RULEMAKING ISSUE
(Information)

November 7, 2008 SECY-08-0174

FOR: The Commissioners

FROM: J. E. Dyer ***/RA/***
Chief Financial Officer

SUBJECT: FISCAL YEAR 2009 PROPOSED FEE RULE AND ADVANCE RULEMAKING FOR GRID-APPROPRIATE REACTORS FEES

PURPOSE:

To inform the Commission of staff plans to (1) proceed with the proposed fiscal year (FY) 2009 fee rule based on the bill reported by the House Appropriations Committee on June 25, 2008, (2) clarify the uses of the 10 percent NRC appropriation excluded from fee recovery, and (3) publish an Advance Notice of Proposed Rulemaking (ANPRM) for a possible variable fee structure for power reactors based on licensed power limits. Additionally, this memorandum identifies administrative changes (Enclosure 1) the staff plans to include in the proposed rule and provides the fee rule schedule (Enclosure 2).

BACKGROUND:

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires that the NRC recover approximately 90 percent of its budget authority[1] each year prior to the end of the fiscal year. To meet the requirements of OBRA-90, each year, the NRC publishes a rule that establishes two types of fees: (1) fees for specific services under 10 CFR Part 170 to recover special benefits to identifiable applicants and licensees, and (2) annual fees under 10 CFR Part 171 to recover generic and other regulatory costs not otherwise recovered under Part 170.

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[1] The 90 percent is applied to the NRC's budget authority less amounts appropriated for the following activities that are off the fee base: High Level Waste (HLW), Waste Incidental to Reprocessing, and generic homeland security.

In accordance with the staff requirements memoranda (SRM) dated October 11, 2005, on SECY-05-0164, “Annual Fee Calculation Method,” approving the use of the rebaselining method of calculating fees each year, the staff will use the rebaselining method for FY 2009. The staff will continue to keep the Commission fully informed of proposed changes and resource allocations associated with the fee rule.

Each year prior to the issuance of the proposed fee rule, the staff sends a paper to the Commission on any recommended policy changes to the fee rule and any other current fee policy issues. There are no policy changes for FY 2009.

DISCUSSION:

2009 Fee Calculations

To allow NRC to collect 90 percent of its FY 2009 budget authority by September 30, 2009, the final FY 2009 fee rule must become effective no later than late August 2009. This means that the proposed fee rule must be published in the *Federal Register* by late March 2009, and the final fee rule must be published by late June 2009, to become effective no earlier than 60 days after publication pursuant to the requirements of the Congressional Review Act.

It takes several weeks to complete the budget allocation and fee calculation process, prepare the proposed rule, and publish it in the *Federal Register*. Therefore, the staff has to begin the process of developing the fee rule now. The NRC is currently operating under a Continuing Resolution (H.R. 2638) which will provide funding at the FY 2008 level for the agency ending on March 6, 2009.

Therefore, in the absence of an enacted appropriation for the full fiscal year, the NRC plans to issue the FY 2009 proposed fee rule based on the bill reported by the House Appropriations Committee ($1,069.8 million). Although, neither the House nor the Senate Appropriations Committees’ bills have been brought to the floor of the chamber for approval, the NRC will use the House bill since it has a higher NRC Appropriation amount. If the actual Appropriation signed by the President is lower than this bill, the fee amounts in the final rule will be lower than the proposed rule amounts.

During a similar situation in FY 2007, the fees for the FY 2007 proposed rule were based on the Appropriations bill passed by the full House. At the time the FY 2007 proposed fee rule was published, the NRC was operating under a continuing resolution that also limited the FY 2007 funding to the NRC’s prior year funding level which was $83 million lower than what the President eventually signed into law for FY 2007. The final Revised Continuing

Appropriation Resolution signed by the President in FY 2007 was $8.3 million higher than the House passed bill used for the proposed rule. The final Appropriation, therefore, resulted in smaller changes to the final rule fee amounts compared to the changes that would have resulted if NRC had used the continuing resolution in effect at the time the proposed rule was published. We also discussed the issue in the Statement of Considerations of the FY 2007 proposed fee rule.

