



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

AE49-1
PDR

APR - 2 1993

MEMORANDUM FOR: Jesse Funches, Deputy Controller
Office of the Controller

FROM: Michael Lesar, Acting Chief
Rules Review and Directives Branch
Division of Freedom of Information and
Publications Services
Office of Administration

SUBJECT: REVIEW OF PROPOSED RULE ENTITLED REVISION OF
FEE SCHEDULES; 100% FEE RECOVERY, FY 1993

The Rules Review and Directives Branch (RRDB) has reviewed the proposed rule that amends fee schedules in Parts 170 and 171 for FY 1993. We have attached a marked copy of the proposed rule that presents our comments.

Because of the extremely short time provided for review of this document, RRDB's review was extremely cursory. Therefore, when this document is submitted for office concurrence, your office should allow sufficient time for RRDB to perform a more thorough review and to obtain the signatures necessary for office concurrence.

We have forwarded a copy of the proposed rule to the Information and Records Management Branch, IRM, for their comment and concurrence concerning the paperwork management aspects of this rulemaking action. We have requested that they respond directly to you.


When the document is forwarded for publication, please include a 3.5 inch diskette that contains a copy of the document in WordPerfect 5.0 or 5.1 as part of the transmittal package. The diskette will be forwarded to the OFR and the Government Printing Office for their use in typesetting the document.

In order to assist you in preparing the list of documents centrally relevant to this proposed rule that is required by NRC's regulatory history procedures, you should place the designator "AE49-1" in the upper right-hand corner of each document concerning the rule that you forward to the Nuclear Document System.

Jesse Funches

- 2 -

If you have any questions concerning this review, please contact Alice Katoski on 492-7928 or me on 492-7758.



Michael Lesar, Acting Chief
Rules Review and Directives Branch
Division of Freedom of Information
and Publications Services
Office of Administration

Attachment: As stated

cc: B. Shelton, IRM

[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AE49

Revision of Fee Schedules: 100% Fee Recovery, FY 1993

Request for comment on ^{U.} S. Court of Appeals Remand
Decision on FY 1991 Fee Schedule

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed 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 soliciting comments ^{On} ~~the~~ March 16, 1993, ^{the} ~~U.S. Court of Appeals for the District of Columbia Circuit~~ remand decision relating to portions of the FY 1991 fee schedule. The remanded portions describe the NRC's decision in that rule to exempt nonprofit educational institutions from NRC fees on the grounds in part that they are unable to pass through the costs of those fees to their customers. Also remanded was that part of the rule describing the Commission's decision to allocate generic

costs associated with low-level waste (LLW) disposal by groups of licensees, rather than by individual licensee. The ^{NRC} ~~Commission in~~ ~~this proposed rule~~ is soliciting comments ^{or} ~~reconsidering~~ the *alternative* approaches ^{that may be} taken on these issues in light of the court's decision.

DATES: The comment period expires (30 days after publication). Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered. Because Public Law 101-508 requires that NRC collect the revised fees by September 30, 1993, and the NRC's ^{to} ~~intend~~ to resolve the court's remand issues in FY 1993, requests for extensions of the comment period will not be granted. ~~Further,~~ The NRC

contemplates that any fees to be collected as a result of this proposed rule would 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, if adopted, would 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 rule which is estimated to be August 1, 1993.

ADDRESSEES: Submit written comments to: Secretary, U.S. Nuclear

applications for the issuance of new licenses or approvals, amendments to or renewal of licenses or approvals, and inspections of licensed activities. Second, annual fees, established in 10 CFR Part 171 under the authority of OBRA-90, recover generic and other regulatory costs not recovered through 10 CFR Part 170 fees.

Subsequent to enactment of OBRA-90, the NRC published three final fee rules after evaluation of public comments. On July 10, 1991 (56 FR 31472), the NRC published a final rule in the Federal Register that established the Part 170 professional hourly rate and the materials licensing and inspection fees, as well as the Part 171 annual fees to be assessed to recover approximately 100 percent of the FY 1991 budget. In addition to establishing the FY 1991 fees, the final rule established the underlying basis and method for determining the 10 CFR Part 170 hourly rate and fees, and the 10 CFR Part 171 annual fees. The FY 1991 rule was challenged in Federal court by several parties and the U.S. Court of Appeals for the District of Columbia Circuit decided the lawsuits on March 16, 1993. The Court case and the NRC's request for comment on the ~~court~~ issues are discussed in Section II.

Resulting from the Court's decision

On April 17, 1992 (57 FR 13625), the NRC published in the Federal Register two limited changes to 10 CFR Parts 170 and 171. The limited changes became effective May 18, 1992. The limited change to 10 CFR Part 170 allowed the NRC to bill quarterly for

No. 91-1407 and Consolidated Cases. The case was brought by NRC licensees Allied-Signal (Allied) and Combustion Engineering (CE), who challenged both the NRC's FY 1991 annual fee rule and denials of their exemption requests filed pursuant to the rule. The opinion was in part unfavorable to the NRC.

The court approved the NRC's refusal to make a "licensee-specific calibration" of annual fees. As a result, the NRC does not have to take into account the myriad financial and economic circumstances influencing the business positions of its approximately 6,800 licensees. The court, however, did require the NRC, in a new rulemaking for FY 1991, to 1) develop a "reasoned" treatment of exemption requests based on licensees' claims of inability to pass through costs to their customers, and 2) reexamine the allocation of annual fees for LLW disposal costs. A part of this rulemaking is to explore these issues pursuant to the court's direction. ~~They are discussed in more detail below, as is the court's decision.~~

Discussion of the Case: Cost Passthrough

The court initially addressed Allied's claim that the NRC failed to consider the inability of uranium hexafluoride (UF₆) converters to pass through the costs of their annual fees to their customers. Allied claimed that its competitive position was weak, that sales turned on as little as one cent per pound, and that NRC annual fees placed an intolerable burden on

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competitiveness, especially as foreign converters are not charged annual fees. Allied pointed to legislative history of the NRC fee statutes allegedly instructing the NRC to levy charges "fairly and equitably" and "to take [passthrough] into account" when charging, among others, uranium producers. The court rejected Allied's statutory argument. The court ruled that the legislative history did not mean that the NRC was barred from charging annual fees to licensees whose ability to pass through these fees was doubtful or nonexistent. Indeed, Judge Williams commented that "[b]ecause [price] elasticities are typically hard to discover with much confidence, the NRC's refusal to read the statute as a rigid mandate to do so is not only understandable but reasonable." Slip op. at 6-7.

The court found, however, that the NRC had not consistently declined to consider passthrough concerns. The court noted that the NRC chose to exempt nonprofit educational institutions on the ground (in part) of an inability to pass through costs to customers. Because the rule did not say why it was possible to calculate the effects of passthrough on educational institutions but not on UF6 converters, the court remanded that portion of the rule to the NRC to "develop a reasoned treatment" of passthrough-based claims. The court suggested that the "estimated benefits" of education alone, unhinged from a general "pass through" rationale, might prove sufficient justification. Specifically, the court put forth "the idea that education yields exceptionally

feasible. First and foremost is the impossible task of assessing the passthrough ability of approximately 6,800 licensees. Each of these licensees operates in a specialized business environment, and must take many factors into account when making daily business decisions. The NRC is a regulatory agency with the responsibility of safeguarding the public health and safety with regard to peaceful uses of nuclear power. It is not a financial regulatory agency, and does not possess the knowledge or resources necessary to successfully and continuously evaluate these business factors. ^{This type of} ~~Such an~~ effort would require the hiring of financial specialists and expanded training of existing employees to cope with these new tasks. This would in turn lead to diversion of the agency's budget from its mission responsibilities, and a possible increase in the NRC's budget (and therefore annual fees) to handle these new demands. The final result could be higher fees charged to licensees for the purpose of determining if they can pass on the cost of those fees. The NRC, for obvious reasons, does not see this as an optimum solution. It believes such an action would fail the "reasonable accuracy and cost" test proposed by the court. In addition, the NRC believes it is not practical to implement because the factors on which the fees would be based are, to some extent, under the control of the licensee. However, as part of its continuing efforts to reevaluate and improve fee collection process and policy, the NRC is soliciting views from interested parties on ways that such an option could be used by the NRC to

evaluate passthrough capability.

The second option, and that proposed by the Commission, is no longer to consider passthrough as a factor in granting exemptions to nonprofit educational institutions. Instead, for FY 1993 the Commission would continue to exempt these licensees from fees, as it has for many years in the past, but would do so solely to support nuclear-related education. The NRC acknowledges that it should not have considered the passthrough capacities of colleges and universities as part of its rationale granting them an exemption from NRC fees. However, the NRC still believes that education in the field of nuclear energy has value not only to industry, but to the Federal government and society as a whole. ^E This belief in the value of ^{NRC/DOE-related} education is buttressed both in the text of the Atomic Energy Act (section 170k) and throughout governmental regulation and statute. As the NRC noted in the statement of considerations for the 1991 fee rule, many colleges and universities supported continuing this longstanding exemption, as it "facilitat[ed] academic research and educational use of licensed materials, [which] both furthers understanding of important research questions and provides training in nuclear science." (See ^{36 FR} ~~NRC Final Rule~~ at 31477, ^{July 10,} 1991). The commenters described how imposition of fees on their nuclear programs would lead, in many cases, to severe cutbacks in and shutdowns of these programs. This in turn would lead to shortages of scientific personnel trained in the use of radioactivity in such areas as

reactor safety and nuclear medicine, with detrimental effects suffered not only by nuclear science but by society at large. The NRC therefore is soliciting comments on continuing the exemption for nonprofit educational institutions on the grounds of supporting education for the benefits it provides both to the nuclear field and to society as a whole. In particular, the NRC invites comment on the point made by the court that education may provide externalized benefits that cannot be quantified via tuition or similar market pricing.

Discussion of the Case: LLW Cost Determination

Following its discussion of the passthrough factor, and its rejection of Allied's claim that Part 171 annual fees should be tied to Part 170 IOAA fees (those charged for specific services, such as reviewing license applications and conducting inspections), the court turned to Allied's attack on the Commission's method of apportioning generic LLW disposal costs among its thousands of licensees.

Allied ~~enjoyed more success~~^{ed} arguing that the Commission allocated generic LLW disposal costs in an arbitrary and capricious manner. Presuming that the agency had licensee-specific data, the court found that the NRC did not justify a rationale for allocating LLW costs by the amount of LLW generated per class, as the NRC did, without going further to similarly

allocate LLW costs licensee-by-licensee. To avoid what it viewed as an unjust windfall (i.e., complete vacation of the LLW fees, and full refunds), the court did not vacate this part of the rule. It instead remanded the LLW issue to the Commission for reconsideration.¹ The court indicated that on remand the Commission should charge LLW costs based on the amount of waste produced per licensee. The court went on to state that if this were done, licensees could permissibly receive refunds for the difference between what they paid under the old and new rules, rather than total refunds.

Options for Consideration

The options for addressing ~~the remand~~ ^{this issue} should be developed and analyzed considering the purpose of the NRC budgeted resources for LLW disposal. To implement the LLW Policy Act, and the Atomic Energy Act, the NRC must perform certain generic activities. These activities include developing rules, policies and guidance, performing research, and providing advice and consultation to LLW compacts and Agreement States who will license some of the future LLW disposal sites. The budgeted costs for these types of generic activities are typical of those recovered from the class of licensees to whom the activities

¹The court did not address Allied's exemption request, which dealt in large part with the issues of passthrough and LLW cost allocation. The court stated that these aspects of the request would be decided as a result of the ordered remand and subsequent rulemaking.

directly relate. (For example, reactor research is recovered from reactor licensees, and guidance and rule development and for regulation uranium producers are recovered from uranium recovery licensees.) However, for these LLW generic activities, there is no disposal site licensed by the NRC from whom to recover the generic budgeted costs that must be incurred.² ^{Because} ~~Since~~ there is no LLW disposal site licensee, these costs, as with other costs included in the surcharge, must be allocated to other NRC licensees in order to recover 100% ^{percent} of the NRC budget as required by OBRA-90. In addition, the LLW costs budgeted by NRC in FY 1991, FY 1992, and FY 1993 are not for the wastes being disposed during these years or prior years, but is to provide the regulatory framework for disposal of LLW at some future date.³ In fact, the sites where LLW were disposed in FY 1991-1993 are licensed and regulated by Agreement States, not the NRC.

