



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

PDR
AF55-2

May 5, 1997

MEMORANDUM FOR: Jesse L. Funches
Chief Financial Officer

FROM: David L. Meyer, Chief *W-L Meyer*
Rules and Directives Branch
Division of Administrative Services
Office of Administration

SUBJECT: OFFICE CONCURRENCE ON RULE ENTITLED
"REVISION OF FEE SCHEDULES; 100% FEE
RECOVERY, FY 1997"

The Office of Administration concurs on the final rule that amends Parts 170 and 171. We have attached a copy of the package that presents our comments.

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 6.1 as part of the transmittal package. The diskette will be forwarded to the Office of the Federal Register 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 "AF55-2" in the upper right-hand corner of each document concerning the final rule that you forward to the Nuclear Document System.

If you have any questions, please contact Alice Katoski, 415-6862, or Michael Lesar, 415-7163, Division of Administrative Services.

Attachment: As stated

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN: 3150-AF 55

Revision of Fee Schedules; 100% Fee Recovery, FY 1997

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), which mandates that the NRC recover approximately 100 percent of its budget authority in Fiscal Year (FY) 1997 less amounts appropriated from the Nuclear Waste Fund (NWF). The FY 1997 NRC Appropriation also excluded from the fee base the cost of NRC review relating to the commercial vitrification of waste stored at the Department of Energy Hanford, Washington, site. The amount to be recovered for FY 1997 is approximately \$462.3

assessed for FY 1996 were adopted by the NRC. These changes were highlighted in the final rule (61 FR 16203; April 12, 1996) and ~~bear on~~^{affect} the approach for establishing annual fees set forth in this final rule for FY 1997.

On February 27, 1997 (62 FR 8885), the NRC published a proposed rule to establish the licensing, inspection, and annual fees necessary for the NRC to recover approximately 100 percent of its budget authority for FY 1997, less the appropriation received from the Nuclear Waste Fund and the General Fund. These changes were highlighted in the proposed rule (62 FR 8885; February 27, 1997) and have been adopted in this final rule for FY 1997. The major changes are summarized as follows:

1. Stabilize 10 CFR 171 annual fees by adjusting all annual fees upward by about 8 percent. This change is consistent with the NRC's intention stated in the FY 1995 final rule. ^{The NRC indicated} that, beginning in FY 1996, annual fees would be stabilized by adjusting prior year annual fees by the percent change (plus or minus) in the NRC budget authority taking into consideration the estimated collections from 10 CFR Part 170 fees and the number of licensees paying fees;
2. Establish and assess a new annual fee of \$2,600,000 (fee Category 1.E.) for each Certificate of Compliance issued to the United States Enrichment Corporation.

3. Revise the two professional hourly rates in §170.20 which are used to determine the 10 CFR Part 170 fees assessed by the NRC. The rate for FY 1997 for the reactor program is \$131 per hour and the rate for the materials program is \$125 per hour.
4. Adjust the current licensing and inspection fees in §§170.21 and 170.31 for applicants and licensees to reflect both the changes in the revised hourly rates and the results of the review required by the Chief Financial Officers Act.
5. Implement a procedural change whereby fees will be assessed under §§170.21 and 170.31 to verify quality assurance, safeguards, contingency and emergency plan changes submitted by licensees. *

II. Responses to Comments

The NRC received nine comments on the proposed rule. Although the comment period ended on March 31, 1997, the NRC has reviewed and evaluated all comments received, including those ~~that were late.~~

2 submitted
after that
date.

Several of the comments were similar in nature. For evaluation purposes, these comments have been grouped, as

appropriate, and addressed as single issues in this final rule.

The comments are as follows:

A. Comments regarding the major changes proposed in the FY 1997 fee rule.

1. Streamline and stabilize annual fees.

Comment. Commenters continue to support the positive steps taken by the NRC to equitably distribute and to reduce the burden of user fees on licensees. Two commenters ^{who} ~~representing~~ nuclear power plants ^{argue} that the annual fees being charged to power plant licensees, and particularly the 8% ^{percent} increase in those fees proposed for 1997, are inconsistent with statutory requirements.

The commenters argue In particular, that ~~section 2214(b) of Title 42 of the U.S. Code~~ ^{42 U.S.C.} requires, without exception, that every

recipient of a definite service from the NRC should pay 10 CFR Part 170 fees. The statute says that "any person who receives a service or thing of value from the Commission shall [emphasis added] pay fees to cover the Commission's costs in providing any such service or thing of value." 42 U.S.C. 2214(b). The

commenters believe that the word "shall" means that the agency has no authority not to charge 10 CFR Part 170 fees to parties ^{that}

who receive benefits from the agency. The result, they argue, of the ~~agency's~~ ^{NRC} not charging all beneficiaries is a fee system that

charges nuclear power plants for services provided to others, and *Therefore, the NRC fee system*
~~this~~ fails to meet the statutory requirement that, "[t]o the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services" to licensees. 42 U.S.C. 2214(c)(3). As evidence that this statutory requirement has been violated, the commenters argue that the 8% *percent* increase in annual fees in FY 1997 is due largely to a projected, and unexplained, reduction in 10 CFR Part 170 fees charged to persons and entities other than power reactor licensees and is thus unrelated to the costs of regulating nuclear power reactors. The commenters believe that the agency should replace the proposed rule with one that charges everyone who receives a service from the agency the cost of providing that service.

