for NRC to implement its statutory responsibilities. Questions relating to the NRC budget approval process were also addressed in the final rules published on July 10, 1991 (56 FR 31482) and July 23, 1992 (57 FR 32696). Given the increase in the budget for the fuel cycle class of licensees, it is necessary to increase the fees to recover the cost for these activities in accordance with OBRA-90. Contrary to some commenters suggestions, this increase is not attributable to NRC activities related to USEC. With regard to USEC, the NRC has adjusted its budgeted allocation for this new and unique added responsibility to reflect planned FY 1993 USEC activities and the fact that USEC will be assessed fees for these activities. The NRC expects to bill USEC for all costs incurred after July 1, 1993, the formation date of USEC. The billings will begin during the first quarter of FY 1994.

3. Comment. Another fuel facility licensee indicated that based on the Court's decision to grant Combustion Engineering an exemption from fees for one of its two low enriched uranium plants located in Hematite, Missouri and Windsor, Connecticut, ~~then~~ it too deserves to be considered for an exemption because it is not operationally equivalent to the plants run by the full scope fuel fabricators since it purchases finished fuel

its reasons for establishing a new Category 4D in its two fee regulations, 10 CFR Parts 170 and 171. The new category will allow the NRC to specifically segregate and identify those licenses which authorize the receipt, possession, and disposal of byproduct material from other persons as defined by Section 11.e.(2) of the Atomic Energy Act. This change is based on NRC's recognition of potential increased activity related to the disposal of 11.e.(2) byproduct material and to better distinguish this unique category of license (58 FR 21670).

The costs allocated to the uranium recovery class of licensee are for safety, generic and other regulatory activities that are attributable to this class of licensees and that are not recovered by 10 CFR Part 170 license and inspection fees. With respect to mill licensees in fee Category 2.A.(2) that authorize both milling operations and the disposal of Section 11.e.(2) byproduct material, the same NRC regulations, (e.g., 10 CFR 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 and the license that only authorizes disposal of 11.e.(2) byproduct material. The 10 CFR 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 licenses. Therefore, mill licenses subject to the fees in fee Category 2A of 10 CFR 170.31 and fee Category 2.A.(2) of 10 CFR 171.16 will not be assessed fees under fee Category 4D. All other licenses,

material. 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 ^{at} the 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 (58 FR 21667-21668). To remove any uncertainty, the NRC is making minor clarifying amendments to 10 CFR 171.16, footnotes 1 and 7.

5. Comment. One commenter indicated that the methodology used in the current rule to determine inspection fees (routine and nonroutine) in 10 CFR Part 170 should remain the same and that by proposing a uniform fee for both routine and non-routine inspections NRC believes they are equivalent. The commenter feels that the burden for inspection fees should be placed on licensees facing nonroutine inspections and that by creating a uniform fee for both types of inspections the NRC, in turn, burdens those licensees who do not require nonroutine inspections and who are unlikely to in the future. The commenter suggests that NRC create a lower fee schedule for routine inspections and make up the difference with higher fees for nonroutine inspections.

Response. NRC indicated in the proposed rule the reason for combining the current routine and nonroutine inspection fees into a single inspection fee. NRC's review of the inspection

appropriated from the Nuclear Waste Fund. Administrative support costs such as office space, telephones, training, supplies, and computers are not charged to the Nuclear Waste Fund. The NRC now budgets administrative support funds centrally in its Nuclear Safety Management and Support program which contains the activities of those offices which annually provide the administrative support. This is done to facilitate a more direct correlation between budget formulation and budget execution. For FY 1993, licensees have not paid for these administrative support activities through their mill/kwhr contribution to the NWF because the costs were not included in appropriations from the NWF.

7. Comment. Several commenters indicated that the hourly rate of \$132 (a seven percent increase over 1992) is excessive in view of the fact that the increase is approximately twice the rate of inflation. These commenters noted that the rate is considerably higher than the typical industry charge-out rate for direct employees and equals or exceeds the hourly charges for senior consultants at major national consulting organizations. The commenters ~~suggested that NRC begin to control its internal cost~~ for example by combining Regional offices, reducing the research program and reducing the inspection hours by use of Systematic Assessment of Licensee Performance (SALP). This would lower both the hourly rate and the base rate being charged enabling the industry to reduce its nuclear program costs. Some commenters suggested that the increase in the hourly rate be limited to the increase in the rate of inflation or the

over the FY 1992 levels, the NRC could not meet the statutory mandate requirement of OBRA-90 to recover approximately 100 percent of the NRC budget authority through fees.

8. Comment. As in FY 1991 and FY 1992, commenters suggested that the NRC fee proposals violate the public trust and demean the intent of Congress. Commenters indicate that the NRC should assess fees based on the amount of throughput of material, the size of the facility, the amount or type of material possessed, the sales generated by the licensed location, the competitive condition of certain markets including the assessment of fees to Agreement States and the effect of fees on domestic and foreign competition. One commenter suggested that because the NRC has authority to allow a State to become an Agreement State, the NRC could also charge a fee to either the Agreement State or to individual firms. Another commenter indicated that the requirement that NRC recover 100 percent of its budget is wrong. It allows budgets to grow more irresponsibly than they usually do because no legislator or executive office needs to face a consequent tax problem. Another commenter suggested that it is imperative for NRC to closely examine what its regulatory program provides and how it can be provided more effectively.

Response. The issue of basing fees on the amount of material possessed, the frequency of use of the material, and the size of the facilities, market competitive positions, and the assessment of fees

address the concerns raised in the petition in terms of whether the proposed fee schedule for FY 1993 is consistent with the methodology adopted in FY 1991.

~~Response.~~ ^{it} The NRC indicated in its final rule for FY 1992 that it is not obligated to address the concerns raised in the petition of rulemaking filed with the NRC before adopting the final rule establishing fees for FY 1992 (57 FR 32694). This continues to be the case for FY 1993 as well. The NRC had intended to handle the petition within the context of the review and evaluation of the fee program for FY 1993. However, on October 24, 1992, the Energy Policy Act was enacted by the Congress. Section 2903(c) of the Act requires the NRC to review its policy for assessment of annual fees under section 6101(c) of the Omnibus Budget Reconciliation Act of 1990, solicit public comment on the need for changes to this policy, and recommend changes in existing law to the Congress the NRC finds are needed to prevent the placement of an unfair burden on certain NRC licensees. On April 19, 1993, the NRC published a Federal Register Notice soliciting public comment on the need, if any, for changes to the existing fee policy and associated laws in order to comply with the requirements of the Energy Policy Act. The NRC now intends to consider the ACNP/SNM petition as well as a second fee petition received from the American Mining Congress on February 4, 1993, in the context of the overall fee policy review as required by the Energy Policy Act. The NRC believes that this will help ensure that similar issues are treated consistently and that