Given the 100% ^{percent} budget recovery requirement of OBRA-90, and the fact that there are no NRC LLW licensees to recover FY 1991-1993 budgeted costs for NRC generic activities, the basic question is how should NRC allocate these costs. The Congress spoke briefly to this issue in developing OBRA-90 by recognizing

²There are NRC organizations that hold a NRC license for the disposal of Special Nuclear Material (SNM). The LLW, at issue is not SNM, but other byproduct and source materials.

³In the FY 1991 rule, the NRC indicated that "once the NRC issues a license to dispose of byproduct LLW, the Commission will reconsider the assessment of generic costs attributable to LLW disposal activities" (56 FR 31487).

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that certain expenses cannot be attributed either to an individual or to classes of NRC licensees. The conferees intend that the NRC fairly and equitably recover these expenses from its licensees through the annual charge even though these expenses cannot be attributed to individual licensees or classes of licensees. These expenses may be recovered from those licensees whom the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. 1356 Cong Rec. at H12692, 3. Consistent with the Congressional guidance, the Commission concluded that all classes of NRC licensees that generate a substantial amount of LLW should be assessed annual fees to cover the generic costs. The court did not challenge this basic decision but questioned the method for determining the amount of the fee to be assessed to each of the licensees that generate LLW. The NRC believes that there are three alternatives (with variation within each alternative) for determining the fee amount for the various licensees. It is reiterated however, that neither of these alternatives is intended to recover the cost of a service provided during a particular year, but instead is intended to recover todays costs for a future benefit (the availability of LLW disposal) to those that dispose LLW in the future.

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Within ~~the above~~ context, the Commission is considering the following three alternatives for determining the amount of the LLW surcharge (fee) to be assessed to the various licensees:

- (1) Assess all licensees that generate LLW a uniform annual fee.
- (2) Allocate the LLW budgeted cost based on the amount of LLW disposed of by groups of licensees and assess each licensee in a group the same annual fee as was done in the FY 1991 and FY 1992 rules.
- (3) Assess each licensee an annual fee based on the amount of waste generated/disposed by the individual licensee, as was suggested by Allied Signal, Inc., and noted by the court.

The NRC believes that the decisions on the ^{se}~~above~~ alternatives should hinge on the Congressional guidance regarding fairness, equity, and practicality. With regard to fairness and equity, the Commission believes the question boils down to which of the alternatives is the best indicator of future benefits to the NRC licensees. With regard to benefits, the Court noted that; "While it is conceivable that the real benefit of LLW disposal services is merely the availability of such services--in which case a flat fee would make sense--any such idea is inconsistent with the Commission's method of apportioning LLW fees among classes of licensees, which appears to assume that benefit is proportional to LLW quantity. If, on the other hand,

any licensee's benefit from LLW disposal is directly proportional to its LLW disposal, apportioning even generic costs on the basis of output seems to make sense--not only as to classes but only as to individual licensees."

Under the first alternative, the NRC would not try distinguishing between the potential future benefits to the various licensees, but would assess the same LLW fee to all NRC licensees that generate low level waste. On the other hand, this alternative would result in a hospital, for example, paying the same LLW annual fee as a reactor, who would pay the same LLW annual fee as a fuel facility. This could be perceived as not fair and equitable.

Alternative 2 is based on the premise that it is not possible to predict the exact future benefit for each licensee, but that current volume of LLW disposed by a group of licensees is a good indicator of the relative future benefit to the various classes. That is the LLW volume disposed today is a good indicator in "macro", but not micro sense. The Commission believes fairness and equity indicate that this broad distinction between the benefits between classes of licensee be used. It is noted that there are various ways to separate the licensees by classes. The FY 1991-1993 rules separate the licensees by the same class that are used for all other annual fees. Obviously this approach results in some efficiencies. Since the NRC does

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not have to maintain and assess fees using different class structures, a second alternative is to divide the licensees into two categories -- "large" waste generators and "small" waste generators. Under this alternative, reactor and fuel facilities could comprise the group of large generators and other licensees the group of small generators.

Alternative 3, would base the annual fee for LLW on the amount of waste disposed by each licensee during a particular year. This alternative may be indicative of future benefits if waste generated by each license is used. However, the NRC does not have easy access to reliable data on waste generation. That is, it is not practical to use waste generation by each license. Instead, waste disposal by each licensee would have to be used. There are problems, however, with using waste disposed of by a licensee as an indicator of the future benefit to licenses. This is because the amount of waste disposed of by specific licensees is affected by many variables that do not affect the amount of waste generated by a licensee. For example, NRC licensees in the State of Michigan did not dispose of any waste in 1991 because they were not permitted to use existing LLW disposal sites. However, these licensees will benefit the future from the NRC regulatory costs today, ^{because} ~~since~~ ultimately ^{licensees must dispose of} the waste ~~must be~~ ^{disposed.} However, under this alternative, the annual fee assessed to licensees in Michigan would have been zero, ^{This would} ~~implying~~ no future benefits to each ^{Michigan} licensee. ~~Also,~~ there are practical

problems with this alternative, in that licensees are concerned about the protection (proprietary) of waste disposal/generator data from their competitors. Licensee's unique fees if developed based on individual licensee disposal, would reveal the amount of LLW disposed of by specific licensees. ^{Therefore,} ~~thus~~ the numbers relating to disposal would be no longer be protected.

The Commission, while recognizing that these are alternative ways to allocate its low-level waste cost, do not believe that Alternatives 1 and 3 provide a major improvement. However, the Commission is requesting comments on each method prior to issuing the final rule. The Commission notes that for FY 1993, it is making a minor improvement to its allocation by adjusting the percentage of use in the allocation to better reflect the impact of waste generated by licensees in Agreement States.

III. Proposed Action

OBRA-90 requires that the NRC recover approximately 100 percent of its FY 1993 budget authority, including the funding of its Office of the Inspector General, less the appropriations received from the NWF, by assessing licensing, inspection and annual fees. The CFO Act requires that the NRC review, on a biennial basis, the fees imposed by the agency.

For FY 1993, the NRC's budget authority is \$540.0 million,

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to pay for the costs of regulatory activities not recovered under 10 CFR Part 170.

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

The NRC proposes four amendments 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 NRC proposes that the agency-wide professional hourly rate, which is used to determine the Part 170 fees, be 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 NRC proposes that the current Part 170 licensing and inspection fees in §§ 170.21 and 170.31 for all applicants

and licensees be increased to reflect the increase in the professional hourly rate as well as to reflect the results of the review required by the CFO Act. To comply with the requirements of the CFO Act, the NRC has reviewed the average professional staff hours 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 historical data for the average number of professional staff hours to complete materials licensing actions show an increasing trend in some categories. This is due primarily to new initiatives underway for certain types of licenses and NRC management guidance that reviewers conduct more detailed reviews of certain renewal applications based on historical enforcement actions in order to ensure safety. The proposed licensing fees have been determined based on the average professional staff hours to process the licensing actions multiplied by the proposed professional hourly rate for FY 1993 of \$132/per hour. The data for the average number of professional staff hours to complete licensing actions were last updated in FY 1990 (55 FR 21173).

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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 fees have increased significantly when compared to the amount currently assessed under 10 CFR Part 170. The data for the

average number of professional staff hours to conduct routine and nonroutine inspections was last updated in FY 1984 (49 FR 21293).
As a result, the average professional staff hours used in the current fee schedule for inspections are over eight years old and are outdated. Since 1985, the amount of the inspection fees has been updated based only on the increased professional hourly rate. Since 1984, the inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that inspections be thorough, in-depth and of high quality. In addition, the Regulatory Information Tracking System (RITS) which tracks professional time for the review of inspection categories has been strengthened. The proposed inspection fees have been determined based on the average professional staff hours to conduct the inspections multiplied by the proposed professional hourly rate for FY 1993 of \$132 per hour. Therefore the NRC is proposing to revise both materials licensing and inspection fees assessed under 10 CFR Part 170 in order to comply with the requirement of the CFO Act which requires that the fees be revised to reflect the cost of the agency of providing the service.

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The review of the inspection information also indicates that over 90 percent of the inspections conducted by NRC are routine inspections. As a result, for most fee categories there were either no nonroutine inspections conducted or a very small number of nonroutine inspections were completed. For these reasons, the

NRC is proposing, for fee purposes, to establish a single inspection fee. This proposed inspection fee would be assessed for either a routine or a nonroutine inspection conducted by the NRC.

Third, a new fee category 4D is proposed to specifically segregate and identify 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.

Fourth, additional language is proposed for irradiator fee Categories 3F and 3G to clarify that the two fee categories would also include pool irradiators for irradiation of materials where the source is not exposed for irradiation purposes.

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.

The NRC proposes five amendments to 10 CFR Part 171. First, NRC proposes to amend §§ 171.15, and 171.16 to increase 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, the NRC proposes to amend § 171.11 by renumbering and restating paragraph (a) as (a)(1), and by adding a new paragraph (a)(2). In addition, paragraphs (b) and (d) would be revised. These proposed changes would incorporate the specific statutory exemption provided in the Energy Policy Act of 1992 for certain nonpower (research) reactors and make clarifying changes to the exemption provision for materials licensees in §171.11(b) and (d). Section 2903(a)(4) of the Energy Policy Act, enacted October 24, 1992, amends Section 6101(c) of OBRA-90 to specifically exempt from 10 CFR Part 171 annual fees certain Federally owned research reactors if ^P(1) The reactor is used primarily for educational training and academic research purposes and ^P(2) The design of the research reactor satisfies certain technical specifications set forth in the legislation. ^PThe NRC, in implementing this provision of the Energy Policy Act, intends to limit the exemption in 10 CFR Part 171 only to Federally owned research reactors. The exemption would cover FY 1992 and subsequent years. The NRC proposes to amend §171.11(d) to clarify that the three factors for exemption for materials licensees should not be read as conjunctive requirements but rather should be read as independent considerations which can support an exemption request. e

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 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, particularly those who hold licenses to operate Federally owned research reactors used primarily for educational training and academic research purposes. To comply with the Energy Policy Act requirements, the NRC intends to solicit public comment on the need for changes to NRC fee policy in a separate rulemaking ^{document} in April 1993. The ~~Federal Register notice~~ relating to the requirements of the Energy Policy Act would allow for a 90-day public comment period. The NRC plans to review the ^{ere} comments as expeditiously as possible and provide the results of the study to the Congress as soon as it is practical to do so.

*proceeding
that is
expected to
be published
in the
Federal
Register*

The NRC also notes that since the final FY 1992 rule was published in July 1992, licensees continue to file requests for termination of their licenses or certificates with the NRC. Other licensees have either called or written to the NRC since the FY 1992 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 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 ~~Part~~ 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 proposing to exempt from the FY 1993 annual fees those 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. All other licensees and approval holders who held a license or approval on October 1, 1992, are subject to the FY 1993 annual fees.

Third, § 171.19 is amended to credit the quarterly partial payments made by certain licensees in FY 1993 toward their FY 1993 annual fees.

Fourth, a new category 4D is proposed to specifically segregate and identify 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.

Fifth, additional language is proposed for irradiator fee Categories 3F and 3G to clarify that those two fee categories include pool irradiators for irradiation of materials where the source is not exposed for irradiation purposes.

The NRC notes that the impact of this proposed rule on small entities has been evaluated in the Regulatory Flexibility Analysis (see Appendix A to this proposed rule). Based on this analysis, the NRC is proposing to continue for FY 1993 a maximum annual fee of \$1,800 per licensed category for those licensees who qualify as a small entity under the NRC's size standards. The NRC is also proposing to continue for FY 1993 the lower tier small entity annual fee of \$400 per licensed category for certain materials licensees, which was established by the NRC in FY 1992 (57 FR 13625; April 17, 1992).

The 10 CFR Part 171 annual fees have been determined using the same method used to determine the FY 1991 and FY 1992 annual fees. The amounts to be collected through annual fees in the amendments to 10 CFR Part 171 are based on the increased professional hourly rate. The proposed amendments to 10 CFR Part 171 do not change the underlying basis for 10 CFR Part 171; that is, charging a class of licensees for NRC costs attributable to that class of licensees. The charges are consistent with the Congressional guidance in the Conference Committee Report, which states that the "conferees contemplate that the NRC will continue

fee for materials licenses would vary depending on the fee category(ies) assigned to the license.

The~~re~~ proposed additional charges not directly or solely attributable to a specific class of NRC licensees or costs not recovered from all NRC licensees on the basis of previous Commission policy decisions would be recovered from the designated classes of licensees previously identified. A further discussion and breakdown of the specific costs by major classes of licensees are shown in Section III of this proposed rule.