Response. The NRC readily acknowledges the commenters' concerns for fairness and equity. As the Commission has explained many times previously, to recover approximately 100 percent of its budget authority in fees a portion of the annual fee paid by power reactors recovers the costs of services rendered by the NRC which are not attributable to the costs of regulating nuclear power plants (cite).

must be provided

However, the NRC believes the current fee system is as fair and equitable as the current statutory structure underlying the agency's fee system will permit. For example, the agency is

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barred by law from charging all but two ^Federal agencies 10 CFR Part 170 fees; not all the work which the NRC does for other agencies and governments can be recovered through reimbursable agreements (see 60 ^{FR}~~Fed. Reg.~~ 32218, 32222; ^o(June 20, 1995)), and yet that work is necessary for public health and safety and U.S. national interests; under the Regulatory Flexibility Act, the agency is obliged to consider carefully the impact of its fee rules on small entities and to seek less onerous alternatives.

Such exemptions from fees as the NRC has granted are of long-standing and well-founded in law, and have been granted only after full and public consideration of the relevant policy questions. Section 2214(b) of Title 42 of the U.S. Code may say that beneficiaries of the agency's work "shall" pay fees to cover its costs, but, as a matter of jurisprudence, laws that use the word "shall" do nonetheless admit of exceptions. ^o were this not so, the exemption provisions in the ^{NRC}agency's safety rules, for example 10 CFR 50.12, would be invalid, ^{because} since they provide for exemptions from rules that use the word "shall". More particularly, as the agency said in response to similar arguments advanced by comments on the FY 1991 rule, the agency is not required to assess fees to every beneficiary of its work. For example, OMB Circular No. A-25, which contains government-wide policy guidance for the IOAA, states, in item 5.(b).(3)., that an agency can exempt fees for recipients engaged in nonprofit activity designed for the public health, safety, and welfare.

Moreover, the statute underlying the agency's annual fees states that "any licensee of the Commission may [emphasis added] be required to pay ... an annual charge." (42 U.S.C. 2214(c)(1).) See 56 ^{FR} ~~Fed. Reg.~~ 31472, 31474; (July 10, 1991).

The 8 ^{percent} increase in annual fees for power reactors, about which the commenters are understandably concerned, was fully explained in the statement of considerations accompanying the proposed rule. See Part II, Section B and Table 1 in 62 ^{FR} ~~Fed. Reg.~~ 8885, 8887; ^{at} (February 27, 1997). As the discussion ~~there~~ shows, the increase is nonetheless neither arbitrary or capricious. To recap briefly, the increase is the result of several factors: a substantial reduction in projected 10 CFR Part 170 fees, largely because reductions in resources devoted to reviews of applications for standard plant reviews and reactor operating licenses; a reduction in the number of licensees paying annual fees, largely the result of one reactor's having ceased operations permanently and the reassignment to Massachusetts ^{effective March 31, 1999} ~~later this year~~ of regulatory responsibility for some 425 ^(62 FR 16628; April 7, 1997) licensees; several million dollars less in excess collections ^{from} ~~from~~ FY 1995 that were available to reduce FY 1996 annual fees; a small increase in the amount by which small entity fees are reduced; and a greater allowance for unpaid bills, to help assure that the agency will meet its obligation to collect 100 percent of its budget.

While the ^{NRC} agency believes that its current fee structure is fully justified by law and policy, ^{it} the agency remains committed to working with Congress to reduce the fee burdens that power plant licensees bear because they pay for regulatory activities that do not directly benefit them. Three years ago, the ~~agency~~ ^{NRC} submitted a report to Congress that recommended ^{the} enactment of legislation that would reduce the amount to be recovered from fees from 100 percent of the NRC budget to about 90 percent, thus eliminating the surcharge ^{imposed on} the power plant ^{and some other} licensees, ~~and some~~ ~~others, bear~~ because some parties receive benefits for which they do not pay. In the near future, the NRC will be updating that report and reassessing the need for legislation.

This final rule adopts the methodology to streamline and stabilize FY 1997 annual fees by adjusting these fees by the percentage change (plus or minus) in NRC's total budget authority. The FY 1996 annual fees have been used as base annual fees and these annual fees have been adjusted upward for FY 1997 based on the percentage change in the NRC's budget authority, taking into consideration the total number of licensees paying fees and estimated collections from 10 CFR Part 170 licensing and inspection fees. Therefore for FY 1997, all annual fees have been adjusted about 8 percent above ~~for~~ FY 1996 levels.

2. Revise the two professional rates in 10 CFR 170.20 based on the FY 1997 budget and adjust the 10 CFR 170.21 and 170.31 licensing (application and amendment) "flat" fees for licenses to

reflect the costs of providing the licensing services.