If the Congress has not enacted a budget for the NRC by the time the proposed rule is issued, the staff will describe the budget situation in the Statement of Considerations accompanying the FY 2009 proposed rule. The rule will explain that, as a result of Congressional action, the fees set forth in the final rule could differ from the proposed fees.

Uses of the 10 percent NRC Appropriation Excluded from Fee Recovery

The NRC receives 10 percent of its budget authority each year as "fee relief"[2] to address fairness and equity concerns related to charging NRC license holders for the cost of the activities that do not provide a direct benefit to the licensees. Like last year, the NRC is not required to recover 10 percent of its budget authority in FY 2009. A description of the fee-relief activities is enclosed in Appendix A.

For FYs 2001 through 2006, the fee relief amount was insufficient to cover the fee-relief activities and was therefore recovered through an increase to the fee assessments based on the percentage of the budget attributable to a class of licensees. The fee relief in FY 2007 and FY 2008 was in excess of the cost of the fee-relief activities. The SRM – SECY-06-0232 approved the allocation of this excess fee relief to all licensees' annual fees, again based on their percent of the budget.

The FY 2008 Congressional Appropriation included additional funds for Scholarships and Fellowships. This was a new fee-relief activity in FY 2008 since it did not provide a direct benefit to the NRC licensees. There are no changes to Appendix A from last year.

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[2] For FYs 1991 through 2000, OBRA-90, as amended, required that the NRC recover approximately 100 percent of its budget authority, less HLW, through fees. The FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee amount by two percent per year beginning in FY 2001, until the fee recovery amount was 90 percent in FY 2005.

Advance Notice of Proposed Rulemaking (ANPRM)

The NRC expects to receive applications in the future for small grid-appropriate nuclear reactors defined as small and medium-sized commercial nuclear reactors with capacities ranging from 10 to 350 megawatts-electric. Per Commission paper SECY-08-0208 dated July 3, 2008 (ADAMS Accession ML081980044), NRC plans to limit all grid-appropriate reactors interactions with stakeholders to non-resource intensive activities for FY 2009 and 2010. However, the NRC does not want its current 10 CFR 171 annual fee structure that allocates agency costs to each power reactor equally to be a disincentive to future smaller and safer designs.

In anticipation of greater interest in these grid-appropriate reactors in the future, the NRC plans to publish an ANPRM requesting comments from the public on a variable approach to charging 10 CFR 171 annual fees for power reactors. Although issuance of a license which triggers imposition of fees is several years ahead in the future, it will demonstrate NRC's proactive approach for working on this issue.

The ANPRM will be published separately from the FY 2009 fee rule. We will refer to the rulemaking in the proposed FY 2009 fee rule, but any response to comments received on the ANPRM will be handled separately from the comments on the FY 2009 fee rule. We will provide the Commission an information copy of proposed language before issuance.

SCHEDULE:

The estimated schedule for the FY 2009 fee rule is included as Enclosure 2. To meet the enclosed schedule, the staff will proceed with the FY 2009 fee calculations based on the bill reported by the House Appropriations Committee.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objections. The Executive Director for Operations has concurred on this paper.

This document is marked "Official Use Only" because it contains predecisional information about the NRC's FY 2009 fee rulemaking. It will be released upon the publication of the FY 2009 proposed fee rule.

/RA/
J. E. Dyer
Chief Financial Officer

Enclosures:
1. Administrative Changes to FY 2009 Proposed Fee Rule
2. Estimated Schedule - FY 2009 Fee Rule

Administrative Changes to Fiscal Year (FY) 2009 Proposed Fee Rule

1. Agreement State Activities

The Commonwealth of Virginia has requested to become an Agreement State effective March 31, 2009. Materials licenses transferred to a new Agreement State are considered terminated by the U.S. Nuclear Regulatory Commission (NRC). NRC assesses one-half the annual fee to licensees for which applications for termination are filed during the period October 1 through March 31 of the fiscal year (FY).