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The NRC notes that in prior litigation over NRC annual fees, the U.S. Court of Appeals for the District of Columbia Circuit concluded that the NRC "did not abuse its discretion by failing to impose the annual fee on all licensees," Florida Power & Light Co. v. NRC, 846 F.2d 765, 770 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 1952 (1989). As noted earlier, the conferees on Public Law 101-508 have acknowledged the D.C. Circuit's holding that the Commission was within its legal discretion not to impose fees on all licensees.

IV. Section-by-Section Analysis

The following analysis of those sections that are affected under this proposed rule provides additional explanatory information. All references are to Title 10, Chapter I, U.S.

Any professional hours expended on or after the effective date of this rule would be assessed at the FY 1993 rate shown in § 170.20. The NRC is proposing to ~~is~~ revise the amount of the import and export licensing fees in § 170.21, facility Category K to provide for the proposed 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, and July 10, 1991, and July 23, 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.

Section 170.31 Schedule of Fees for Materials Licenses and Other Regulatory Services, including Inspections and Import and Export Licenses.

The licensing and inspection fees in this section would be modified to recover more completely the FY 1993 costs incurred by the Commission in providing licensing and inspection services to identifiable recipients. Those flat fees, which are based on the average time to review an application or conduct an inspection, have been adjusted to reflect both the proposed increase in the professional hourly rate from \$123 per hour in FY 1992 to \$132 per hour in FY 1993 and the revised average professional staff hours to process a licensing action (new license, renewal, and amendment) and to conduct inspections.

As previously indicated, the CFO Act-90 requires that the NRC conduct a review, on a biennial basis, of fees and other charges imposed by the agency for its services. Consistent with the CFO Act requirement, the NRC has completed its review of license and inspection fees assessed by the agency. The review focused on the flat fees that are charged nuclear materials users for licensing actions (new licenses, renewals, and amendments) and for inspections. The full cost license/inspection fees (e.g., for reactor and fuel facilities) and annual fees were not included in this biennial review because the hourly rate for full cost fees and the annual fees are reviewed and updated annually in order to recover 100 percent of the NRC budget authority.

To determine the licensing and inspection flat fees for materials licensees and applicants, the ~~staff~~ uses historical

(NRC)

data to determine the average number of professional hours required to perform a licensing action or inspection for each license category, for example, small gauge users and radiographers. These average hours are multiplied by the proposed professional hourly rate of \$132 per hour for FY 1993. Because the professional hourly rate is updated annually, the biennial review examined only the average number of hours per licensing action and inspection. The review indicates that the NRC needs to modify the average number of hours on which the current licensing and inspection flat fees are based in order to recover the cost of providing the licensing and inspection services. The average hours for licensing actions were last reviewed and modified in 1990 (55 FR 21873) ^{5: May 23, 1990}. Thus the revised hours used to determine the proposed fees for FY 1993 reflect the changes in the licensing program that have occurred since that time, for example, new initiatives underway for certain types of licenses and management guidance that reviewers conduct more detailed reviews of certain renewal applications based on historical enforcement actions in order to insure safety. The average number of hours for materials licensing actions (new licenses, renewals and amendments) have not changed significantly for most categories. For new license applications, approximately 60 percent of the materials license population would have increases of less than 25 percent; for license renewals, approximately 85 percent would have increases of less than 25 percent; and for amendments, approximately 90 percent would have

check

increases of less than 25 percent. Only 2 percent of the materials license population would have increases of 100 percent or greater, for example, in the renewal area, irradiator 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). Over 90 percent of the materials license population would have increases of less than 50 percent for all types of licensing actions.

For materials inspections, a distribution of the changes to the inspection fees shows that inspection fees would increase by at least 100 percent for 19 percent of the licenses. The largest increases would be for inspections conducted of those licenses authorizing byproduct material for 1) 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 would have increases of more than 50 percent. The primary reasons for these relatively large increases is that the average number of hours on which inspection fees are based have not been updated since 1984 (49 FR 21973) ^(i May 24, 1984). As a result, the average hours are over eight years old and are outdated. During the past eight years, the NRC's inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that, based on historical enforcement actions, inspections be more thorough and in-depth so as to

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 --

^P (1) The reactor is used primarily for educational training and academic research purposes; and ^P (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 ^P (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 ^P (ii) Is so licensed for operation at a thermal power level of more than 1 megawatt, does not contain- ^P (I) A circulating loop through the core in which the licensee conducts fuel experiments; ^P (II) A liquid fuel loading; or ^P (III) An experimental facility in the core in excess of 16 square inches in cross-section. ^P The NRC, in implementing this provision of the Energy Policy Act, intends to limit the exemption in 10 CFR Part 171 only to Federally owned research reactors. The proposed exemption would cover FY 1992 and subsequent years. The NRC, in making this change, is not intending to change its exemption policy. As in FY 1991 and FY 1992, the NRC plans to 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

that is expected to be published in the Federal Register

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 intends to solicit public comment on the need for changes to NRC fee policy in a separate rulemaking in April 1993. The ^{is} ~~Federal Register notice~~ ^{document} would allow for a 90-day public comment period. The NRC plans to review the comments as expeditiously as possible and provide the results of the study to the Congress as soon as it is practical to do so.

The NRC also notes that since the FY 1992 final rule was published in July 1992, licensees continue 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 ~~Part~~ 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 proposing to exempt 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, 1992⁷ and were capable of permanently ceasing licensed activities entirely by September 30, 1992. All other licensees and approval holders who held a license or approval on October 1, 1992, are subject to the FY 1993 annual fees.

Section 171.15 Annual Fee: Reactor operating licenses.

The annual fees in this section would be revised to reflect the FY 1993 budgeted costs. Paragraphs (a), (b)(3), (c)(2), (d), and (e) would be revised to comply with the requirement of OBRA-90 to recover approximately 100 percent of the NRC budget for FY 1993. Table IV shows the budgeted costs that have been allocated to operating power reactors. They have been expressed in terms of the NRC's FY 1993 programs and program elements. The resulting total base annual fee amount for power reactors is also shown. On the average, the power reactor base annual fees for FY 1993 have increased approximately 2.2 percent above the FY 1992 annual fees.

Under the decision the NRC could charge a separate fee for dual licenses when the facilities are the same and the dual licenses was for administrative convenience. In this instance, the NRC could not justify the issue because there is a specific exemption for one CE license?

Conversion

Allied Signal Corp. \$662,000
 Sequoyah Fuels Corp. 662,000
 Subtotal \$1,324,000
 Other fuel facilities (5 facilities at \$122,000 each) \$610,000
 Total \$14,421,000

Safeguards and Safety

\$662,000
 662,000
 \$1,324,000
 \$610,000
 \$14,421,000

One of the Combustion Engineering's low enriched fuel facilities has not been included in the fee base because of the D.C. Circuit Court decision dated 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 proposes to grant an exemption for one of the low enriched fuel facilities for FY 1992 and FY 1993.

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

second, and third quarterly payments for FY 1993 will have been made by operating power reactor licensees and some materials licensees before the final rule is effective. Therefore, NRC will credit payments 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. 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.

The NRC notes that many licensees have written during the past two years indicating that although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were ^{in fact} neither using the material to conduct operations or had disposed of the material and no longer needed the license. In responding ^{to} ~~licensees about this matter~~ ^{question}, the NRC has indicated that annual fees would be assessed based on whether a licensee holds a valid NRC license ^{that} ~~which~~ 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 they receive a license from the NRC. Therefore, the NRC ^{re} ~~emphasizes again~~ that the annual fees will be assessed based on whether a licensee holds a valid NRC license ^{that} ~~which~~ authorizes possession and use of radioactive

rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia, National Cable Television Association v. Federal Communications Commission, 554 F.2d 1094 (D.C. Cir. 1976); National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir. 1976); Electronic Industries Association v. Federal Communications Commission, 554 F.2d 1109 (D.C. Cir. 1976) and Capital Cities Communication, Inc. v. Federal Communications Commission, 554 F.2d 1135 (D.C. Cir. 1976). These decisions of the Courts enabled the Commission to develop fee guidelines that are still used for cost recovery and fee development purposes.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in Mississippi Power and Light Co. v. U.S. Nuclear Regulatory Commission, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). The Court held that (1) ^PThe NRC had the authority to recover the full cost of providing services to identifiable beneficiaries; ^P(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act and with applicable regulations; ^P(3) The NRC could charge for costs incurred in conducting environmental reviews required by NEPA; ^P(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule; ^P(5) The NRC could assess a fee for renewing a license

to operate a low-level radioactive waste burial site; and ^{P(6)} The
NRC's fees were not arbitrary or capricious.

With respect to 10 CFR Part 171, on November 5, 1990, the Congress passed Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90). For FYs 1991 through 1995, OBRA-90 requires that approximately 100 percent of the NRC budget authority be recovered through the assessment of fees. To accomplish this statutory requirement, the NRC, in accordance with § 171.13, is publishing the proposed amount of the FY 1993 annual fees for operating reactor licensees, fuel cycle licensees, materials licensees, and holders of Certificates of Compliance, registrations of sealed source and devices and QA program approvals, and Government agencies. OBRA-90 and the Conference Committee Report specifically state that ^{P(1)} The annual fees be based on the Commission's FY 1993 budget of \$540.0 million less the amounts collected from Part 170 fees and the funds directly appropriated from the NWF to cover the NRC's high level waste program; ^{P(2)} The annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and ^{P(3)} The annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. ^P Therefore, when developing the annual fees for operating power reactors the NRC continued to consider the various reactor vendors, the types of containment, and the location of the operating power reactors. The annual fees for fuel cycle licensees, materials licensees, and holders

all licensees, and holders of certificates, registrations, and approvals, including those licensees who are classified as small entities under the Regulatory Flexibility Act. The Regulatory Flexibility Analysis, prepared in accordance with 5 U.S.C. 604, is included as Appendix A to this proposed rule.

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and that a backfit analysis is not required for this proposed rule. The backfit analysis is not required because these amendments do not require the modification of or additions to systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility or the procedures or organization required to design, construct or operate a facility.

List of Subjects

P 10 CFR Part 170 -

Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material..

P 10 CFR Part 171 -

4
Annual charges, Byproduct material, Holders of certificates, registrations, approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Parts 170, and 171.

PART 170 -- FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for Part 170 is revised to read as follows:

Authority: 31 U.S.C. 9701, 96 Stat. 1051; sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201w); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205, Pub. L. 101-576, 104 Stat. 2842, (31 U.S.C. 902).

2. Section 170.20 is revised to read as follows:

§ 170.20 Average cost per professional staff-hour.

Fees for permits, licenses, amendments, renewals, special projects, Part 55 requalification and replacement examinations and tests, other required reviews, approvals, and inspections

whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. Fees for licenses in this 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, 1991, and July 23, 1992ⁿ 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

SCHEDULE OF MATERIALS FEES
(See footnotes at end of table)

<u>Category of materials licenses and type of fees^{1/}</u>	<u>Fee^{2/, 3/}</u>
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1. Special nuclear material:

A. Licenses for possession and use of 200 grams or more of plutonium in unsealed form or 350 grams or more of contained U-235 in unsealed form or 200 grams or more of U-233 in unsealed form. This includes applications to terminate licenses as well as licenses authorizing possession only:

License, Renewal, Amendment	Full Cost
Inspections	Full Cost

B. Licenses for receipt and storage of spent fuel at an independent spent fuel storage installation (ISFSI):

License, Renewal, Amendment	Full Cost
Inspections	Full Cost

Amendment	\$690
Inspections	\$3,500 ^{2/}

P. All other specific byproduct material licenses,
except those in Categories 4A through 9D:

Application - New license	\$570
Renewal	\$670
Amendment	\$360
Inspections	\$1,500

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
treatment, packaging of resulting waste and residues,
and transfer of packages to another person authorized
to receive or dispose of waste material:

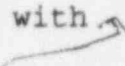
License, renewal, amendment . . .	Full Cost
Inspections	Full Cost

Renewal	N/A
Amendment	N/A
Inspections	Fees as specified in appropriate fee categories in this section.

^{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: ^P(1) A 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 ^P(2) A 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 § 170.12(b), (e), and (f).

(c) Renewal/reapproval fees - Applications for renewal of licenses and approvals must be accompanied by the prescribed renewal fee for each category, except that fees for applications for renewal of licenses and approvals 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  § 170.12(d).