P a. Comment. Commenters supported the revised method of calculating two hourly rates adopted by NRC in FY 1995 to separately, and more equitably, allocate costs associated with the reactor program and the materials program. ^{However,} one commenter was concerned, ~~however,~~ that the increase in hourly rates from last year exceeds the general increase that was provided to all government workers in January 1996. The commenter encouraged the NRC to control its costs by seeking efficiencies in these areas to attain a downward trend of licensing and inspection fees. Another commenter indicated that the hourly rate will increase almost five percent (\$120 per hour to \$125 per hour) and believes the hourly rate is unjustifiably high and does not reflect the cost of providing regulatory services to licensees. The commenter stated that the \$125 hourly rate equals or exceeds the hourly charges of senior consultants or principals at major consulting firms, and that it exceeds the generally accepted rate for similar work in private industry. The commenter requests that, with hourly rates as high as \$125, the NRC continue its efforts to provide bills that contain more meaningful descriptions of the work done.

Response. ~~Consistent with the comments,~~ the NRC has established in this final rule two professional hourly rates for FY 1997 which will be used to determine the 10 CFR Part 170 fees.

A rate of \$131 per hour is established in \$170.20 for the reactor program and a second rate of \$125 per hour is established in \$170.20 for the nuclear materials and nuclear waste programs. The two rates are based on the "cost center" concept that is now being used for budgeting purposes.

The NRC professional hourly rates are established to recover approximately 100 percent of the agency's Congressionally-approved budget, less the appropriation from the Nuclear Waste Fund (NWF), and the General Fund. The rates reflect the NRC budgeted cost per direct professional hour. This cost includes the salary and benefits for the direct hours, ~~and~~ a prorata share of the salary and benefits for the program ~~and~~ agency overhead ⁷ and agency general and administrative expenses (e.g., rent, supplies, and information technology). Both the method and budgeted costs used by the NRC in the development of the hourly rates of \$131 and \$125 are discussed in detail in Part III, Section-by-Section Analysis, relating to \$170.20 of the proposed rule (62 FR 8888; February 27, 1997) ~~and~~ the same section of this final rule. For example, Table II shows the budgeted costs and the direct FTEs that must be recovered through fees assessed for the hours expended by the direct FTEs. The budgeted costs as well as the direct resources are those required by the NRC to implement its statutory responsibilities and effectively accomplish the mission of the agency. Additional information on the hourly rates is provided in the NRC workpapers located in the

Public Document Room. The specific details regarding the budget for FY 1997 are documented in the NRC's publication "Budget Estimates, Fiscal Years 1997" (NUREG-1100, Volume 12), which is available to the public. Copies of NUREG-1100, Volume 12, may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20402-9328.

Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC 20555-0001. The NRC will continue its current practice of providing available backup data to support 10 CFR Part 170 licensing and inspection billings upon request by the licensee or applicant.


*P*b. Comment. One commenter indicated that although they appreciate NRC's efforts to stabilize fees based on percentage changes in NRC's annual budget, they have concerns about the lack of a reasonable relationship between the cost to uranium recovery licensees of NRC's regulatory program and the benefit derived from such services. The commenters assert that the Commission cannot impose fees under the IOAA unless there is a rational relationship between the fees and the regulatory services provided. The commenters, citing Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985), note that in applying this IOAA requirement, the fees

the court in Central & S Motor Freight Tariff Ass'n, supra. There the court held that fees should be a reasonable approximation of the attributable costs ^{that} ~~which~~ the Commission identifies as being expended to benefit the recipient. The Court suggested that a fee might be questionable if the fee unreasonably exceeds the value of the specific services for which it is charged. Here the services provided by the NRC are required for licensees to maintain their licenses and the benefits derived therefrom. The basis for the revised hourly rates is fully discussed in NRC's response to comment A.2.a. which relate to the hourly rates being assessed by NRC under 10 CFR Part 170. The commenter has provided virtually no evidence that could cause the NRC to conclude that its fees unreasonably exceed the value of the services rendered.

In FY 1995, the NRC changed the methodology for allocating those budgeted costs (about 10 percent of the NRC budget authority) that cause fairness and equity concerns because the legislation requested by the NRC had not been passed by the Congress (60 FR 32218; June 20, 1995). These costs, which include the cost of the Agreement State oversight and regulatory support to the Agreement States, are now treated in a manner similar to overhead. These costs are distributed based on the percentage of the budget directly attributable to a class of licensees. Commenters at that time supported this method of allocation as being more equitable, pending legislative relief by

United States Enrichment Corporation.

P a. Comment. The United States Enrichment Corporation (USEC) commented that the annual fee of \$2,600,000 which have been proposed for the first time for each of the two enrichment facilities are not fair and equitable when compared to those imposed on similar facilities regulated by the NRC. The rationale for this as expressed in the NRC's proposed rule is an unsupported assertion that the relative weighted safety and safeguards factors for USEC's facilities are similar to a high enriched uranium facility. USEC believes this rationale is incorrect, unsupported by the facts, and contradictory to the NRC's own licensing actions. USEC indicates that the NRC has, in fact, certified USEC's gaseous diffusion plants (GDPs) as low enriched uranium facilities and, as part of that licensing action, the NRC has approved safeguards measures appropriate for low enriched uranium facilities and has not imposed the safeguards measures required at high enriched facilities possessing strategic special nuclear material. USEC indicates that, in accordance with the joint statement of understanding between the NRC and the Department of Energy (DOE), DOE is solely responsible for any strategic special nuclear material which may be located at the Portsmouth, OH, GDP and that the presence of any such high enriched uranium at the Portsmouth GDP is not relevant to the NRC's fee-setting process. USEC states that the NRC methodology for determining annual fees for major fuel facilities, presented