Virginia will be assuming regulatory authority for approximately 386 current NRC licensees. The number of materials users licensees will be revised to reflect that NRC will still collect one-half of the annual fee from these licensees. A larger share of the budget resources for small materials licensees will be allocated to the Agreement States surcharge category. This will help mitigate the impact on the annual fee for the remaining small materials NRC licensees. Any other changes in the number of Agreement States, and the associated impacts on annual fees, will be discussed in the fee rule, based on the latest information available at that time.

2. Adding New Fee Categories for Uranium Recovery Licensees

The staff is exploring the possibility of replacing the existing single fee category for uranium recovery in-situ leach (ISL) facilities with four fee categories based on the type of ISL facilities. The addition of the new fee categories is needed to reflect the diverse types of uranium recovery facilities planned for construction and operation in the near future. Additionally, the new fee categories will better reflect the NRC's regulatory effort expended for the different types of facilities, both existing and planned.

One fee category would be for ISL Resin facility which performs ISL recovery operations and includes equipment for collection of dissolved uranium from onsite underground ore bodies onto ion exchange columns where resin beads selectively remove the uranium from solution. ISL resin facilities lack the equipment necessary to process the resins further and the resins are transported to another facility for further processing of the collected uranium into yellowcake.

A second fee category would be for an ISL yellowcake facility with zero to three satellites. These facilities include a central processing plant (CPP) with all the equipment necessary to collect uranium on resin, strip uranium from the resin, and process the uranium into a yellowcake slurry or dried yellowcake powder. These facilities may also receive resins from up to three satellite facilities for further processing of the contained uranium into yellowcake. In this regard, a satellite facility includes the same equipment and performs the same functions as an ISL resin facility where uranium-loaded resins are transported to a CPP operated by the same company or licensee for further processing of the contained uranium into yellowcake.

A third ISL fee category would be for an ISL yellowcake facility with more than three satellites. These facilities have a CPP with the same equipment as the second fee category above, but have four or more satellite facilities, which necessitate a correspondingly greater allocation of the staff's budgeted resources for oversight.

The fourth fee category would be for a Resin Toll Milling Facility. These facilities do not conduct any onsite recovery of uranium but consist of a CPP for the purpose of processing resins from other ISL facilities into yellowcake. Resource allocation for resin toll milling facilities would be less than that required for the other categories of ISL facilities.

3. Biennial Review of Fees

To comply with the Chief Financial Officers Act of 1990, on a biennial basis the NRC evaluates historical professional staff hours used to process a new license application of those material users fee categories that are subject to flat application fees. This review also includes new license and amendment applications for import and export licenses. Changes resulting from this biennial review impacts 10 CFR Part 170 flat fees for the small materials users and import and export licensees.

The program offices have completed this review for the FY 2009 fees. The Office of Federal and State Materials and Environmental Management Programs (FSME) has recommended changes to the professional staff hours for a majority of small materials users. The Office of International Operations (OIP) did not recommend any changes to the hours for the import and export licenses. Since the 10 CFR Part 170 fees for the material users license application is calculated by multiplying the professional staff hours times the hourly rate, the FY 2009 fees will be impacted by changes in the professional staff hours in addition to any changes to the hourly rate.

4. Change Small Entity Fees and Threshold

In accordance with its policy of reviewing the small entity fees biennially, the staff reviewed the small entity fees this year to determine if the fees should be changed. The small entity fees primarily impacts NRC's small materials licensees. FY 2000 was the last time that an in-depth analysis of the small entity fees was conducted. Based on an in-depth analysis conducted this year (see Appendix B), we will use alternative 3 which results in reducing the maximum small entity fee from $2,300 to $1,900 and the lower tier fee from $500 to $400. This reduction reflects the decrease in annual fees for the small materials licensees in past two years.

In addition, we are changing the methodology for reviewing small entity fees every two years. To determine the small entity annual fee, a fixed percentage of 39 percent will be applied to the prior two-year weighted average of small materials users fees in the biennial review fiscal year. This gives the small entities advance notice of a possible adjustment in fees in the biennial review year. An analysis of the method is included in Appendix B.