(d) Amendment fees -

(1) Applications for amendments to licenses and approvals, except those subject to fees assessed at full costs, must be accompanied by the prescribed amendment fee for each license affected. An application for an amendment to a license or approval classified in more than one fee category must be accompanied by the prescribed amendment fee for the category affected by the amendment unless the amendment is applicable to two or more fee categories in which case the amendment fee for the highest fee category would apply. For those licenses and approvals subject to full costs (fee Categories 1A, 1B, 1E, 2A,

4A, 4D, 5B, 10A, 11, 12, 13A, and 14), amendment fees are due upon notification by the Commission in accordance with § 170.12(c).

(2) An application for amendment to a materials license or approval that would place the license or approval in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for the new category.

(3) An application for amendment to a license or approval that would reduce the scope of a licensee's program to a lower fee category must be accompanied by the prescribed amendment fee for the lower fee category.

(4) Applications to terminate licenses authorizing small materials programs, when no dismantling or decontamination procedure is required, are not subject to fees.

(e) Inspection fees - Although a single inspection fee is shown in the regulation, separate charges will be assessed for each routine and nonroutine inspection performed, including inspections conducted by the NRC of Agreement State licensees who conduct activities in non-Agreement States under the reciprocity provisions of 10 CFR 150.20. Inspections resulting from investigations conducted by the Office of Investigations and nonroutine inspections that result from third-party allegations are not subject to fees. If a licensee holds more than one materials license at a single location, a fee equal to the

highest fee category covered by the licenses will be assessed if the inspections are conducted at the same time, unless the inspection fees are based on the full cost to conduct the inspection. The fees assessed at full cost will be determined based on the professional staff time required to conduct the inspection multiplied by the rate established under § 170.20 to which any applicable contractual support services costs incurred will be 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 Footnote 5 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~~ ^{these} 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.

^{3/}Full cost fees will be determined based on the

88 Stat. 1242 as amended (42 U.S.C. 5841); sec. 2903, Pub. L. 102-486, 106 Stat. 3125, (42 U.S.C. 2214 note).

6. In § 171.11, paragraphs (a) ~~is revised and renumbered to read (a)(1). A new paragraph (a)(2) is added and paragraphs (b)~~ and (d) are revised to read as follows:

§ 171.11 Exemptions.

(a) ^{An} ~~No~~ annual fees ^(is not) shall be required for:

(1) A construction permit or license applied for by, or issued to, a nonprofit educational institution for a production or utilization facility, other than a power reactor, or for the possession and use of byproduct material, source material, or special nuclear material. This exemption does not apply to those byproduct, source ^{or} special nuclear material licenses which authorize:

(i) Human use;

(ii) Remunerated services to other persons;

(iii) Distribution of byproduct material, source material, or special nuclear material or products containing byproduct material, source material, or special nuclear material; and

(iv) Activities performed under a Government contract.

(2) Federally owned research reactors used primarily for educational training and academic research purposes. For purpose of this exemption, the term research reactor means a nuclear reactor that - ~~P(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 ~~P(ii)~~ ^{is} so licensed for operation at a thermal power level of more than 1 megawatt, does not contain- ~~P(A)~~ ^{is} a circulating loop through the core in which the licensee conducts fuel experiments; ~~P(B)~~ ^{is} liquid fuel loading; or ~~P(C)~~ ^{is} 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 ~~upon~~ ^{on} its own initiative, grant ~~such~~ ^{an} exemption from the requirements of this part ~~as if~~ ^{that it} determines ~~are~~ ^{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 extraordinary circumstances, any exemption requests filed beyond that date would not be considered. The filing of an exemption request does not extend the date on which the bill is payable. Only the 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 invoice.

§ 171.15 Annual Fees: Reactor operating licenses.

// { (a) Each person licensed to operate a power, test or research reactor shall pay the annual fee for each unit for which the person holds an operating license at any time during the Federal FY in which the fee is due, except for those test and research reactors exempted in §171.11(a)(1) and (a)(2).

(b) ***

(3) Generic activities required largely for NRC to regulate power reactors, e.g., updating Part 20 of this chapter, or operating the Incident Response Center. The base FY 1993 annual fees for each operating power reactor subject to fees under this section and which must be collected before September 30, 1993, are shown in paragraph (d) of this section.

(c) ***

(2) The FY 1993 surcharge to be added to each operating power reactor is \$283,000. This amount is calculated by dividing the total cost for these activities (\$30.8 million) by the number of operating power reactors (109).

(d) The FY 1993 Part 171 annual fees for operating power reactors are as follows:

O. Licenses for possession and use of byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations. This category 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. \$17,200

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

X

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.

3/ 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. ✕

4/ 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.

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

6/ 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.

PROPOSED

APPENDIX A TO THIS ~~FINAL~~ RULE —
REGULATORY FLEXIBILITY ANALYSIS FOR THE
AMENDMENTS TO 10 CFR PART 170 (LICENSE FEES) AND
10 CFR PART 171 (ANNUAL FEES)

I. ~~BACKGROUND~~ ○

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) establishes as a principle of regulatory practice that agencies endeavor to fit regulatory and informational requirements, consistent with applicable statutes, to a scale commensurate with the businesses, organizations, and government jurisdictions to which they apply. To achieve this principle, the Act requires that agencies consider the impact of their actions on small entities. If the agency cannot certify that a rule will not significantly impact a substantial number of small entities, then a regulatory flexibility analysis is required to examine the impacts on small entities and the alternatives to minimize these impacts.

To assist in considering these impacts under the Regulatory Flexibility Act, the NRC adopted size standards for determining which NRC licensees qualify as small entities (50 FR 50241; December 9, 1985). These size standards were clarified November 6, 1991 (56 FR 56672). The NRC size standards are as follows:

- (1) A small business is a business with annual receipts of

\$3.5 million or less except private practice physicians for which the standard is annual receipts of \$1 million or less.

(2) A small organization is a not-for-profit organization which is independently owned and operated and has annual receipts of \$3.5 million or less.

(3) Small governmental jurisdictions are governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

(4) A small educational institution is one that is (1) supported by a qualifying small governmental jurisdiction, or (2) one that is not state or publicly supported and has 500 employees or less.

Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), requires that the NRC recover approximately 100 percent of its budget authority, less appropriations from the Nuclear Waste Fund, for Fiscal Years (FY) 1991 through 1995 by assessing license and annual fees. For FY 1991, the amount collected was approximately \$445 million, and for FY 1992, the amount collected was approximately \$492.5 million. The amount to be collected in FY 1993 is approximately \$518.9.

To comply with OBRA-90, the Commission amended its fee regulations in 10 CFR Parts 170 and 171 in FY 1991 (56 FR 31472) and FY 1992, (57 FR 32691) based on a careful evaluation of over

L; July 23, 1992
138

J; July 10, 1992

500 comments. These final rules established the methodology used by NRC in identifying and determining the fees assessed and collected in FY 1991 and FY 1992. The NRC has used the same methodology established in the FY 1991 and FY 1992 rulemakings to establish the proposed fees to be assessed for FY 1993.

II. ~~IMPACT ON SMALL ENTITIES~~ (1)

The comments received on the proposed FY 1991 and FY 1992 fee rule revisions and the small entity certifications received in response to the final FY 1991 and FY 1992 fee rules indicate that NRC licensees qualifying as small entities under the NRC's size standards are primarily those licensed under the NRC's materials program. Therefore, this analysis will focus on the economic impact of the annual fees on materials licensees.

The Commission's fee regulations result in substantial fees being charged to those individuals, organizations, and companies that are licensed under the NRC materials program. Of these materials licensees, the NRC estimates that about 18 percent (approximately 1,200 licensees) qualify as small entities.

The commenters on the FY 1991 and FY 1992 proposed fee rules indicated the following results if the proposed annual fees were not modified:

- Large firms would gain an unfair competitive advantage over small entities. One commenter noted that a small

impact on small entities. Commenters on the proposed fee rule for FY 1992 did not present alternatives that have not been considered previously.

IV. ~~MAXIMUM FEE~~ (C)

To implement Option 3, the NRC established and is proposing to continue for FY 1993 a maximum annual fee for small entities. The RFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity. Therefore, the NRC has no benchmark to assist it in determining the amount or the percent of gross receipts that should be charged to a small entity. ~~Therefore~~ the NRC for FY 1993 proposes to rely on the analysis previously completed that established a maximum annual fee for a small entity by comparing NRC 10 CFR Part 170 license and inspection fees ^{under} with Agreement State fees for those fee categories that are expected to have a substantial number of small entities. Because these fees have been charged to small entities, the NRC continues to believe that these fees or any adjustments to these fees during the past year do not have a significant impact on them. The NRC concludes, in issuing this proposed rule for FY 1993, that the proposed materials license and inspection fees do not have a significant impact on small entities and that the maximum small entity fee of \$1,800 be maintained to alleviate the impact of the annual fees on small entities.

By maintaining the maximum annual fee for small entities at

small entity. Nuclear gauge users were used to measure the reduction in fees because they represent about 40 percent of the materials licensees and most likely would include a larger percentage of lower tier small entities than would other classes of materials licensees. The Commission is continuing an annual fee of \$400 for the lower tier small entities to ensure that the lower tier small entities receive a reduction (75 percent for small gauge users) substantial enough to mitigate any severe impact. Although other reduced fees would result in lower subsidies, the Commission believes that the amount of the associated annual fees, when added to the license and inspection fees, would still be considerable for small businesses and organizations with gross receipts that are less than \$250,000 or for governmental entities in jurisdictions with a population of less than 20,000.

V. 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 analysis and the *final rule published on* April 17, 1992, ~~final rule~~, 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,

Proposed Rule for FY 1991
ACF 1992 ~~Implementation~~ [7590-01]

4/2/93
OGC comments
on Draft
Proposed Rule

AC49-1
PDR

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AE49

Revision of Fee Schedules; 100% Fee Recovery, FY 1993

~~Request for comment on U.S. Court of Appeals Remand
Decision on FY 1991 Fee Schedule~~

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed 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. ⁽¹⁾ In

addition, the NRC is soliciting comments on the March 16, 1993, ^{a proposed rule increasing the}

U.S. Court of Appeals for the District of Columbia Circuit ~~remand~~

decision ^{remanding to the NRC} relating to portions of the FY 1991 fee schedule. ^{annual rule.} The

remanded portions ^{pertain to (1)} describe the NRC's decision in that rule to

exempt nonprofit educational institutions, ^{but not other enterprises,} from NRC fees on the

grounds in part that ^{educational institutions} they are unable to pass through the costs of

^{and (2)} those fees to their customers; ~~Also remanded was that part of~~

~~the rule describing the Commission's decision to allocate generic~~

~~Ray [illegible]
FY [illegible]
Dec 50 [illegible]~~

costs associated with low-level waste (LLW) disposal by groups of licensees, rather than by individual licensee. The Commission in this proposed rule is soliciting comments reconsidering the approaches taken on these issues in light of the court's

decision. *Because the court's reasoning calls into question portions of the Commission's 1992 rule, the proposed rule also addresses that rule. A annual fee*

D' 3: The comment period expires (30 days after publication).

Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered.

Because Public Law 101-508 requires that NRC collect the ^{FY1993} ~~remand~~

No later than fees by September 30, 1993, and the NRC's ^{it is} ~~intention~~ ^{current} ~~to~~ resolve the court's ~~remand issues~~ ^{in FY 1993} requests for extensions of the comment period will not be granted. Further, the NRC

contemplates that any fees to be collected as a result of this proposed rule would 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, if adopted, would 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 rule which is estimated to be August 1, 1993.

ADDRESSEES: Submit written comments to: Secretary, U.S. Nuclear

The FY 1992 rule also ^{was} challenged before the court & appeals. The NRC expects the court to remand the FY 1992 rule shortly in view of the court's decision in the FY 1991 rule.

applications for the issuance of new licenses or approvals, amendments to or renewal of licenses or approvals, and inspections of licensed activities. Second, annual fees, established in 10 CFR Part 171 under the authority of OBRA-90, recover generic and other regulatory costs not recovered through 10 CFR Part 170 fees.

Subsequent to enactment of OBRA-90, the NRC published three final fee rules after evaluation of public comments. On July 10, 1991 (56 FR 31472), the NRC published a final rule in the Federal Register that established the Part 170 professional hourly rate and the materials licensing and inspection fees, as well as the Part 171 annual fees to be assessed to recover approximately 100 percent of the FY 1991 budget. In addition to establishing the FY 1991 fees, the final rule established the underlying basis and method for determining the 10 CFR Part 170 hourly rate and fees, and the 10 CFR Part 171 annual fees. The FY 1991 rule was challenged in Federal court by several parties and the U.S. Court of Appeals for the District of Columbia Circuit decided the lawsuits on March 16, 1993. The Court case and the NRC's request for comment on the ~~court~~ issues are discussed in Section II.