in the June 20, 1995, Federal Register, clearly states that the issued license is the source for determining authorized nuclear material and use/associated activity and is the determining factor in placing a licensee into one of the five fuel facility license fee categories created in the NRC's methodology. USEC ~~Arques~~ *Arques*  that the GDPs are clearly in the low enriched fuel category on the basis of the issued licenses (certificates) and not in the high enriched-fuel category. USEC states that the NRC's proposal to put the GDPs into the same fee category as high enriched fuel facilities has not been justified by the cited NRC methodology and appears to be arbitrary and that the NRC has provided no basis for its conclusion that the relative weighted safety and safeguards factors for the GDPs are similar to a high enriched uranium facility. USEC states that the annual fee for the GDPs should be the same as that set for other low enriched facilities, \$1,276,000 annually.

Response NRC does not dispute that the GDPs have been certified as low enriched uranium facilities with corresponding safeguards measures for category III facilities. NRC recognizes that DOE maintains sole regulatory responsibility for strategic special nuclear material that may be located at the Portsmouth GDP. The NRC methodology for determining annual fees for major fuel facilities, published in the June 20, 1995 *60* FR 32218; 32234, does state that the issued license is the source for determining authorized nuclear material and use/associated

enriched fuel facilities. The large size and scope of the GDP operations require substantially more effort for the development of inspection procedures, guidance, and schedules. This large size and scope is also expected to result in a higher number of reportable events that NRC staff must review.

The complexity, higher potential accident consequences, and large size and scope of the GDP operations require the NRC to provide generic regulatory programmatic effort that is of a scope, depth of coverage, and rigor equivalent to that for a high enriched fuel facility. This level of generic effort is the basis for assigning the two GDPs to the high enriched fuel facility category for the purpose of determining and assessing annual fees in FY 1997.

H b. Comment. USEC also indicated that based on the March 16, 1993, D.C. Court of Appeals decision to grant Combustion Engineering an exemption from fees for one of its two low enriched uranium plants located in Hematite, Missouri and Windsor, Connecticut, it too deserves to be considered for an exemption because it is not operationally equivalent to the plants run by the full scope fuel fabricators. Therefore, the commenter requests that the NRC reconsider the implication of the Court's holding with respect to the disproportionate allocation of its costs under 10 CFR 171.11(d), especially as the allocation of these costs adversely impacts the licensee.

1. Eliminate the application fee for uranium enrichment facilities.

Comment. One commenter noted that an application fee of \$125,000 is required to accompany an application to construct and operate a uranium enrichment facility (\$170.31, fee Category 1.E.) and stated that the application fee is assessed in addition to the "full cost" to process the application. The commenter requests that the application fee for uranium enrichment facilities be eliminated to achieve fee equity among all materials licensees.

Response. ^{Section} \$170.31, fee Category 1.E. of the Commission's regulations was established on June 1, 1992 (57 FR 18388). The change in the fee regulations was made to reflect changes made to the Atomic Energy Act of 1954 (as amended) by the Solar, Wind, Waste and Geothermal Power Production Incentives Act of 1990. The principal effect of these amendments is that uranium enrichment facilities will be licensed subject to the provisions of the Act pertaining to source and special nuclear material rather than under the provisions pertaining to a production facility. Previous to June 1992, uranium enrichment facilities were treated for fee purposes under \$170.21, the fee regulation that relates to reactors and other production and utilization facilities. As a result of the conforming changes made June 1, 1992, to the NRC's regulations, the category relating to uranium

Response. The need for legislation is beyond the scope of this rulemaking proceeding. As indicated in the FY 1996 final rule (61 FR 16203; April 12, 1996), the NRC will continue to work with the Congress to make fees more fair and equitable. As part of its Strategic Assessment and Rebaselining initiative, the Commission considered issues associated with fees. After evaluation of comments from stakeholders, the Commission concluded that in order to make annual fees more fair and equitable for all NRC licensees, the Commission must seek Office of Management and Budget and Congressional authorization to remove certain NRC activities that do not directly benefit NRC licensees from the fee base and instead fund those activities from non fee-based appropriations or separate appropriations. To this end, the Commission has requested the ^{NRC} staff to prepare an update to its February 1994 report ~~that was sent~~ to Congress on this matter. This ~~report~~ update will consider changes that have occurred or clearly will occur since the Commission issued the 1994 report to Congress.

4. Fees based on other factors.

Comment. One commenter, while understanding the need for NRC to be financially self-sufficient, was concerned about the effect of an 8 percent increase in annual fees on rural hospitals. The commenter states that the annual fees should be revised to take into account the small, low procedure volume, one

room, one camera, diagnostic nuclear medicine department who pays the same annual fee as a large metropolitan hospital. Another commenter indicated, ~~however~~, that the NRC's intention to continue small entity and lower tier small entity fees based on market volume (gross annual receipts) is necessary and proper in order to aid in the survival of small firms.

