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PETITION FILE FRM 170-3  
(57 FR 46818)

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DOCKETED  
USNRC

December 22, 1992

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The Honorable Samuel J. Chilk  
Commissioner  
U.S. Nuclear Regulatory Commission  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852

Re: American College of Nuclear Physicians,  
Petition for Rulemaking, Request for Comment  
(57 Fed. Reg. 46818 (Oct. 13, 1992))

Dear Mr. Chilk:

On October 13, 1992, the United States Nuclear Regulatory Commission (NRC) requested comment on a petition for rulemaking filed by the American College of Nuclear Physicians and the Society of Nuclear Medicine (ACNP and SNM) (57 Fed. Reg. 46818 (October 13, 1992)). The ACNP and SNM petition requests that NRC amend its fee regulations to mitigate the adverse impacts experienced by ACNP and SNM members due to the recent increases in fees levied on NRC licensees.

Pursuant to the Federal Register notice referenced above, the American Mining Congress (AMC) hereby submits the following comments in support of the ACNP and SNM petition. These comments are submitted by AMC on behalf of its member companies who are NRC licensees and who are also adversely affected by the current NRC fee regulations. These members include the owners and operators of uranium mills and mill tailings sites and in situ uranium production facilities.

AMC supports the ACNP and SNM petition and believes that it demonstrates the flawed nature of NRC's current fee regulations. These rules impose exorbitant fees on NRC licensees that often exceed the licensee's ability to pay and which bear no relationship to the benefit provided by NRC oversight and regulation. Licensees are left entirely at the mercy of NRC, which to a large extent retains complete ability to determine both the amount and the costs of the regulatory services it deems necessary. There is no assurance that any given regulatory or oversight task performed by NRC will be completed either expeditiously, efficiently or within a reasonable

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range of costs. In effect, NRC has issued itself a blank check to spend the money of its licensees in whatever way it pleases.

The NRC fee regulations were created by NRC in order to implement the Omnibus Budget and Reconciliation Act of 1990, Pub. L. 101-508 ("OBRA") which requires NRC to recover 100 percent of its budget authority (minus allowances for specified expenditures). However, NRC's authority to levy fees under OBRA is not without limits. As AMC has previously noted to NRC, NRC's authority to prescribe fees for regulatory services under 10 C.F.R. 170 derives entirely from the Independent Offices Appropriations Act of 1952 ("IOAA"), 33 U.S.C. § 9701. Under IOAA, a regulatory agency may only assess fees upon those individuals who receive a particularized benefit from the agency. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349-51 (1974). In addition, the magnitude of the fee must be "commensurate with the benefit received." National Cable Television Ass'n v. United States, 415 U.S. 336, 342-43 (1974). Most importantly, a fee must be "reasonably related to and may not exceed the value of the service to the recipient, whatever the agency's costs may be." Central & S. Motor Freight Tariff Ass'n v. United States, 777 F. 2d 772, 729 (D.C. Cir. 1985).

The current NRC fee regulations, issued by NRC on July 23, 1992, (57 Fed. Reg. 32691, 32699 (July 23, 1992)) fail to meet these requirements. For example, NRC has calculated its professional staff cost at \$214,509 per "Full Time Equivalent" resulting in an hourly rate of \$123 per hour. Yet this rate is calculated based on NRC's estimated costs for all of the regulatory "services" it provides during a year and not on the basis of the "value" of these "services" to the licensees. NRC retains complete control over the amount and quality of the "services" it provides and the amount of fees assessed against an individual licensee may well exceed that licensee's available financial resources.

Use of such an hourly rate can only lead to increased NRC oversight fees at a time when the domestic uranium industry is consistently experiencing declining markets and profits. Thus, while there is a smaller and smaller need for NRC oversight and control, and while the domestic uranium industry becomes less and less able to pay for such services, both the amount and cost of these services will undoubtedly increase under the current NRC fees rule. NRC should consider amendments to its current fee regulations that more realistically account for the current conditions experienced by its licensees. Otherwise, the cost of NRC oversight may well exceed the value of the services or products that licensees themselves are seeking to provide.

This problem has not gone unnoticed by Congress. Section 2903(c) of the Federal Energy Policy Act of 1992, instructs NRC to

"review its policy for assessment of annual charges under section 6101(c) of the Omnibus Budget Reconciliation Act of 1990, solicit public comment on the need for changes to such policy and recommend to Congress such changes in existing law as the Commission finds are needed to prevent the placement of an unfair burden on certain licensees of the Commission..."

Id. Thus, Congress has already explicitly instructed NRC to review its fee regulations with an eye toward eliminating unfair burdens.

The ACNP and SNM petition provides an excellent example of the way in which the current NRC fee regulations impose unfair burdens on certain NRC licensees. As noted in the petition, fees for nuclear physicians have increased by approximately 1400 percent and this has forced more than 400 nuclear medicine licensees to terminate their licenses. 57 Fed. Reg. 46818, 46819 (October 13, 1992).

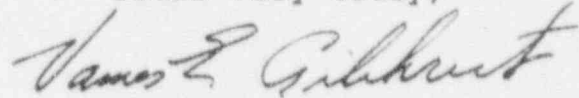
Under the new fee regulations, AMC members have experienced similar fee increases and it is apparent that such increases are likely to continue unabated if the current NRC fee rules remain in place. Few, if any, industries (especially those facing stiff international competition for a declining market) can withstand such steep fee increases -- particularly where licensees lack any ability to predict or control the amount of fees that will be assessed against them in the years to come.

AMC supports the ACNP and SNM petition and urges NRC to reassess its overall approach to its fee regulations. Although NRC is operating under a statutory mandate to recover its costs, it need not do so in a way that will inevitably lead to an overall inflation of its operating expenses. Congress has in fact recognized the dilemma that NRC now finds itself in and explicitly asked NRC to review the problem. AMC believes that many of its members who are impacted by the fee rules may not be able to survive under the current fee regime. These members will be forced to seek relief of some kind if the situation remains unchanged.

AMC appreciates the opportunity to comment on the ACNP and SNM petition. AMC believes that it is possible for NRC to meet its statutory obligations under OBRA without imposing unfair burdens on particular classes of NRC licensees. AMC looks forward to working with NRC to achieve such a result.

Thank you for considering these comments. If you have any questions or require assistance, please contact me at 202/861-2876 or AMC's counsel, Anthony J. Thompson of Perkins Coie at 202/628-6600.

Yours very truly,

A handwritten signature in cursive script, reading "James E. Gilchrist".

James E. Gilchrist  
Vice President  
Environmental Affairs