Remanded by the Court

On April 17, 1992 (57 FR 13625), the NRC published in the Federal Register two limited changes to 10 CFR Parts 170 and 171. The limited changes became effective May 18, 1992. The limited change to 10 CFR Part 170 allowed the NRC to bill quarterly for

and licensees be increased to reflect ^{both} the increase in the professional hourly rate ^{and} ~~as well as to reflect~~ the results of the review required by the CFO Act. To comply with the requirements of the CFO Act, the NRC has reviewed the average professional staff hours ^{needed} 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 historical data for the average number of professional staff hours ^{needed} to complete materials licensing actions show an increasing trend in some categories. This is due primarily to new initiatives underway for certain types of licenses and NRC management guidance that reviewers conduct more detailed reviews of certain renewal applications based on historical enforcement actions in order to ensure ^{public health and} safety. The proposed licensing fees ^{are} ~~have been determined~~ based on the average professional staff hours ^{needed} to process the licensing actions multiplied by the proposed professional hourly rate for FY 1993 of \$132/per hour. The data for the average number of professional staff hours ^{needed} to complete licensing actions were last updated in FY 1990 (55 FR 21173).

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 fees have increased significantly when compared to the amount currently assessed under 10 CFR Part 170. The data for the

average number of professional staff hours ^{necessary} to conduct routine and nonroutine inspections ^{were} ~~was~~ last updated in FY 1984 (49 FR 21293). As a result, the average professional staff hours used in the current fee schedule for inspections are ~~over eight years old and~~ ^{are} outdated. Since 1985, the amount of the inspection fees has been updated based only on the increased professional hourly rate. Since 1984, the inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that inspections be ^{more} thorough, in-depth and of high ^{er} quality. In addition, the Regulatory Information Tracking System (RITS) which tracks professional time for the review of inspection categories has been strengthened. The proposed inspection fees ^{were} ~~have been determined~~ based on the average professional staff hours ^{necessary} to conduct the inspections multiplied by the proposed professional hourly rate for FY 1993 of \$132 per hour. Therefore the NRC is proposing to revise both materials licensing and inspection fees assessed under 10 CFR Part 170 in order to comply with ~~the requirement of the CFO Act~~ ^{ment} which requires ~~that the~~ fees be revised to reflect the cost of the agency of providing the service.

The review of the inspection information also indicates that over 90 percent of the inspections conducted by NRC are routine inspections. As a result, for most fee categories ~~there were~~ either no nonroutine inspections ^{were} ~~conducted~~ or a very small number of nonroutine inspections were completed. For these reasons, the

rather than separate fees for routine and non-routine inspections.

NRC is proposing for fee purposes, to establish a single inspection fee. This proposed inspection fee would be assessed for either a routine or a nonroutine inspection conducted by the NRC.

Third, a new fee category 4D is proposed to specifically segregate and identify 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.

In the post... (describe how this deviates from current practice).

Fourth, additional language is proposed for irradiator fee Categories 3F and 3G to clarify that the two fee categories would also include pool irradiators for irradiation of materials where the source is not exposed for irradiation purposes. *currently 900*

(describe problem) —

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.

The NRC proposes five amendments to 10 CFR Part 171. First, NRC proposes to amend §§ 171.15, and 171.16 to increase 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, the NRC proposes to amend § 171.11 by renumbering and restating paragraph (a) as (a)(1), and by adding a new paragraph (a)(2). In addition, paragraphs (b) and (d) would be revised. These proposed changes would incorporate the specific statutory exemption provided in the Energy Policy Act of 1992 for certain nonpower (research) reactors and make clarifying changes to the exemption provision for materials licensees in § 171.11(b) and (d). Section 2903(a)(4) of the Energy Policy Act, enacted October 24, 1992, amends Section 6101(c) of OERA-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. The NRC, in implementing this provision of the Energy Policy Act, intends to limit the exemption in 10 CFR Part 171 only to Federally owned research reactors. The exemption would cover FY 1992 and subsequent years. The NRC proposes to amend § 171.11(d) to clarify that the three factors for exemption for materials licensees should not be read as conjunctive requirements but rather should be read as independent considerations which can support an exemption request.

[Handwritten notes and signatures on the right margin: "e", "C. J. ...", "J. ...", "Mike"]

~~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 public comment on the need for changes to this policy, and recommend changes in existing law to ~~the~~ Congress ^{that} 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. To comply with the Energy Policy Act requirements, the NRC intends to solicit public comment on the need for changes to NRC fee policy in a separate ^{notice} ~~rulemaking in~~ *that will be published in* April 1993. The Federal Register notice ^{for this ~~rulemaking~~ action} ~~relating to the~~ ~~requirements of the Energy Policy Act~~ would allow for a 90-day public comment period. The NRC plans to review the comments as expeditiously as possible and provide the results of the study to the Congress as soon as it is practical to do so.

The NRC also notes that since the final FY 1992 rule was published in July 1992, licensees ^{have} ~~continued~~ to file requests for termination of their licenses or certificates with the NRC. Other licensees have either called or written to the NRC since the FY 1992 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 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 Part 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 proposing to exempt from the FY 1993 annual fees those 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. All other licensees and approval holders who held a license or approval on October 1, 1992, are subject to the FY 1993 annual fees.

Third, § 171.19 is amended to credit the quarterly partial payments made by certain licensees in FY 1993 toward their FY 1993 annual fees.

Fourth, a new category 4D is proposed to specifically segregate and identify 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.

to allocate generic costs that are attributable to a given class of licensee to such class" and the "conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual fee." 136 Cong. Rec., at H12692-93.

In particular, this issue has been raised by certain uranium mill licensees who have mills not currently in operation, indicated

The NRC notes that many licensees have ~~written~~ during the past two years ~~indicating~~ that although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were in fact ~~neither~~^{not} using the material to conduct operations or had disposed of the material and no longer needed the license. In responding to licensees about this matter, the NRC has ~~indicated~~^{stated} that annual fees would be assessed based on whether a licensee holds ^a valid NRC license which 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} ~~they~~ receives a license from the NRC. Therefore, the NRC emphasizes again that the annual fees will be assessed based on whether a licensee hold a valid license with the NRC which authorizes possession and use of radioactive material.

To clarify our position, remove any ambiguity about our position, the Commission is proposing a minor Clarifying amendment to 10 CFR § 171.16, footnote 7.

C. FY 1993 Budgeted Costs.

Table III
FY 1993 Budget Authority by Major Category
(Dollars in millions)

Salaries and benefits	\$254.1
Administrative support	83.8
Travel	<u>14.1</u>
Total nonprogram support obligations	\$352.0
Program support	<u>166.9</u>
Total Budget Authority . . .	\$518.9
Less direct program support and offsetting receipts	<u>146.6</u>
Budget Allocated to Direct FTE	\$372.3
Professional Hourly Rate . . .	\$132/hour

Section 170.21 Schedule of Fees for Production and Utilization Facilities, Review of Standard Reference Design Approvals, Special Projects, Inspections and Import and Export Licenses.

The proposed licensing and inspection fees in this section, which are based on full-cost recovery, are revised to reflect the FY 1993 budgeted costs and to more completely recover costs incurred by the Commission ^{by} ~~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 would be assessed at the FY 1993 rate shown in § 170.20. The NRC is proposing to ~~to~~ revise the amount of the ~~import and export licensing fees in § 170.21, facility Category K~~ to provide for the proposed 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, ~~and~~ July 10, 1991, and July 23, 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.

Section 170.31 Schedule of Fees for Materials Licenses and Other Regulatory Services, including Inspections and Import and Export Licenses.

The licensing and inspection fees in this section would be modified to recover more completely the FY 1993 costs incurred by the Commission in providing licensing and inspection services to identifiable recipients. Those flat fees, which are based on the average time to review an application or conduct an inspection, have been adjusted to reflect both the proposed increase in the professional hourly rate from \$123 per hour in FY 1992 to \$132 per hour in FY 1993 and the revised average professional staff hours to process a licensing action (new license, renewal, and amendment) and to conduct inspections.

As previously indicated, the CFO Act ~~90~~ requires that the NRC conduct a review, on a biennial basis, of fees and other charges imposed by the agency for its services. Consistent with the CFO Act requirement, the NRC has completed its review of license and inspection fees assessed by the agency. The review focused on the flat fees that are charged nuclear materials users for licensing actions (new licenses, renewals, and amendments) and for inspections. The full cost license/inspection fees (e.g., for reactor and fuel facilities) and annual fees were not included in this biennial review because the hourly rate for full cost fees and the annual fees are reviewed and updated annually in order to recover 100 percent of the NRC budget authority.

To determine the licensing and inspection flat fees for materials licensees and applicants, the staff uses historical

data to determine the average number of professional hours required to perform a licensing action or inspection for each license category, ~~for example, small-gauge users and radiographers.~~ These average hours are multiplied by the proposed professional hourly rate of \$132 per hour for FY 1993. Because the professional hourly rate is updated annually, the biennial review examined only the average number of hours per licensing action and inspection. The review indicates that the NRC needs to modify the average number of hours on which the current licensing and inspection flat fees are based in order to recover the cost of providing the licensing and inspection services. The average ^{number of} hours ^{required} for licensing actions ^{was} ~~were~~ last reviewed and modified in 1990 (55 FR 21873). Thus the revised hours used to determine the proposed fees for FY 1993 reflect the changes in the licensing program that have occurred since that time, for example, new initiatives underway for certain types of licenses and management guidance that reviewers conduct more detailed reviews of certain renewal applications based on historical enforcement actions in order to insure safety. The average number of hours for materials licensing actions (new licenses, renewals and amendments) have not changed significantly for most categories. For new license applications, approximately 60 percent of the materials license population would have increases of less than 25 percent; for license renewals, approximately 85 percent would have increases of less than 25 percent; and for amendments, approximately 90 percent would have

increases of less than 25 percent. Only 2 percent of the materials license population would have increases of 100 percent or greater, for example, in the renewal area, irradiator 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). Over 90 percent of the materials license population would have increases of less than 50 percent for all types of licensing actions.

For materials inspections, a distribution of the changes to the inspection fees shows that inspection fees would increase by at least 100 percent for 19 percent of the licenses. The largest increases would be for inspections conducted of those licenses authorizing byproduct material for 1) 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 would 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 have not been updated since 1984 (49 FR 21973). As a result, the ^{number of} ^{is} average hours ~~are~~ ~~over eight years old and are~~ outdated. During the past eight years, the NRC's inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that, based on historical enforcement actions, inspections be more thorough and in-depth so as to

Public health and
improve safety. In addition, the Regulatory Information Tracking System (RITS) which tracks professional time expended for the review of inspection categories has been strengthened. The review of the inspection information also indicates that over 90 percent of the inspections conducted are routine inspections. As a result, for most fee categories ~~there were~~ either no nonroutine inspections ^{were} conducted or a very small number of nonroutine inspections were completed. For these reasons, the NRC is proposing for fee purposes to combine routine and nonroutine inspection fees into a single fee. This proposed inspection fee will be assessed for either a routine or a nonroutine inspection conducted by the NRC.

The amounts of the licensing and inspection flat fees were rounded, as in FY 1991 and FY 1992, by applying standard rules of arithmetic so that the amounts rounded would be ~~de~~ minimus and convenient to the user. Fees that are greater than \$1,000 are rounded to the nearest \$100. Fees under \$1,000 are rounded to the nearest \$10.

The proposed 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 proposed 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, will apply to those professional staff hours expended on or after the effective date of this rule.

A new category 4D is proposed 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. Additional language is proposed for irradiator fee Categories 3F and 3G to clarify that those two fee categories include pool irradiators for irradiation of materials where the source is not exposed for irradiation purposes.

Part 171

Section 171.11 Exemptions.

Paragraph (a) of this section is revised and renumbered as (a)(1). A new paragraph (a)(2) 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-(I) a circulating loop through the core in which the licensee conducts fuel experiments; (II) a liquid fuel loading; or (III) 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, intends to limit the exemption in 10 CFR Part 171 only to Federally owned research reactors. ~~The proposed exemption would cover FY 1990 and subsequent years.~~ ^{1993 rule} The NRC, in making this change, is not intending to change its exemption policy. As in FY 1991 and FY 1992, the NRC plans to 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

earlier in this notice, the Commission has accepted discussed its proposal to continue operating certain non-profit educational institutions for annual fees.

insertion P-44

had exemption requests denied unless there are significantly changed circumstances. ^{HP} The NRC is proposing to revise § 171.11(b) to not only require that requests for exemptions 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 with 90 days from the date of the invoice.