Response. The issue of basing fees on the amount of material possessed, the frequency of use of the material, the size of the facilities, and market competitive positions, was addressed by the NRC in previous rules and in the Regulatory Flexibility Analysis in Appendix A to the final rule published July 10, 1991 (56 FR 31511-31513). The NRC did not adopt that approach because it would require licensees to submit large amounts of new data and would require additional NRC staff to evaluate the data submitted and to develop and administer even more complex fee schedules. The NRC continues to believe that uniformly allocating the generic and other regulatory costs to the specific licensee within a class to determine the amount of the annual fee is a fair, equitable, and practical way to recover those costs and that establishing reduced annual fees based on gross receipts (size) is the most appropriate approach to minimize the impact on small entities. Therefore, NRC finds no basis for altering its approach at this time. This approach was upheld by the D.C. Circuit in its March 16, 1993, decision in Allied-Signal.

Third, the NRC has adjusted the current Part 170 licensing and inspection fees in §§170.21 and 170.31 for applicants and licensees to reflect both the changes in the revised hourly rates and the result of the review required by the Chief Financial Officers (CFO) Act. To comply with the requirements of the CFO Act, the NRC has evaluated historical professional staff hours used to process a licensing action (new license and amendment) for those materials licensees whose fees are based on the average cost method (flat fees). This review also included new license and amendment applications for import and export licenses.

Evaluation of the historical data shows that the average number of professional staff hours needed to complete materials licensing actions be increased in some categories and decreased in others to reflect the costs incurred in completing the licensing actions. Thus, the revised average professional staff hours reflect the changes in the NRC licensing review program that have occurred since FY 1995. The licensing fees are based on the revised average professional staff hours needed to process the licensing actions multiplied by the nuclear materials professional hourly rate for FY 1997 of \$125 per hour. The data for the average number of professional staff hours needed to complete licensing actions were last updated in FY 1995 (60 FR 32218; June 20, 1995). For new materials licenses, the licensing fees for FY 1997 are increased in approximately 70 percent of the categories, while the proposed fees for materials amendments will increase in over 60 percent of the categories.

In addition to the ^{sc}~~above rule~~ changes, the NRC is clarifying how it would recover the costs of post-implementation reviews of changes licensees make without prior NRC review; for example, changes under §§50.54, 50.59 and 70.32. Licensees will be billed for post-implementation review of these changes under §§170.21 and 170.31, beginning with the effective date of the FY 1997 final fee rule. There will be no change in how fees are assessed

Donegani for any pre-implementation interactions, including any review prior to licensee submissions, between NRC and licensees. As in the past, any pre-implementation interaction will not be fee bearing. The NRC informed reactor licensees on May ____, 1997, that their submittals under §50.54(a), (p) and (q) should not ask for pre-implementation reviews. Instead, licensees are required to perform their analyses, implement their changes (if the analyses show that the changes do not degrade plans the NRC has already approved), and make their submittals under the relevant subsection of §50.54. The NRC will then verify that the changes are in compliance with §50.54.

In summary, the NRC has:

- (1) Revised the two 10 CFR Part 170 hourly rates;
- (2) Revised the licensing (application and amendment) fees assessed under 10 CFR Part 170 in order to comply with the CFO Act's requirement that fees be revised to reflect the cost to the agency of providing the service;
- (3) Added a provision to the regulations exempting from 10 CFR Part 170 fees certain amendments to materials portable gauge licenses issued in accordance with NUREG-1556 Volume 1; and
- (4) Changed the procedure whereby charges under Part 170 will be made for post-implementation quality assurance plan, safeguards contingency plan and emergency plan changes.

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.

Because the total amount estimated for recovery through fees in FY 1997 is the same as the amount for FY 1996, establishing new baseline fees is not warranted for FY 1997. While the total amount to be collected is the same, the distribution between Part 170 and 171 fees would change. In FY 1996, 26% was estimated to be collected from 10 CFR Part 170 fees. This decreases to 21% in FY 1997. Therefore, to recover 100 percent of the budget, 10 CFR Part 171 annual fees must increase in FY 1997 compared to FY 1996. The NRC is establishing the FY 1997 annual fees for all licensees at a level of 8.2 percent above the FY 1996 annual fees. The 8.2 percent increase results primarily from a reduction in the amount of the budget recovered for 10 CFR Part 170 fees, a reduction in other offsetting adjustments, and reduction in the number of licensees paying annual fees. In addition, the NRC has made adjustments to recognize that all fees billed in a fiscal year are not collected in that year. Table I shows the total budget and amounts of fee billed and collected for FY 1996 and FY 1997.

TABLE I

Calculation of the Percentage Change to the FY 1996 Annual Fees

	(Dollars in Millions)	
	<u>FY96</u>	<u>FY97</u>
Total Budget	\$473.3	\$476.8
Less NWF	-11.0	-11.0
Less General Fund (Hanford Tanks)	<u>---</u>	<u>-3.5</u>
Total Fee Base	\$462.3	\$462.3
Less Part 170 Fees	114.5	96.0
Less other receipts	<u>6.0^{1/}</u>	<u>----</u>
Part 171 Fee Collections Required	\$341.8	\$366.3
<u>Part 171 Billing Adjustments^{2/}</u>		

Small Entity Allowance	4.9	5.0
Unpaid FY 1997 bills		3.0
Payments from prior year bills	<u>---</u>	<u>-2.0</u>
Subtotal	<u>4.9</u>	<u>6.0</u>
Total Part 171 Billing	\$346.7	\$372.3

^{1/} \$6 million in excess collections from FY 1995 were available to reduce FY 1996 annual fees.