In 2007, the NRC revised its receipts-based size standards (72 FR 44951, August 10, 2007) to conform to the Small Business Agency standards. The maximum average gross annual receipts (upper tier) to qualify as a small entity were changed to $6.5 million from $5 million. The NRC is now proposing to revise the small entity lower tier receipts-based threshold to $450,000 from $350,000. This change is approximately the same percentage adjustment as the change in the upper tier receipts-based standard.

5. Changes to 10 CFR 170.11 Exemptions

In response to number of questions on specific sub-sections related to fee exemptions for special projects, the staff is simplifying the language such that the stakeholders are clear about when a special project is exempt from NRC fees. The section has also been re-numbered for ease of reading.

6. Direct Hours per Full Time Equivalent (FTE) in the Hourly Rate Calculation

The Part 170 hourly rate is calculated by dividing the cost per direct FTE by the number of direct hours per direct FTE in a year. The FY 2008 Fee Rule used 1,371 hours per direct FTE in the hourly rate calculations. The FY 2007 fee rule used 1,287 direct hours. The change to the 1,371 hours per direct FTE to develop the hourly rate in FY 2008 was consistent with the Office of the Chief Financial Officer's (OCFO's) response to an Office of the Inspector General recommendation that actual cost and labor data be used to develop and refine future rate calculations.

For FY 2009, we are looking at the latest time and labor data to determine if the direct hours per FTE should be revised. A revision in the direct hours per FTE may also result in a change to the hourly rate.

Estimated Schedule – Fiscal Year (FY) 2009 Fee Rule

Action	Date
FY 2009 Proposed Fee Rule SECY Paper to Commission	November 14, 2008
Complete fee calculations	December 15, 2008
Draft proposed rule to offices for review	December 22, 2008
Office concurrences on proposed rule due, send to DCFO	January 16, 2009
DCFO concurrence due, send to EDO	January 20 2009
EDO concurrence on proposed rule due	January 26, 2009
Proposed rule to CFO for signature	January 28, 2009
Proposed rule to ADM to forward to Federal Register	February 11, 2009
Publish proposed rule	February 23, 2009
30-day public comment period ends	March 25, 2009
Draft final rule to offices for review	April 17, 2009
Office concurrences on final rule due, send to DCFO	May 1, 2009
DCFO concurrence due, send to EDO	May 4, 2009
EDO concurrence on final rule due	May 11, 2009
Final rule to CFO for signature	May 12, 2009
Final rule to Commission for review	May 21, 2009
Final rule to ADM to forward to Federal Register	May 29, 2009
Publish final rule	June 12, 2009
Final rule effective (60 days after publication)	August 11, 2009

NOTES:

1) This is an estimated schedule and subject to change, in particular due to unexpected changes in the FY 2009 budget.

2) This schedule is based on no Commission paper accompanying the final fee rule because all fee rule changes are addressed in the “FY 2009 Proposed Fee Rule” paper.

Enclosure 2

Attached List:

Distribution:
OCFO/DFM RF
OCFO R/F
D. Sollenberger, FSME
C. Seelig, FSME
J. McDevitt, OIP
R. Erickson OCFO
M. Fahey, OI
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J. Gallo ACRS
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T. Carter, FSME
NRR R/F
B. Usilton, FSME
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M. Ma, NSIR
D.Nelson, OE
J. Murphy, NRR
M. Tenaglia, OGC
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S. Hudson, OCFO
C. Holzle, OGC
M. Muessle, RES
J. Whetstine, ASLBP
NMSS R/F
EDO R/F
K. Ferrell, NRO
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APPENDIX A

DESCRIPTION OF FEE-RELIEF ACTIVITIES
(Categories of Activities that Raise Fee-Related Fairness and Equity Concerns)

The NRC receives appropriations ("fee relief") in the amount of approximately ten percent of its budget to pay for activities that do not directly benefit the licensees. These fee-relief activities (also known as "surcharge" costs in previous years) were first identified in 1994. In its FY 1995 final fee rule, absent the 10 percent fee relief, NRC treated the cost of these activities like overhead and distributed the cost based on the percentage of the budget attributable to a class of licensees. The categories of the fee-relief activities were approved by the Commission (SRM – SECY-95-017, February 19, 1995) prior to its publication in the annual fee rule and has the support of licensees based on comments received for the proposed FY 1995 fee rule when it was originally published. Changes to the categories of fee-relief activities needs Commission approval and has to be published for public comments in the proposed rule.