✓ insert for p 43 here.

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.

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 clarifying the section to indicate that the three factors should not be read as conjunctive requirements but rather should be read 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

no
duplication

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 intends to solicit public comment on the need for changes to NRC fee policy in a separate ~~Federal Register Notice~~ *Notice will be published* ~~rulemaking in April 1993. The Federal Register notice would~~ *allow for a 90-day public comment period, in that Notice will be provided* review the comments as expeditiously as possible and provide the results of the study to the Congress as soon as it is practical to do so.

The NRC also notes that since the FY 1992 final rule was published in July 1992, licensees continue 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 Part 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 proposing to exempt from the FY 1993 annual fees those licensees, and holders

*Gone
as p 26
be ?
eliminate*

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. All other licensees and approval holders who held a license or approval on October 1, 1992, are subject to the FY 1993 annual fees.

Section 171.15 Annual Fee: Reactor operating licenses.

The annual fees in this section would be revised to reflect the FY 1993 budgeted costs. Paragraphs (a), (b)(3), (c)(2), (d), and (e) would be revised to comply with the requirement of OBRA-90 to recover approximately 100 percent of the NRC budget for FY 1993. Table IV shows the budgeted costs that have been allocated to operating power reactors. They have been expressed in terms of the NRC's FY 1993 programs and program elements. The resulting total base annual fee amount for power reactors is also shown. On the average, the power reactor base annual fees for FY 1993 have increased approximately 2.2 percent above the FY 1992 annual fees.

to be assessed for each major type of operating power reactor.

Paragraph (e) would be revised to show the amount of the FY 1993 annual fee for non-power ^{test and research} reactors. In FY 1993, \$520,000 in costs are attributable to those commercial and Federal government licensees that are licensed to operate test and research reactors. Applying these costs uniformly to those nonpower reactors which are not exempt from fees results in an annual fee of \$65,000 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} ~~and~~ the design of the reactor satisfies certain technical specifications set forth in the legislation. The NRC proposes to grant an exemption in FY 1993 to the Veterans Administration Medical Center ^{its} ~~for their~~ research reactor. [location?]

Section 171.16 Annual fees: Materials Licensees, Holders of Certificates of Compliance, Holders of Sealed Source and Device Registrations, Holders of Quality Assurance Program Approvals, and Government agencies licensed by the NRC.

Paragraph (d) would be revised to reflect the FY 1993 budgeted costs for materials licensees, including Government agencies licensed by the NRC. These fees are necessary to recover the FY 1993 generic costs totalling \$_____ million applicable to fuel facilities, uranium recovery facilities, holders of transportation certificates and QA program approvals,

and other materials licensees, including holders of sealed source and device registrations.

Tables VI and VII show the NRC program elements and resources that are attributable to fuel facilities and materials users, respectively. The costs attributable to the uranium recovery class of licensees are those associated with uranium recovery licensing and inspection. For transportation, the costs are those budgeted for transportation research, licensing, and inspection. Similarly, the budgeted costs for spent fuel storage ^{include} ~~are~~ those for spent fuel storage research, licensing, and inspection.

UF₆ Conversion

Allied Signal Corp.
Sequoyah Fuels Corp.

Subtotal

Other fuel facilities
(5 facilities at \$122,000
each)

Total

Safeguards and Safety

\$662,000

662,000

\$1,324,000

\$610,000

\$14,421,000

One of the Combustion Engineering's low enriched ^{uranium} fuel facilities has not been included in the fee base because of the D.C. Circuit Court ^{of appeals} decision ^{of} dated 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 proposes to grant an exemption for one

of ^{CE's} ~~the~~ low enriched ^{uranium} fuel facilities for FY 1992 ^{2 and subsequent} ~~and FY 1993~~ ~~extended 4 years~~.

As a result, the NRC will ~~divide~~ calculate its FY 1993 annual fee for low enriched fuel category, by dividing its cost among five elements, rather than 6 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). 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	\$58,100
Class II facilities	\$25,400
Other facilities	\$21,100

For spent fuel storage licenses, the generic costs of \$733,000 have^{ve} been spread uniformly ~~to~~^{among} those licensees who hold specific or general licenses for receipt and storage of spent fuel at an ISFSI. This results in an annual fee of \$146,600.

To equitably and fairly allocate the \$35.1 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 ~~each~~^{these} category^{ies} of licensees 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 \$35.1 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 \$_____ million were identified for the medical improvement program which is attributable to medical licensees; about \$_____ in costs were identified as being attributable to radiography licensees; and about \$_____ was identified as being attributable to irradiator licensees. On the average, the materials annual fees for FY 1993 are increased about ____ percent above the FY 1992 annual fees. The reason for this significant increase is twofold. 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). The materials fees must be established at these ^{proposed} 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.

To recover the \$4.4 million attributable to the transportation class of licensees, about \$1.0 million will be assessed to the Department of Energy (DOE) to cover all of its transportation casks under Category 18. The remaining transportation costs for generic activities (\$3.4 million) are

The options the Commission is considering in this area are ~~This issue to be discussed at some length~~ earlier in this Notice.

Paragraph (e) would be amended to establish the additional charge which is to be added to the base annual fees shown in paragraph (d) of this proposed rule. This surcharge will continue to be shown, for convenience, with the applicable categories in paragraph (d). The additional charge will recover approximately ___ percent of the NRC budgeted costs of \$___ million relating to LLW disposal generic activities because ___ percent of the LLW is generated by these licensees. Although these NRC LLW disposal regulatory activities are not directly attributable to materials licensees, the costs nevertheless must be recovered in order to comply with the requirements of OBRA-90. The Commission has continued the previous policy decision to recover approximately ___ percent of these LLW costs from materials licensees. The FY 1993 budgeted costs related to the additional charge and the amount of the charge are calculated as follows:

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

Of the \$___ million in budgeted costs shown above for LLW activities, 50 percent of the amount (\$___ million) would be allocated to fuel facilities included in Part 171 (19 facilities), as follows: \$___ per HEU, LEU, and UF₆ facility and \$___ for each of the other 5 fuel facilities. The remaining 50 percent (\$___ million) would be allocated to the material


second, and third quarterly payments for FY 1993 will have been made by operating power reactor licensees and some materials licensees before the final rule is effective. Therefore, NRC will credit payments 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. 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.

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P 29*

~~The NRC notes that many licensees have written during the past two years indicating that although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were in fact neither using the material to conduct operations or had disposed of the material and no longer needed the license. In responding to licensees about this matter, the NRC has indicated that annual fees would be assessed based on whether a licensee holds a valid NRC license which 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 they receive a license from the NRC. Therefore, the NRC emphasizes again that the annual fees will be assessed based on whether a licensee holds a valid NRC license which authorizes possession and use of radioactive~~

of certificates, registrations and approvals and for licenses issued to Government agencies take into account the type of facility or approval and the classes of the licensees.

10 CFR Part 171, which established annual fees for operating power reactors effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in Florida Power and Light Company v. United States, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

10 CFR Parts 170 and 171, which established fees based on the FY 1989 budget, were also legally challenged. As a result of the Supreme Court decision in Skinner v. Mid-American Pipeline Co., 109 S. Ct. 1726 (1989), and the denial of certiorari in Florida Power and Light, all of the lawsuits were withdrawn. 

The Commission's ^{ET} 1991 annual fee rule was recently ^{OR} largely upheld by the D.C. Circuit in Allied Signal v. NRC, discussed VIII. Regulatory Flexibility Analysis extensively earlier in this notice.

The NRC is required by the Omnibus Budget Reconciliation Act of 1990 to recover approximately 100 percent of its budget authority through the assessment of user fees. OBRA-90 further requires that the NRC establish a schedule of charges that fairly and equitably allocates the aggregate amount of these charges among licensees.

This proposed rule establishes the schedules of fees that are necessary to implement the Congressional mandate for FY 1993. The proposed rule results in an increase in the fees charged to

(2) Federally owned research reactors used primarily for educational training and academic research purposes. For purpose 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- (I) a circulating loop through the core in which the licensee conducts fuel experiments; (II) a liquid fuel loading; or (III) 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 upon its own initiative, grant such exemptions from the requirements of this part as it determines are 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 extraordinary circumstances, any exemption requests filed beyond that date ^{will} ~~would~~ not be considered. The filing of an exemption request does not extend the date on which the bill is payable. Only ~~the~~ 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.

small companies, out of business or, at the very least, make it hard to survive.

- Some companies would have budget problems. Many medical licensees commented that, in these times of slashed reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Another noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship and some facilities would experience a great deal of difficulty in meeting this additional burden.

Over
~~Based on our experience during~~ the past two years, approximately 2,300 license, approval, and registration terminations *have been* ~~were~~ requested. Although some of these terminations were requested because the license was no longer needed or licenses or registrations could be combined, indications are that other termination requests were due to the economic impact of the fees.

The NRC continues to receive written and oral comments from small materials licensees. These comments indicate that the \$3.5 million threshold for small entities is not representative of small businesses with gross receipts in the thousands of dollars. These commenters believe that the \$1,800 maximum annual fee represents a relatively high percentage of gross annual receipts for these "Mom and Pop" type businesses. Therefore, even the

larger fee because it has more than one source. Thus, this alternative does not necessarily achieve the goal of the RFA to minimize the impact on small entities. The NRC continues to believe that this approach would not result in a fair and equitable allocation of its generic and other costs not recovered under 10 CFR Part 170. Therefore, the NRC has rejected this approach.

For similar reasons, the second suggested alternative, basing the fee on the frequency of use of the licensed radioactive source, would not necessarily reduce the cost for small entities that meet the size standards discussed earlier. Therefore, the NRC also rejected this approach.

^{third}
The ~~last~~ alternative would base fees on the size standards that the NRC has used to define small entities. This alternative would ensure that any benefits from modifying the proposed fees would apply only to small entities. Three basic options, each using the NRC size standards, were considered for modifying the annual fees imposed on small entities:

1. Exempt all small entities which meet the size standards from annual fees.
2. Require small entities to pay a fixed percent of the amount of the fee in each of the specific material license fee categories.

3. Establish a maximum fee for small entities.

Under Option 1, all small entities would be exempted from fees. However, because small entities would not pay any of the generic costs attributable to their class of licensees, this option could be viewed as inconsistent with the objectives of OBRA-90. Under this option, all the annual fees attributable to small entities would be paid by other NRC licensees.

Under Option 2, small entities would pay a percentage (e.g., 50 percent) of the proposed fee for each specific category of materials license, regardless of how small or large the fee is. This option could result in a reduction in annual fees that are already relatively small and that do not have a significant impact on a substantial number of small entities. However, for those fee categories assessed large annual fees, the percentage of reduction may result in assessing small entities licensed under those fee categories relatively large annual fees.

Option 3 would establish a maximum fee for all small entities. Under this option, a small entity would pay either the smaller of the annual fee for the category or the maximum small entity fee. This alternative strikes a balance between the requirements of OBRA-90 and the RFA, which are to consider and reduce, as appropriate, the impact of an agency's regulatory actions on small entities. Therefore, the NRC continues to believe that Option 3 is the most appropriate to reduce the

available

small entity. Nuclear gauge users were used to measure the reduction in fees because they represent about 40 percent of the materials licensees and most likely would include a larger percentage of lower tier small entities than would other classes of materials licensees. The Commission is continuing an annual fee of \$400 for the lower tier small entities to ensure that the lower tier small entities receive a reduction (75 percent for small gauge users) substantial enough to mitigate any severe impact. Although other reduced fees would result in lower subsidies, the Commission believes that the amount of the associated annual fees, when added to the license and inspection fees, would still be considerable for small businesses and organizations with gross receipts ^{of} ~~that~~ are less than \$250,000 or for governmental entities in jurisdictions with a population of less than 20,000.

V. 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 analysis and the April 17, 1992, final rule 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,

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

April 1, 1993

MEMORANDUM FOR: Mike Lesar, DFIPs
Trip Rothschild, OGC

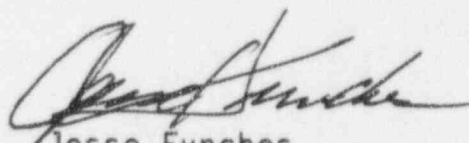
FROM: Jesse Funches
Deputy Controller

SUBJECT: NOTICE OF PROPOSED RULEMAKING -- 100% FEE
RECOVERY FOR FY 1993

Enclosed for your review and comment is a draft of a proposed rule for the FY 1993 fees to be assessed to recover 100 percent of the NRC budget authority.