^{2/} These adjustments are necessary to ensure that the "billed" amount results in the required collections. Positive amounts indicate amounts billed that will not be collected in FY 1997.

As shown in Table I, the total amount of annual fees to be billed in FY 1997 is \$25.6M (\$372.3-\$346.7) or 7.4 percent higher than the amount that was to be billed in annual fees in FY 1996. The NRC notes that the reduction in the estimates of 10 CFR Part 170 fees for FY 1997 is primarily in the areas relating to the review of applications for reactor operating licenses and the review of standard plant applications. In addition, for the first time the estimates take into consideration an allowance for bad debt by estimating billings in the fiscal year that are not projected to be collected in that fiscal year and collections received in the current fiscal year as a result of billings from a prior fiscal year. These adjustments to the annual fees will allow the NRC to come closer to meeting its obligation to recover approximately 100 percent of its budget authority through the assessment of fees.

In addition to changes in 10 CFR Part 170 fees and other adjustments, the number of licensees to pay fees in FY 1997 has decreased compared to FY 1996. This decrease in the number of licensees paying fees causes annual fees to increase by an

additional 0.8 percent. For example, the Haddam Neck power reactor ceased operations in December 1996 and the fuel has been permanently removed from the reactor. Therefore, the utility will pay only a partial annual fee in FY 1997. In addition, Massachusetts became an Agreement State on March 21, 1997 and ^{as} approximately 425 NRC licenses ~~were~~ transferred to Massachusetts. *Regulatory authority on* These licenses will pay only one half of the annual fee for FY 1997.

Third, an annual fee is established in §171.16(d), fee Category 1.E., for each certificate of compliance issued to the United States Enrichment Corporation (USEC) on November 26, 1996, to operate the two gaseous diffusion plants (GDPs) located at Paducah, Kentucky and at Piketon, Ohio. The NRC assumed regulatory jurisdiction over the two plants from the U.S. Department of Energy (DOE) on March 3, 1997.

Fourth, Footnote 1 of 10 CFR 171.16(d) is amended to provide for a waiver of annual fees for FY 1997 for those materials licensees, and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 1996, and permanently ceased licensed activities entirely by September 30, 1996. All other licensees and approval holders who held a license or approval on October 1, 1996, are subject to FY 1997 annual fees. This change is being made in recognition of the fact that since the final FY 1996 rule was published in April 1996, some licensees have filed requests for termination of their licenses or certificates with the NRC. Other licensees have either called or written to the NRC since the FY 1996 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. However, the NRC was unable to respond and take action on all such requests before the end of the fiscal year on

are adjusted for FY 1997 to reflect both the increase in the hourly rate and the revised average professional staff hours needed to process certain types of licensing actions.

For those applications currently on file and pending completion, footnote 2 of \$170.21 is revised to provide that professional hours expended up to the effective date of the final rule will be assessed at the professional rates in effect at the time the service was rendered. For topical report applications currently on file that are still pending completion of the review, and for which review costs have reached the applicable fee ceiling established by the July 2, 1990⁷ 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, which are based on full-cost recovery, are modified to recover the FY 1997 costs incurred by the NRC in providing licensing and inspection

The amounts of the materials licensing "flat" fees were rounded off so that the amounts would be de minimis and the resulting flat fee would be convenient to the user. Fees that are greater than \$1,000 but are less than \$100,000 are rounded to the nearest \$100. Fees that are greater than \$100,000 are rounded to the nearest \$1,000. Fees under \$1,000 are rounded to the nearest \$10.

For those licensing, inspection, and review fees that are based on full-cost recovery (cost for professional staff hours plus any contractual services), the materials program hourly rate of \$125, as shown in \$170.20, apply to those professional staff hours expended on or after the effective date of the final rule.

In addition to the ^{sc}~~above rule~~ changes, the NRC is clarifying how it would recover the costs of post-implementation reviews of changes licensees make without prior NRC review; for example, changes under \$50.54, 50.59 and 70.32. Licensees will be billed for post-implementation reviews of these changes under \$170.21 and 170.31, beginning with the effective date of the FY 1997 final fee rule. There will be no change in how fees are assessed for any pre-implementation interactions including any review prior to licensee submissions, between the NRC and licensees. As in the past, any pre-implementation interaction will not be fee-bearing. The NRC informed reactor licensees on May __, 1997, that their submittals under \$50.54(a), (p) and (q) should not ask

for pre-implementation reviews. ⁰ Instead, licensees are required to perform their analyses, implement their changes (if the analyses show that the changes do not degrade plans the NRC has already approved), and make their submittals under the relevant ^{paragraph} ~~subsection~~ of \$50.54. The NRC will then verify that the changes are in compliance with \$50.54.

Part 171

Section 171.13 Notice.

