

REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act (RFA), as amended at 5 U.S.C. 601 et seq., requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The U.S. Nuclear Regulatory Commission (NRC) has established standards for determining which NRC licensees qualify as small entities pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.810, “NRC size standards.” These standards are based on the Small Business Administration’s (SBA) most common receipts-based size standards and provides for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee’s eligibility to qualify for a maximum small entity fee. The small entity fee categories in § 171.16(c), “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,” of this final rule are based on the NRC’s size standards.

On January 14, 2019, the President signed into law Public Law (Pub. L.) 115-439, “Nuclear Energy Innovation and Modernization Act” (NEIMA) (42 U.S.C. 2215). The NEIMA fee-related changes, effective October 1, 2020, include, (1) repealing the prior fee-recovery framework and replacing it with a revised framework and, (2) improving the accuracy of invoices for service fees.

Effective October 1, 2020, NEIMA repealed Section 6101 of the Omnibus Budget Reconciliation Act of 1990, as amended (OBRA-90) (42 U.S.C. 2214) and put in place a revised fee-recovery framework for FY 2021 and subsequent fiscal years, requiring the NRC to recover, to the maximum extent practicable, approximately 100 percent of its total budget authority for

the fiscal year, less the budget authority for excluded activities. For FYs 2005 through 2020, OBRA-90 required the NRC to recover approximately 90 percent of its budget authority for the fiscal year through fees, less amounts for the activities excluded from fee recovery under OBRA-90 or other legislation. The 10 percent of the remaining budget authority not recovered through fees was historically referred to as fee-relief activities. In this proposed rule, the NRC would establish a revised fee-recovery framework, which would eliminate the 10 percent limit on fee-relief activities. Accordingly, the NRC would no longer provide a fee-relief credit (when the amount budgeted for fee-relief activities is less than the 10 percent threshold, which would have decreased annual fees for licensees) or assess a fee-relief surcharge (when the amount budgeted for fee-relief activities is greater than the 10 percent threshold, which would have increased annual fees for licensees) as part of the calculation of annual fees for each licensee fee class. NEIMA requires that the schedule of charges established by rulemaking should fairly and equitably allocate the total amount to be recovered from the NRC's licensees based on the principle that licensees who require the greatest utilization of agency resources pay the greatest annual charges. Since fiscal year (FY) 1991, the NRC has complied with the law by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by the NRC in identifying and determining the fees to be assessed and collected in any given FY.

The NRC is rebaselining its 10 CFR Part 171 annual fees in FY 2021. Compared to FY 2020, the NRC is decreasing annual fees for fuel facilities; non-power production or utilization facilities; most materials users, uranium recovery, and for the U.S. Department of Energy (DOE) Uranium Mill Tailings Radiation Control Act Program. The NRC is increasing annual fees for operating power reactors, spent fuel storage/reactor decommissioning activities, for DOE transportation activities, and for some materials users.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) provides Congress with the opportunity to review agency rules before they go into effect. Under this

legislation, the NRC's annual fee rule is considered a "major" rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective.

The SBREFA also requires that the NRC prepare a written compliance guide to assist small entities in complying with each rule for which a regulatory flexibility analysis is prepared. As required by law, this guide was prepared for FY 2021. The small entity compliance guide is publicly available in the NRC's Agencywide Documents Access and Management System (ADAMS) at ADAMS Accession No. **MLXXXXXXXXXX**. In FY 2021, a biennial review of fees was performed. Accordingly, the small entity fees increase to \$4,900 for the upper-tier fee and \$1,000 for the lower-tier fee. The next regulatory flexibility analysis will be performed during the next small entity biennial review scheduled for FY 2023.

I. Impact on Small Entities.

The NRC's fee rule will result in fees charged to those individuals, organizations, and companies licensed by the NRC, including those licensed under the NRC materials program. The comments received in response to previous proposed fee rules and the small entity certifications indicate that licensees qualifying as small entities under the NRC's size standards are primarily materials licensees. Therefore, this analysis will focus on the economic impact of fees on materials licensees. In FY 2021, approximately 29.5 percent of all licenses under the materials program (approximately 2,528 total program licenses) were held by licensees qualifying as small entities.

To reduce the significance of the annual fees on a substantial number of small entities, the NRC established the maximum small entity fee in FY 1991. In FY 1992, the NRC introduced a second lower tier to the small entity fee. Because the NRC's methodology for small entity size standards has been approved by the Small Business Administration, the NRC did not modify its current methodology for this rulemaking.