I would appreciate your review and comments on this draft as quickly as possible but no later than COB Friday, April 2, 1993. Please note that: 1) some of the proposed annual fees are now being finalized; 2) the final proposed rule will include the proposed annual fees as well as your comments on the draft; and 3) your office concurrence on the final proposed rule will be requested on an expedited basis.

If you have any questions, please contact me or Jim Holloway on X24301. Thank you for your continued cooperation on the NRC fee program.


Jesse Funches
Deputy Controller

Enclosure:
As stated

April 1, 1993

MEMORANDUM FOR: Mike Lesar, DFIPs
Trip Rothschild, OGC

FROM: Jesse Funches
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Deputy Controller

Enclosure:
As stated

DISTRIBUTION: OC R/F, OC S/F, JFunches, JHolloway

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NAME:	JHolloway	JFunches
DATE:	04/ /93	04/ /93

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[7590-01]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AE49

Revision of Fee Schedules; 100% Fee Recovery, FY 1993

Request for comment on ^{U.}U.S. Court of Appeals Remand
Decision on FY 1991 Fee Schedule

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed 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 soliciting comments on the March 16, 1993, U.S. Court of Appeals for the District of Columbia Circuit remand decision relating to portions of the FY 1991 fee schedule. The remanded portions describe the NRC's decision in that rule to exempt nonprofit educational institutions from NRC fees on the grounds in part that they are unable to pass through the costs of those fees to their customers. Also remanded was that part of the rule describing the Commission's decision to allocate generic

costs associated with low-level waste (LLW) disposal by groups of licensees, rather than by individual licensee. The Commission in this proposed rule is soliciting comments reconsidering the approaches taken on these issues in light of the court's decision.

DATES: The comment period expires (30 days after publication).

Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered.

Because Public Law 101-508 requires that NRC collect the revised fees by September 30, 1993, and the NRC ~~intends~~ ^{to set} to resolve the

court's remand issues in FY 1993, requests for extensions of the comment period will not be granted. Further, the NRC

contemplates that any fees to be collected as a result of this proposed rule would 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, if adopted, would 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 rule which is estimated to be August 1, 1993.

ADDRESSEES: Submit written comments to: Secretary, U.S. Nuclear

large externalized benefits that cannot be captured in tuition or other market prices." Slip op. at 8. The court also ordered the NRC to address on remand a related claim of CE, that long-term fixed price contracts in its business (production of low enriched uranium (LEU)) required a phase-in of passed through costs. The NRC in this proposed rule is soliciting comments on these two issues, and especially the question of externalized benefits resulting from education, as part of the remanded rulemaking.

Despite the remand, the court did not vacate the rule, both because by law the NRC could not make required refunds under a vacated rule and then "recover . . . fees under a late-enacted rule," and because the court found a "serious possibility that the Commission will be able to substantiate its decision on remand." Slip op. at 8-9.

Options for Consideration

In this proposed rulemaking, the NRC views two options as possible, and proposes to follow the course of action dictated by the second. The first option is to do what is suggested by the court, and take passthrough into account for those licensees for whom it can be done "with reasonable accuracy and at reasonable cost" Slip op. at 7. For a number of reasons, including those stated in the court opinion, the NRC does not believe taking passthrough into account for any licensee would be

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option

feasible. First and foremost is the impossible task of assessing the passthrough ability of approximately 6,800 licensees. Each of these licensees operates in a specialized business environment, and must take many factors into account when making daily business decisions. The NRC is a regulatory agency with the responsibility of safeguarding the public health and safety with regard to peaceful uses of nuclear power. It is not a financial regulatory agency, and does not possess the knowledge or resources necessary to successfully and continuously evaluate these business factors. Such an effort would require the hiring of financial specialists and expanded training of existing employees to cope with these new tasks. This would in turn lead to diversion of the agency's budget from its mission responsibilities, and a possible increase in the NRC's budget (and therefore annual fees) to handle these new demands. The final result could be higher fees charged to licensees for the purpose of determining if they can pass on the cost of those fees. The NRC, for obvious reasons, does not see this as an optimum solution. It believes such an action would fail the "reasonable accuracy and cost" test proposed by the court. In addition, the NRC believes it is not ^{an} practical ^{option} to implement because the factors on which the fees would be based are, to some extent, under the control of the licensee. However, as part of its continuing efforts to reevaluate and improve fee collection process and policy, the NRC is soliciting views from interested parties on ways that such an option could be used by the NRC to

evaluate passthrough capability.

The second option, and that proposed by the Commission, is ^{to} no longer to consider passthrough as a factor in granting exemptions to nonprofit educational institutions. Instead, for FY 1993 the Commission would continue to exempt these licensees from fees, as it has for many years in the past, but would do so solely to support nuclear-related education. The NRC acknowledges that it should not have considered ^{used?} the passthrough capacities of colleges and universities as part of its rationale in granting them an exemption from NRC fees. However, the NRC still believes that education in the field of nuclear energy has value not only to industry, but to the Federal government and society as a whole. This belief in the value of education is buttressed both in the text of the Atomic Energy Act (section 170k) and throughout governmental regulation and statute. As the NRC noted in the statement of considerations for the 1991 fee rule, many colleges and universities supported continuing this longstanding exemption, as it "facilitat[ed] academic research and educational use of licensed materials, [which] both furthers understanding of important research questions and provides training in nuclear science." See NRC Final Rule at 31477 (1991). The commenters described how imposition of fees on their nuclear programs would lead, in many cases, to severe cutbacks in and shutdowns of these programs. This in turn would lead to shortages of scientific personnel trained in the use of radioactivity in such areas as

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reactor safety and nuclear medicine, with detrimental effects suffered not only by nuclear science but by society at large. The NRC therefore is soliciting comments on continuing the exemption for nonprofit educational institutions on the grounds of supporting education for the benefits it provides both to the nuclear field and to society as a whole. In particular, the NRC invites comment on the point made by the court that education may provide externalized benefits that cannot be quantified via tuition or similar market pricing. X

Discussion of the Case: LLW Cost Determination

Following its discussion of the passthrough factor, and its rejection of Allied's claim that Part 171 annual fees should be tied to Part 170 IOAA fees (those charged for specific services, such as reviewing license applications and conducting inspections), the court turned to Allied's attack on the Commission's method of apportioning generic LLW disposal costs among its thousands of licensees.

Allied enjoyed more success arguing that the Commission allocated generic LLW disposal costs in an arbitrary and capricious manner. Presuming that the agency had licensee-specific data, the court found that the NRC did not justify a rationale for allocating LLW costs by the amount of LLW generated per class, as the NRC did, without going further to similarly

allocate LLW costs licensee-by-licensee. To avoid what it viewed as an unjust windfall (i.e., complete vacation of the LLW fees, and full refunds), the court did not vacate this part of the rule. It instead remanded the LLW issue to the Commission for reconsideration.¹ The court~~X~~ indicated that on remand the Commission should charge LLW costs based on the amount of waste produced per licensee. The court went on to state that if this were done, licensees could permissibly receive refunds for the difference between what they paid under the old and new rules, rather than total refunds.

Options for Consideration

The options for addressing the remand should be developed and analyzed considering the purpose of the NRC budgeted resources for LLW disposal. To implement the LLW Policy Act, and the Atomic Energy Act, the NRC must perform certain generic activities. These activities include developing rules, policies and guidance, performing research, and providing advice and consultation to LLW compacts and Agreement States who will license some of the future LLW disposal sites. The budgeted costs for these types of generic activities are typical of those recovered from the class of licensees to whom the activities

¹The court did not address Allied's exemption request, which dealt in large part with the issues of passthrough and LLW cost allocation. The court stated that these aspects of the request would be decided as a result of the ordered remand and subsequent rulemaking.

directly relate. (For example, reactor research is recovered from reactor licensees, and guidance and rule development ~~and~~ for regulation ^{NRC} uranium producers are recovered from uranium recovery licensees.) However, for these LLW generic activities, there is no disposal site licensed by the NRC from whom to recover the generic budgeted costs that must be incurred.² Since there is no ^{NRC} LLW disposal site licensee, these costs, as with other costs included in the surcharge, must be allocated to other NRC licensees in order to recover 100% of the NRC budget as required by OBRA-90. In addition, the LLW costs budgeted by NRC in FY 1991, FY 1992 and FY 1993 are not for the wastes being disposed of during these years or prior years, but is to provide the regulatory frame work for disposal of LLW at some future date.³ In fact, the sites where ~~byproduct~~ LLW were disposed in FY 1991-1993 are licensed and regulated by Agreement States, not the NRC.

Given the 100% budget recovery requirement of OBRA-90, and the fact that there are no NRC LLW licensees to recover FY 1991-1993 budgeted costs for NRC generic activities, the basic question is how should NRC allocate these costs. The Congress spoke briefly to this issue in developing OBRA-90 by recognizing

²There are NRC organizations that hold a NRC license for the disposal of Special Nuclear Material (SNM). The LLW ~~at~~ issue is not SNM ~~but~~ other byproduct and source materials.

³In the FY 1991 rule, the NRC indicated that "once the NRC issues a license to dispose of byproduct LLW, the Commission will reconsider the assessment of generic costs attributable to LLW disposal activities" (56 FR 31487).

that certain expenses cannot be attributed either to an individual or to classes of NRC licensees. The conferees intend that the NRC fairly and equitably recover these expenses from its licensees through the annual charge even though these expenses cannot be attributed to individual licensees or classes of licensees. These expenses may be recovered from those licensees whom the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. 1356 Cong Rec. at H12692, 3. Consistent with the Congressional guidance, the Commission concluded that all classes of NRC licensees that generate a substantial amount of LLW should be assessed annual fees to cover the generic costs. The court did not challenge this basic decision but questioned the method for determining the amount of the fee to be assessed to each of the licensees that generate LLW. The NRC believes that there are three alternatives (with variation within each alternative) for determining the fee amount for the various licensees. It is reiterated however, that neither of these alternatives is intended to recover the cost of a service provided during a particular year, but instead is intended to recover today's costs for a future benefit (the availability of LLW disposal) to those that dispose ^NLLW in the future. ✓

Within the above context, the Commission is considering the following three alternatives for determining the amount of the LLW surcharge (fee) to be assessed to the various licensees:

- (1) Assess all licensees that generate LLW a uniform annual ^{surcharge} fee.
- (2) Allocate the LLW budgeted cost based on the amount of LLW disposed of by groups of licensees and assess each licensee in a group the same annual ^{surcharge} fee as was done in the FY 1991 and FY 1992 rules.
- (3) Assess each licensee an annual ^{surcharge} fee based on the amount of waste generated/disposed by the individual licensee, as was suggested by Allied Signal, Inc., and noted by the court. 7.

The NRC believes that the decisions on the above alternatives should hinge on the Congressional guidance regarding fairness, equity, and practicality. With regard to fairness and equity, the Commission believes the question boils down to which of the alternatives is the best indicator of future benefits to the NRC licensees. With regard to benefits, the Court noted that; "While it is conceivable that the real benefit of LLW disposal services is merely the availability of such services--in which case a flat fee would make sense--any such idea is inconsistent with the Commission's method of apportioning LLW fees among classes of licensees, which appears to assume that benefit is proportional to LLW quantity. If, on the other hand,

any licensee's benefit from LLW disposal is directly proportional to its LLW disposal, apportioning even generic costs on the basis of output seems to make sense--not only as to classes but ^{also} ~~only~~ as to individual licensees." *yes*

Under the first alternative, the NRC would not try distinguishing between the potential future benefits to the various licensees, but would assess the same LLW fee to all NRC licensees that generate low level waste. ~~On the other hand,~~ this alternative would result in a hospital, for example, paying the same LLW annual fee as a reactor, who would pay the same LLW annual fee as a fuel facility. This could be perceived as not fair and equitable.

Alternative 2 is based on the premise that it is not possible to predict the exact future benefit for each licensee, but that current volume of LLW disposed by a group of licensees is a good indicator of the relative future benefit to the various classes. That is, the LLW volume disposed today is a good indicator in "macro", but not micro sense. The Commission believes fairness and equity indicate that this broad distinction between the benefits between classes of licensee be used. It is noted that there are various ways to separate the licensees by classes. The FY 1991-1993 rules separate the licensees by the same class that are used for all other annual fees. Obviously this approach results in some efficiencies. Since the NRC does

not have to maintain and assess fees using different class structures, a second alternative is to divide the licensees into two categories -- "large" waste generators and "small" waste generators. Under this alternative, reactor and fuel facilities could comprise the group of large generators and other licensees the group of small generators.