The language in this section is revised to indicate that in the unlikely event the NRC is unable to publish a fee rule with an effective date within the current fiscal year, ^{re} ~~then~~ the NRC will continue to assess fees at the same rates as the previous fiscal year. The NRC believes that it will be able to publish an effective fee rule within a current fiscal year as it has done since FY 1991 when 100 percent fee recovery was initiated. However, the possibility exists that the NRC might be unable to establish fees for a current fiscal year through the notice and comment process. Therefore, as a contingency plan for meeting the requirement of OBRA-90, the NRC is amending §171.13 to indicate that if the NRC is unable to promulgate a final fee rule within a current fiscal year, then fees will continue to be assessed at the same rates as the previous fiscal year. The NRC will continue to work diligently to publish the fee rules at the

3.P.; 4.A. through 9.D., and 10.B. For annual fee purposes, the anniversary date of the materials license is considered to be the first day of the month in which the original materials license was issued. For example, if the original materials license was issued on June 17 then, for annual fee purposes, the anniversary date of the materials license is June 1 and the licensee would continue to be billed in June of each year for the annual fee in effect on June 1. Materials licensees with anniversary dates in FY 1997 before the effective date of the FY 1997 final rule will be billed during the anniversary month of the license and continue to pay annual fees at the FY 1996 rate in FY 1997. Those materials licensees with license anniversary dates falling on or after the effective date of the FY 1997 final rule would be billed, at the FY 1997 revised rates, during their anniversary month of their license and payment would be due on the date of the invoice.

During the past six years, many licensees have indicated that, although they held a valid NRC license authorizing the possession and use of special nuclear, source, or byproduct material, they were either not using the material to conduct operations or had disposed of the material and no longer needed the license. In response, the NRC has consistently stated that annual fees are assessed based on whether a licensee holds a valid NRC license that authorizes possession and use of radioactive material. Whether or not a licensee is actually conducting operations using the material is a matter of licensee discretion. The NRC cannot control whether a licensee elects to possess and use radioactive material once it receives a license from the NRC. Therefore, the NRC reemphasizes that the annual fee will be assessed based on whether a licensee holds a valid NRC license that authorizes possession and use of radioactive material. To remove any uncertainty, the NRC issued minor clarifying amendments to 10 CFR 171.16, footnotes 1 and 7 on July 20, 1993 (58 FR 38700).

manufacturing license for a facility or the procedures or organization required to design, construct or operate a facility.

Insert
39A

List of Subjects

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.

10 CFR Part 171 -- Annual charges, Byproduct material, Holders of certificates, registrations, approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

and 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^{ing} 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 continues 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, Pub. L. 93-4381, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205, Pub. L. 101-576, 104 Stat. 2842, (31 U.S.C. 901).

2. In §170.11, paragraph (a)(11) is added to read as follows:

INSERT 59A

X. Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996 the NRC has determined that this action is a major rule and has verified this determination with the Office of Information and Regulatory Affairs of ~~OPE~~.

(the Office of Management and Budget

educational institutions, and costs that would not be collected from small entities based on Commission policy in accordance with the Regulatory Flexibility Act.

* * * * *

(e) The FY 1997 annual fees for licensees authorized to operate a nonpower (test and research) reactor licensed under Part 50 of this chapter, except for those reactors exempted from fees under §171.11(a), are as follows:

Research reactor	\$57,200
Test reactor	\$57,200

(f) For FY 1997 and FY 1998, annual fees for operating reactors will be calculated and assessed in accordance with §171.13 ~~of this section.~~

9. In §171.16, the introductory text of paragraph (c) and paragraphs (c)(1), (c)(4), (d), and (e) are revised to read as follows:

§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.

* * * * *

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification, the licensee may pay reduced annual fees for FY 1997 as follows:

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

2/ For FY 1998, fees for these materials licenses will be calculated and assessed in accordance with §171.13 and will be published in the Federal Register for notice and comment.

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

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

4/ Standardized spent fuel facilities, ^{10 CFR} Parts 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

(SDMP) activities; and

(3) Activities not currently assessed under 10 CFR Part 170 licensing and inspection fees based on existing law or Commission policy, e.g., reviews and inspections conducted of nonprofit educational institutions and Federal agencies; activities related to decommissioning and reclamation and costs that would not be collected from small entities based on Commission policy in accordance with the Regulatory Flexibility Act.

* * * * *

10. In §171.17, introductory text, paragraphs (a) (b) introductory text, and (b) (1) are revised to read as follows:

§171.17 Proration.

Annual fees will be prorated for NRC licensees as follows:

(a) Reactors. The annual fee for reactors (power and nonpower) that are subject to fees under this part and are granted a license to operate on or after October 1 of a Fiscal Year is prorated on the basis of the number of days remaining in the fiscal year. Thereafter, the full fee is due and payable each subsequent fiscal year. Licensees who have requested amendment to withdraw operating authority permanently during the

in the next available monthly billing for the fee in effect on the anniversary date of the license. Thereafter, annual fees for new licenses will be assessed in the anniversary month of the license.

Dated at Rockville, Maryland, this ____ day of _____,
1997.

For the Nuclear Regulatory Commission.

Jesse L. Funches
Chief Financial Officer.