Beginning with FY 2001, the NRC has used the fee relief to offset the cost of the fee-relief activities. The difference between the fee relief and the budgeted amount of these activities results in an adjustment (increase or decrease) to the fee assessments based on the percent of the budget allocated to regulating each class of licensee. For example, in fiscal year (FY) 2006, the total budgeted amount of fee-relief activities amounted to $72.8 million. The NRC received $69.3 million in fee relief, leaving $3.5 million to be recovered through an increase to the fee assessments. On the other hand, in FY 2008, the total budgeted amount of fee-relief activities amounted to $77.7 million. The NRC received $86.6 million in fee relief, leaving $8.9 million to be distributed through a decrease to licensees' annual fees. The SRM – SECY-06-0232 approved the allocation of this excess fee relief to all licensees' annual fees, again based on their percent of the budget.

Listed below are the eight categories of activities for which the U.S. Nuclear Regulatory Commission (NRC) does not charge the direct beneficiaries of its services because of fee-related fairness and equity concerns.[1] Each year, my staff requests program offices to identify their budget for these fee-relief activities, Agreement State oversight; International; Non-reactor Generic Decommissioning and Reclamation; and In Situ Leach Rule and Unregistered General Licensees. The budget for the remaining fee-relief activities, Small Entities; Nonprofit Educational Institutions/Research Reactors; and Regulatory Support to Agreement States is determined by my staff which is based on the percentage of beneficiaries for these services compared to the total number of NRC licensees.

<u>Fee-relief categories for which Office of the Chief Financial Officer (OCFO) requests offices to identify costs</u>:

Agreement State Oversight

Fee fairness and equity issue: NRC performs Agreement State oversight activities, but cannot charge Agreement States or their licensees[2] Part 171 annual fees under the

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[1]There are some activities that may relate to a category below, but are recovered through Part 170 charges, Part 171 annual fees, or reimbursable agreements (e.g., certain international activities). The costs of these activities should not be included in any cost estimates provided for the categories listed here.

[2]OBRA-90 allows NRC to charge annual fees only to holders of NRC licenses, certificates, or other approvals. Agreement State licensees have never been considered NRC

Omnibus Budget Reconciliation Act of 1990 (OBRA-90), and as a matter of policy does not assess Part 170 fees for specific services rendered to Agreement States or their licensees.

Activities Included: Those associated with Commission review of State activities to ensure that Agreement State programs are adequate and compatible with the Commission's program. This includes: approving new Agreement States; assessing technical adequacy and compatibility of Agreement State programs; exchanging regulatory and safety information; participating in Integrated Materials Performance Evaluation Program (IMPEP) activities involving Agreement States; providing general technical assistance to Agreement States; providing NRC training to Agreement State personnel, including travel and per diem costs; and paying for most Agreement State travel related to programmatic activities.

International Activities

Fee fairness and equity issue: As a matter of policy and practicality, NRC does not assess fees to foreign organizations, foreign governments, international organizations, the State Department or Department of Transportation (DOT) for the activities listed below.

Activities Included:[3] Those authorized by the Commission to fulfill legal authority or responsibility set forth in statutes, executive orders, presidential decision directives, multilateral U.S. government commitments, and agency-to-agency exchange agreements.[4] This includes those to support international nuclear safety, security and regulatory policy formulation; treaty implementation; international information exchange; international safety, security and safeguards assistance; nuclear proliferation deterrence; and technical assistance provided to DOT for certain foreign approved transport package designs for import/export (for which NRC does not have regulatory authority).

Generic Decommissioning and Reclamation Activities (Non-reactor)

Fee fairness and equity issue: Per agency policy, NRC does not charge annual fees to materials program licensees that are undergoing decommissioning or site reclamation, as well as materials program licensees that have received possession-only licenses and permanently ceased licensed activities.