Alternative 3^x would base the annual fee for LLW on the amount of waste disposed by each licensee during a particular year. This alternative may be indicative of future benefits if waste generated by each license is used. However, the NRC does not have easy access to reliable data on waste generation. That is, it is not practical to use waste generation by each license. Instead, waste disposal by each licensee would have to be used. There are problems, however, with using waste disposed of by a licensee as an indicator of the future benefit to licensees^e. This is because the amount of waste disposed of by specific licensees is affected by many variables that do not affect the amount of waste generated by a licensee. For example, NRC licensees in the State of Michigan did not dispose of any waste in 1991 because they were not permitted to use existing LLW disposal sites. However, these licensees will benefitⁱⁿ the future from the NRC regulatory costs today, since ultimately the waste must be disposed. However, under this alternative, the annual fee assessed to licensees in Michigan would have been zero, implying no future benefits to each licensee. Also, there are practical

problems with this alternative, in that licensees are concerned about the protection (proprietary) of waste disposal/generator data from their competitors. Licensee's unique fees if developed based on individual licensee disposal, would reveal the amount of LLW disposed of by specific licensees, thus, the numbers relating to disposal would ~~be~~ no longer be protected.

The Commission, while recognizing that these are alternative ways to allocate its low level waste cost, do not believe that Alternatives 1 and 3 provide a major improvement. However, the Commission is requesting comments on each method prior to issuing the final rule. The Commission notes that for FY 1993, it is making a minor improvement to its allocation by adjusting the percentage of use⁷ in the allocation to better reflect the impact of waste generated by licensees in Agreement States.

III. Proposed Action

OBRA-90 requires that the NRC recover approximately 100 percent of its FY 1993 budget authority, including the funding of its Office of the Inspector General, less the appropriations received from the NWF, by assessing licensing, inspection and annual fees. The CFO Act requires that the NRC review, on a biennial basis, the fees imposed by the agency.

For FY 1993, the NRC's budget authority is \$540.0 million,

of which approximately \$21.1 million has been appropriated from the NWF. Therefore, OBRA-90 requires that the NRC collect approximately \$518.9 million in FY 1993 through 10 CFR Part 170 licensing and inspection fees and 10 CFR Part 171 annual fees. The NRC estimates that approximately \$ 116.6 million will be recovered in FY 1993 from the fees assessed under 10 CFR Part 170. The remaining \$402.3 million would be recovered through the FY 1993 10 CFR Part 171 annual fees.

The NRC has not changed the basic approach, policies, or methodology for calculating 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). With respect to the FY 1993 fees, the NRC is requesting public comment on the issue of whether the methodology adopted in FY 1991 and FY 1992 has been properly applied to the FY 1993 budget authority. Under this proposed rule, fees for most licenses will increase because --

(1) NRC's budget has increased. This has resulted in a corresponding increase in the professional hourly rate; and

(2) Approximately 2,300 licensees have requested that their licenses be terminated or combined since the FY 1991 and FY 1992 final rules were adopted. This has resulted in fewer licensees

to pay for the costs of regulatory activities not recovered under 10 CFR Part 170.

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

The NRC proposes four amendments 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 NRC proposes that the agency-wide professional hourly rate, which is used to determine the Part 170 fees, be 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 NRC proposes that the current Part 170 licensing and inspection fees in §§ 170.21 and 170.31 for all applicants

and licensees be increased to reflect the increase in the professional hourly rate as well as to reflect the results of the review required by the CFO Act. To comply with the requirements of the CFO Act, the NRC has reviewed the average professional staff hours 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 historical data for the average number of professional staff hours to complete materials licensing actions show an increasing trend in some categories. This is due primarily to new initiatives underway for certain types of licenses and NRC management guidance that reviewers conduct more detailed reviews of certain renewal applications based on historical enforcement actions in order to ensure safety. The proposed licensing fees have been determined based on the average professional staff hours to process the licensing actions multiplied by the proposed professional hourly rate for FY 1993 of \$132¹/₂ per hour. The data for the average number of professional staff hours to complete licensing actions were last updated in FY 1990 (55 FR 21173).

Get John L. Brown to review

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 fees have increased significantly when compared to the amount currently assessed under 10 CFR Part 170. The data for the

average number of professional staff hours to conduct routine and nonroutine inspections was last updated in FY 1984 (49 FR 21293). As a result, the average professional staff hours used in the current fee schedule for inspections are over eight years old and are outdated. Since 1985, the amount of the inspection fees has been updated based only on the increased professional hourly rate. Since 1984, the inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that inspections be thorough, in-depth and of high quality. In addition, the Regulatory Information Tracking System (RITS) which tracks professional time for the review of inspection categories has been strengthened. The proposed inspection fees have been determined based on the average professional staff hours to conduct the inspections multiplied by the proposed professional hourly rate for FY 1993 of \$132 per hour. Therefore the NRC is proposing to revise both materials licensing and inspection fees assessed under 10 CFR Part 170 in order to comply with the requirement of the CFO Act ~~which requires~~ that the fees be revised to reflect the cost of the agency of providing the service.

The review of the inspection information also indicates that over 90 percent of the inspections conducted by NRC are routine inspections. As a result, for most fee categories there were either no nonroutine inspections conducted or a very small number of nonroutine inspections were completed. For these reasons, the

to allocate generic costs that are attributable to a given class of licensee to such class" and the "conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual fee." 136 Cong. Rec., at H12692-93.

The NRC notes that many licensees have written during the past two years indicating that although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were in fact neither using the material to conduct operations or had disposed of the material and no longer needed the license. In responding to licensees about this matter, the NRC has indicated that annual fees would be assessed based on whether a licensee holds ^a valid NRC license which 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 they receive a license from the NRC. Therefore, the NRC emphasizes again that the 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. e

C. FY 1993 Budgeted Costs. ✓

The FY 1993 budgeted costs by major activity, to be recovered through 10 CFR Parts 170 and 171 fees are shown in Table I.

Table I
Recovery of NRC's FY 1993 Budget Authority

<u>Recovery Method</u>	<u>Estimated Amount (\$ in Millions)</u>
Nuclear Waste Fund	\$21.1
Part 170 (license and inspection fees)	116.6
Part 171 (annual fees)	
Power Reactors	316.4
Nonpower Reactors	.6
Fuel Facilities	14.4
Spent Fuel Storage	.6
Uranium Recovery	.5
Transportation	4.5
Material Users	<u>35.1^{1/}</u>
Subtotal	\$372.1
Costs remaining to be recovered not identified above	30.2
Total	<u>\$540.0</u>

^{1/}Includes \$5.3 million that will not be recovered from small materials licensees because of the reduced small entity fees.

The NRC is proposing that the \$30.2 million identified for those activities which are not identified as either 10 CFR Parts 170 or 171 or the NWF in Table I be distributed among the NRC classes of licensees as follows:

The licensing and inspection fees in this section would be modified to recover more completely the FY 1993 costs incurred by the Commission in providing licensing and inspection services to identifiable recipients. Those flat fees, which are based on the average time to review an application or conduct an inspection, have been adjusted to reflect both the proposed increase in the professional hourly rate from \$123 per hour in FY 1992 to \$132 per hour in FY 1993 and the revised average professional staff hours to process a licensing action (new license, renewal, and amendment) and to conduct inspections.

As previously indicated, the CFO Act-90 requires that the NRC conduct a review, on a biennial basis, of fees and other charges imposed by the agency for its services. Consistent with the CFO Act requirement, the NRC has completed its review of license and inspection fees assessed by the agency. The review focused on the flat fees that are charged nuclear materials users for licensing actions (new licenses, renewals, and amendments) and for inspections. The full cost license/inspection fees (e.g., for reactor and fuel facilities) and annual fees were not included in this biennial review because the hourly rate for full cost fees and the annual fees are reviewed and updated annually in order to recover 100 percent of the NRC budget authority.

To determine the licensing and inspection flat fees for materials licensees and applicants, the staff uses historical

increases of less than 25 percent. Only 2 percent of the materials license population would have increases of 100 percent or greater, for example, in the renewal area, irradiator 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). Over 90 percent of the materials license population would have increases of less than 50 percent for all types of licensing actions.

For materials inspections, a distribution of the changes to the inspection fees shows that inspection fees would increase by at least 100 percent for 19 percent of the licenses. The largest increases would be 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 would have increases of more than 50 percent. The primary reasons for these relatively large increases is that the average number of hours on which inspection fees are based have not been updated since 1984 (49 FR 21973). As a result, the average hours are over eight years old and are outdated. During the past eight years, the NRC's inspection program has changed significantly. For example, NRC management guidance in recent years has emphasized that, based on historical enforcement actions, inspections be more thorough and in-depth so as to

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, will apply to those professional staff hours expended on or after the effective date of this rule.

A new category 4D is proposed 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.

Additional language is proposed for irradiator fee Categories 3F and 3G to clarify that those two fee categories include pool irradiators for irradiation of materials where the source is not exposed for irradiation purposes.

Part 171

Section 171.11 Exemptions.

Paragraph (a) of this section is revised and renumbered as (a)(1). A new paragraph (a)(2) is added which incorporates the specific statutory exemption provided in the Energy Policy Act of 1992 for certain nonpower (research) reactors and paragraphs (b)

had exemption requests denied unless there are significantly changed circumstances. The NRC is proposing to revise § 171.11(b) to not only require that requests for exemptions 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 with 90-days from the date of the invoice.

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.

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 clarifying the section to indicate that the three factors should not be read as conjunctive requirements but rather should be read 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

<u>Category of Costs</u>	FY 1993 Budgeted Costs (\$ In Millions)
1. Activities not attributable to an existing NRC licensee or class of licensee:	
a. reviews for DOE/DOD reactor projects, West Valley Demonstration Project, DOE Uranium Mill Tailing Radiation Control Act (UMTRCA) actions;	\$5.2
b. international cooperative safety program and international safeguards activities; and	8.3
c. % of low level waste disposal generic activities;	
2. Activities not assessed Part 170 licensing and inspection fees or Part 171 annual fees based on Commission policy:	
a. activities associated with nonprofit educational institutions; and	7.1
b. costs not recovered from Part 171 for small entities.	<u>4.5</u>
Total Budgeted Costs	\$

The annual additional charge is determined as follows:

Total budgeted costs = \$ 109 million = \$ per
Total number of operating reactors 109 operating power reactor

On the basis of this calculation, an operating power reactor, Beaver Valley 1, for example, would pay a base annual fee of \$2,096,000 and an additional charge of \$ for a total annual fee of \$ for FY 1993.

Paragraph (d) would be revised to show, in summary form, the amount of the total FY 1993 annual fee, including the surcharge,

allocated to holders of approved QA plans. The annual fee for approved QA plans is \$67,400 for users and fabricators and \$1,000 for users only.

The amount or range of the FY 1993 base annual fees for all materials licensees is summarized as follows:

Materials Licenses
Base Annual Fee Ranges

<u>Category of License</u>	<u>Annual Fees</u>
Part 70 - High enriched fuel	\$ million
Part 70 - Low enriched fuel	\$
Part 40 - UF ₆ conversion	\$
Part 40 - Uranium recovery	\$
Part 30 - Byproduct Material	\$ 1/
Part 71 - Transportation of Radioactive Material	\$
Part 72 - Independent Storage of Spent Nuclear Fuel	\$

1/ Excludes the annual fee for a few military "master" materials licenses of broad-scope issued to Government agencies which is \$_____.

add revision 3F and 3G

A new Category 4D is proposed to specifically 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.

Paragraph (e) would be amended to establish the additional charge which is to be added to the base annual fees shown in paragraph (d) of this proposed rule. This surcharge will continue to be shown, for convenience, with the applicable categories in paragraph (d). The additional charge will recover approximately __ percent of the NRC budgeted costs of \$____ million relating to LLW disposal generic activities because __ percent of the LLW is generated by these licensees. Although these NRC LLW disposal regulatory activities are not directly attributable to materials licensees, the costs nevertheless must be recovered in order to comply with the requirements of OBRA-90. The Commission has continued the previous policy decision to recover approximately __ percent of these LLW costs from materials licensees. The FY 1993 budgeted costs related to the additional charge and the amount of the charge are calculated as follows:

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

Of the \$__ million in budgeted costs shown above for LLW activities, 50 percent of the amount (\$__ million) would be allocated to fuel facilities included in Part 171 (19) 14? facilities), as follows: \$__ per HEU, LEU, and UF₆ facility and \$__ for each of the other 5 fuel facilities. The remaining 50 percent (\$__ million) would be allocated to the material