X

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, as amended, (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 (RFA), first 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). On April 7, 1994 (59 FR 16513), the Small Business Administration (SBA) issued a final rule

regulations in 10 CFR Parts 170 and 171 in FY 1991 (56 FR 31472; July 10, 1991) in FY 1992, (57 FR 32691; July 23, 1992) in FY 1993 (58 FR 38666; July 20, 1993) in FY 1994 (59 FR 36895; July 20, 1994) in FY 1995 (60 FR 32218; June 20, 1995) and in FY 1996 (61 FR 16203) ^{April 12, 1996} based on a careful evaluation of over 1,000 comments. These final rules established the methodology used by NRC in identifying and determining the fees assessed and collected in FYs 1991-1996.

The NRC indicated in the FY 1995 final rule that it would attempt to stabilize annual fees as follows. Beginning in FY 1996, it would adjust the annual fees only by the percentage change (plus or minus) in NRC's total budget authority unless there was a substantial change in the total NRC budget authority or the magnitude of the budget allocated to a specific class of licensees, in which case the annual fee base would be recalculated (60 FR 32225; June 20, 1995). The NRC also indicated that the percentage change would be adjusted based on changes in the 10 CFR Part 170 fees and other adjustments as well as an adjustment for the number of licensees paying the fees. As a result, the NRC is establishing the FY 1997 annual fees for all licensees at 8.2 percent above the FY 1996 annual fees. Because the total amount to be recovered through fees in FY 1997 is the same as the amount estimated for recovery in FY 1996, the NRC believes that establishing new baseline fees for FY 1997 is not warranted.

ATTACHMENT 1 TO APPENDIX A

U. S. Nuclear Regulatory Commission
Small Entity Compliance Guide
Fiscal Year 1997

Introduction

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires all Federal agencies to prepare a written guide for each "major" final action as defined by the Act. The NRC's fee rule, published annually to comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA-90) which requires the NRC to collect approximately 100 percent of its budget authority each year through fees, meets the thresholds for being considered "major" under the SBREFA. Therefore, in compliance with the law, this small entity compliance guide has been prepared for FY 1997. The purpose of this guide is to assist small entities in complying with the NRC fee rule.

This guide is designed to aid NRC materials licensees. The information provided in this guide may be used by licensees to determine whether they qualify as a small entity under NRC regulations and are therefore eligible to pay reduced FY 1997 annual fees assessed under 10 CFR Part 171. Licensees who meet NRC's size standards for a small entity must complete NRC Form 526 in order to qualify for the reduced annual fee. NRC Form 526 will accompany each annual fee invoice mailed to materials licensees. The completed form, along with the appropriate small entity fee and the payment copy of the invoice, should be mailed to the U.S. Nuclear Regulatory Commission, License Fee and Accounts Receivable Branch, P.O. Box 954514, St. Louis, MO 63195-4514.

The NRC, in compliance with the Regulatory Flexibility Act of 1980 (RFA), has established separate annual fees for those materials licensees who meet the NRC's size standards for small entities. These size standards, developed in consultation with the Small Business Administration, were revised by the NRC and became effective ^{on} May 11, 1995. The small entity size standards are found in 10 CFR 2.810 of the NRC's regulations. To comply with

the RFA, the NRC has established two tiers of small entity fees. These fees are found in 10 CFR 171.16(c) of the fee regulations.

NRC Definition of Small Entity

what is a The NRC has defined *for purposes of its regulations* small entity in consultation with the Small Business Administration. The definition is codified in NRC's regulations at 10 CFR 2.810. Under the NRC regulation, small entities are:

1. Small business - a for-profit concern that provides a service or a concern not engaged in manufacturing with average gross receipts of \$5 million or less over its last 3 completed fiscal years;
2. Manufacturing industry - a manufacturing concern with an average number of 500 or fewer employees based upon employment during each pay period for the preceding 12 calendar months;
3. Small organization - a not-for-profit organization which is independently owned and operated and has annual gross receipts of \$5 million or less;
4. Small governmental jurisdiction - a government of a city, county, town, township, village, school district or special district with a population of less than 50,000;
5. Small educational institution - an educational institution supported by a qualifying small governmental jurisdiction, or one that is not state or publicly supported and has 500 or fewer

c. The licensee's name and address must be entered as they appear on the invoice. Name and/or address changes for billing purposes must be annotated on the invoice. Correcting the name and/or address on NRC Form 526 or on the invoice does not constitute a request to amend the license. Any request to amend a license is to be submitted to the respective licensing staffs in the NRC Regional or Headquarters Offices.

d. Check the appropriate size standard under which the licensee qualifies as a small entity. Check one box only. Note the following:

- Handwritten note in a circle: "Standard as discussed in the 5-2-97 meeting"*
- (1) The size standards apply to the licensee, not the individual authorized users listed in the license.
 - (2) Gross annual receipts as used in the size standards includes all revenue in whatever form received or accrued from whatever sources, not solely receipts from licensed activities.
 - (3) A licensee who is a subsidiary of a large entity does not qualify as a small entity.
 - (4) The owner of the entity, or an official empowered to act on behalf of the entity, must sign and date the small entity certification.

3. The NRC sends invoices to its licensees for the full annual fee, even though some entities qualify for reduced fees as a small entity. Licensees who qualify as a small entity and file NRC Form 526, which certifies eligibility for small entity fees, may pay the reduced fee, which for a full year is either \$1,800 or \$400, for each fee category shown on the invoice depending on the size of the entity. Licensees