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licensees, although the NRC could, under its common defense and security authority, issue NRC licenses to Agreement State licensees, thus creating the requisite legal foundation to charge them annual fees. However, this would require substantial changes in regulatory practice, as well as a subsequent amendment of NRC fee regulations.

[3]The issuance of export-import licenses is paid for through fees assessed to most applicants for the licenses under Part 170 and as such, is not included here.

[4]See SECY-97-226 for a list of the range of legal authorities upon which NRC's international program is based.

Activities Included: Any materials program decommissioning activity that is not licensee-specific, such as research, rulemaking, and the development of guidance for decommissioning; resolving policy issues associated with site decommissioning; and interacting with the U.S. Environmental Protection Agency on issues associated with the management of radioactive material. This fee-relief category includes generic decommissioning activities associated with unlicensed sites.

In Situ Leach Rule and Unregistered General Licensees

Fee fairness and equity issue: In accordance with SRM COMJSM-06-001, "Regulation of Groundwater Protection at In Situ Leach Uranium Extraction Facilities," dated March 24, 2006, the Commission determined resources associated with this rulemaking will not be recovered through fees. Therefore, budgeted resources for the rulemaking are included as part of fee-relief activities. Also included in this category are budgeted resources for unregistered general licensees (GLs), because the NRC does not collect fees from unregistered GLs. (OCFO will determine the percentage of GL resources to allocate to this surcharge category, based on the ratio of the estimated number of GLs that will remain unregistered to the number of registrable GLs assumed in formulating the budget.)

Activities Included: Those supporting the In Situ Leach Uranium recovery rulemaking. Also included in the category is the portion of the GL program attributable to unregistered GLs (which OCFO will calculate).

Fee-relief categories for which OCFO will identify costs:

Small Entities

Fee fairness and equity issue: NRC charges reduced annual fees to those entities that qualify as small entities, in compliance with the Regulatory Flexibility Act (RFA) of 1980, as amended.

Activities Included: Those associated with the regulation of licensees that qualify as small entities. (The costs of these activities are reduced by the amount that NRC does collect in reduced annual fees from small entities.)

Nonprofit Educational Institutions/Research Reactors

Fee fairness and equity issue: NRC does not charge Part 170 or Part 171 fees to nonprofit educational institutions, per Commission policy. In addition, the Energy Policy Act of 1992 exempted from Part 171 annual fees certain State and Federally-owned research reactors used primarily for educational training and academic research purposes where the design of the reactor satisfies certain technical specifications. This fee exemption was extended to Part 170 fees in the FY 2006 fee rule (when the agency otherwise implemented its new authority under the Energy Policy Act of 2005 to charge Federal agencies Part 170 fees).[5]

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[5]Under these requirements, the test and research reactors at the following sites are exempt from all fees: the Veteran's Administration Medical Center in Omaha, Nebraska; the U.S. Geological Survey in Denver, Colorado; the Armed Forces Radiobiological Institute in

Activities Included: Those associated with the regulation of nonprofit educational institutions. However, the exemption does not apply to byproduct, source or special nuclear material licenses that authorize human use, the provision of remunerated services to other persons, distribution, or activities under a Government agency contract. The NRC currently exempts approximately 400 licenses held by nonprofit educational institutions from both fees for services and annual fees. In addition, this surcharge category includes the activities supporting the fee exempt research reactors.

Regulatory Support to Agreement States

Fee fairness and equity issue: Under OBRA-90, the NRC may only charge annual fees to NRC licensees. Thus, the NRC cannot charge Agreement States or their licensees Part 171 annual fees, and as a matter of policy does not assess Part 170 fees for specific services rendered to an Agreement State or its licensees.

Activities Included: Generic activities that support Agreement State nuclear materials users and uranium recovery licensees. These activities include developing regulations and guidance, as well as other activities that provide regulatory support, such as regulatory research, certain information technology projects and legal advice. (Also included in this category are costs of homeland security activities associated with sources in Agreement States, even though regulatory authority remains with the NRC for these activities. However, fees are not assessed to sources in Agreement States for these activities; therefore these costs are included in this fee-relief category.)