In the Staff Requirements Memorandum, dated October 19, 2016, (ADAMS Accession No. ML16293A902) for SECY-16-0097, “Fee Setting Improvements and Fiscal Year 2017 Proposed Fee Rule,” (ADAMS Accession No. ML16194A365), the Commission directed the staff to begin the fees transformation activities listed in SECY-16-0097 as “Process Changes Recommended for Future Consideration—FY 2018 and Beyond.” The NRC has completed 39 of the 40 fees transformation activities.

The one fees transformation activity yet be to completed is the rulemaking to update the NRC’s small business size standards in § 2.810, “NRC size standards.” In FY 2020, the NRC conducted a survey of materials licensees to collect relevant data to help determine the need for changes to the NRC’s small business size standards in § 2.810. In addition, the NRC considered changes in the small business size standards published by the Small Business Administration. On December 7, 2020, the staff submitted SECY-20-0111, “Rulemaking Plan to Amend the Receipts-Based NRC Size Standards,” to the Commission (ADAMS Accession No. ML20268B327) with the staff’s recommendations for amending the NRC’s receipts-based size standards. In the SRM for SECY-20-0111 (ADAMS Accession No. ML21029A186), the Commission approved the staff’s recommendation to initiate a amend the NRC’s small business size standards in §§ 2.810 and 171.16(c) to comply with the Small Business Runway Extension Act of 2018 and related Small Business Administration regulations and to reflect inflation adjustments. The NRC is currently in the process of developing the proposed rule for this rulemaking activity. The NRC will continue to include updates on this rulemaking activity within the FY 2021 and FY 2022 fee rules to ensure that affected licensees are adequately informed. The public can track all NRC rulemaking activities, including the rulemaking on the NRC’s size standards, on the NRC’s Rulemaking Tracking and Reporting system at <https://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/active/RuleIndex.html>, or by Docket ID NRC-2014-0264 at <http://www.regulations.gov>.

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

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

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

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

3. Some companies would go out of business.

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

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

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

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

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

II. Maximum Fee.

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

Since that time, the NRC conducted an in-depth biennial review of the FY 2009 small entity fees. The review noted significant changes between FY 2000 and FY 2008 in both the external and internal environment which impacted fees for NRC's materials users' licensees. Based on that review, the NRC changed the methodology for reviewing small entity fees. As stated in SECY-08-0174, "Fiscal Year 2009 Proposed Fee Rule and Advance Rulemaking for Grid-Appropriate Reactor Fees," dated November 7, 2008, (ADAMS Accession No.

ML083120518), the NRC determined that the maximum small entity fee should be adjusted each biennial year using a fixed percentage of 39 percent applied to the prior 2-year weighted average of materials users' fees for all fee categories which have small entity licensees. The 39 percent was based on the small entity annual fee for 2005, which was the first year the NRC was required to recover only 90 percent of its budget authority. This methodology remains in place; however, the NRC also considers whether or not implementing an increase will have a disproportionate impact on the NRC's small licensees when compared to other licensees. Therefore, the increase for the upper and lower tier fees were capped at a 21 percent increase.

In FY 2021, the NRC staff performed a biennial review using the fee methodology developed in FY 2009 that applies a fixed percentage of 39-percent to the prior 2-year weighted average of materials users' fees. Based on this methodology, the upper tier small entity fee increased from \$4,500 to \$4,900 and the lower-tier fee increased from \$900 to \$1,000. This constitutes a 9 percent and 11 percent increase, respectively. Implementing this increase results in a proportionate impact upon the NRC's small licensees compared to other licensees. Therefore, for FY 2021, the increase for the upper and lower tier fees were not subject to the 21 percent capped increase. The NRC staff will perform a biennial review again in FY 2023.

III. Summary.

The NRC has determined that the 10 CFR Part 171 annual fees significantly impact a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to recover 100 percent of the NRC's budget authority and the requirement to consider means of reducing the impact of the fee on small entities. Based on its regulatory flexibility analysis, the NRC concludes that a maximum annual fee of \$4,900 for small entities and a lower-tier small entity annual fee of \$1,000 for small businesses and not-for-profit organizations with gross annual receipts of less than \$485,000, small governmental jurisdictions with a population of fewer than 20,000, small manufacturing entities that have fewer than 35

employees, and educational institutions that are not State or publicly supported and have fewer than 35 employees, reduces the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of NEIMA. Thus, the fees for small entities maintain a balance between the objectives of NEIMA and the RFA.

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