Scholarships and Fellowships

Fee fairness and equity issue: The NRC's final enacted Salaries and Expenses appropriation in the Consolidated Appropriation Act, 2008 included an additional $15 million for scholarships and fellowships, subject to 90 percent fee recovery. The NRC classified the $15 million for scholarships and fellowships as a fee-relief activity since it does not provide a direct benefit to the NRC licensees.

Activities Included: This $15 million was for scholarships and fellowships to enable students to pursue education in fields of study that constitute critical skills areas needed to sustain NRC's regulatory mission, as well as skills needed to facilitate the construction and operation of nuclear facilities and the handling of nuclear materials per House Report 110-185 (pages 153-154). The accompanying explanatory report language in the final appropriation provided a similar explanation for the uses of the funding as provided in House Report 110-185, but further clarified that the funds were intended to benefit the nuclear sector broadly, rather than solely to benefit the NRC.

If NRC is appropriated money for scholarships and fellowships in FY 2009, it will continue to be included as a fee-relief activity.

Bethesda, Maryland; and the Rhode Island Atomic Energy Commission in Narragansett, Rhode Island.

ANALYSIS OF SMALL ENTITY FEES

APPENDIX B

1. Summary

The NRC currently has two tiers of annual small entity fee. The current maximum small entity fee is $2,300 while the lower tier small entity fee is $500. The agency has reviewed its small entity fee in accordance with its policy to re-examine the small entity fees every two years. Based on the review, the new maximum small entity fee will be reduced to $1,900 while the lower tier small entity fee will change to $400. The small entity fees primarily impacts U.S. Nuclear Regulatory Commission's (NRC) small materials users[1] licensees. Significant changes between fiscal year (FY) 2000 and FY 2008 in both the external and internal environment has impacted fees for NRC's small materials users licensees. Since FY 2000 the number of small entity licensees in the upper tier has increased approximately 53 percent. In addition, due to changes in the law, NRC is now only required to recover 90 percent of its budget authority compared to the 100 percent recovery requirement in FY 2000. This ten percent fee relief has influenced the small materials users' annual fees. A decrease in the NRC's budget allocation to the small materials users has also influenced their annual fees.

The last in-depth analysis of small entity fees was prepared in FY 2000. As a result of the analysis, the maximum small entity annual fee increased from $1,800 to $2,300. The small entity annual fees have been re-examined as part of the biennial review beginning in FY 2001; however, the annual fee base used has not changed since FY 2000. The NRC will propose to change the small entity fee in the FY 2009 fee rule.

Recommendation

The FY 2009 proposed fee rule will include changes to the small entity annual fees and the methodology used to determine the fees. As described in Alternative 3 in the following discussion, the NRC will determine the maximum small entity fee each biennial year using a fixed percentage of 39 percent applied to the prior two-year weighted average of small materials users fees. The lower tier annual fee remains at 22 percent of the maximum small entity annual fee. For FY 2009, these changes result in a maximum small entity fee of $1,900 and a lower tier annual fee of $400. This is an approximately 17 percent decrease in the small entity annual fees from the previous year.

There are a number of advantages of using Alternative 3 compared to the current approach. The current approach uses FY 2000 as the base year and limits the comparison of small materials annual fees to a fixed base of seven fee categories. The alternative uses the prior two years and includes the weighted average of small materials fees for all fee categories which have a small entity licensee. The methodology is straight forward and predictable. The NRC's small entity licensees will be able to predict the change in their fee in the biennial year based on the small materials fees for the previous two years.

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[1] Licensees in this class include doctors, hospitals, radiographers, well loggers, gauge users, sealed source and device registrants, and nuclear laundries.

2. Background

Since FY 2005, NRC is required by the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, to recover approximately 90 percent of its budget authority, less the amounts appropriated from the Nuclear Waste Fund (NWF), amounts appropriated for Waste Incidental to Reprocessing (WIR), and amounts appropriated for generic homeland security activities, through fees to NRC licensees and applicants.

The NRC assesses two types of fees to meet the requirements of OBRA-90, as amended. First, license and inspection fees, established in 10 CFR part 170 under the authority of the Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701, recover the NRC's costs providing special benefits to identifiable applicants and licensees. Second, annual fees established in 10 CFR part 171 under the authority of OBRA-90, as amended, recover generic and other regulatory costs not otherwise recovered through 10 CFR part 170 fees.

The Regulatory Flexibility Act (RFA), as amended 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 NRC determined that the annual fees would result in a significant impact on a substantial number of small entities and as a result established a maximum annual fee for small entities of $1,800 in 1991. The small entity annual fee is charged to those licensees who qualify as small entities and would otherwise be required to pay annual fees as stipulated under 10 CFR Section 171.16(d). The NRC revised the small entity fee in 1992 and two tiers were established, an upper tier of $1,800 and a lower tier of $400. Based on the changes that had occurred since FY 1991, the NRC re-analyzed its maximum small entity annual fees in FY 2000, and determined that the small entity fees should be increased by 25 percent to reflect the increase in the average fees paid by other materials licensees since FY 1991, as well as changes in the fee structure for materials licensees.

The NRC stated in the Regulatory Flexibility Analysis for the FY 2001 final fee rule (66 FR 32452; June 14, 2001) that it would re-examine the small entity fees every two years, in the same years in which it conducts the biennial review of fees as required by the Chief Financial Officer's Act. A biennial review provides a routine, predictable schedule and allows licensees to anticipate when potential changes to these fees might occur. Accordingly, the NRC examined the small entity fees again in FY 2003 (68 FR 36714; June 18, 2003), and determined that a change was not warranted to the small entity fees established in FY 2000. The NRC performed similar reviews, and reached the same conclusion, in FY 2005 (70 FR 30526, May 26, 2005) and FY 2007 (72 FR 31402, June 6, 2007).

Changes that have occurred since FY 2000 in the distribution of small entity licensees and OBRA-90 now call for a re-analysis of NRC's small entity annual fees. This document presents a review of the NRC small entity fee structure and presents alternative methods for revising the small entity annual fee to reflect the current operating environment in the NRC.

3. Discussion

A. Basis for Change in Small Entity Annual Fee Methodology

The effect of the post FY 2000 changes on the NRC small entity fee will be explored in this section.

3.1 Changes in the Distribution of Small Entity Licensees

In developing the maximum small entity annual fee the NRC considered the existing license and inspection fees assessed to small entities by the Agreement States for those categories with the largest number of small entity licenses. When NRC prepared its analysis of small entity annual fees in FY 1999, seven NRC fee categories were selected for review based on the following criteria:

- The number of small entities present in the category
- The presence of the category in the FY 1991 review

Since FY 1999, the distribution of small entity licensees has changed. Table 1 shows the number of upper tier small entity licensees in each fee category and the percentage of the total for FY 2008.

The seven fee categories used in both the FY 1991 and the FY 1999 analyses were: 3M— R&D – Other; 3N— Service License, 3O— Radiography; 3P— All other Byproduct Materials; 5A— Well Logging; 7A— Teletherapy; and 7C— Medical Other. Together these categories contained 80 percent of NRC's small entity licensees for FY 1999.

In FY 2008, 5A—Well Logging had approximately 0.7 percent of the total upper tier small entity licensees (7 out of 1,009) and 7A—Teletherapy had no upper tier small entity licensees. Using only the upper tier licensees is a viable indicator since the upper tier fee is the focus of this study. However, for purposes of comparison, including the lower tier licensees would increase 5A—Well Logging licensees to 0.8 percent of the total small entity licensees (12 out of 1,414) and 7A—Teletherapy to 0.1 percent or (1 out of 1,414).

Table 1

FY 2008 Upper Tier Small Entity Licensee Summary

The seven fee categories used in previous year analyses are highlighted

Fee Category	# of Upper Tier Small Entity licensees	% of Upper Tier Small Entity licensees
1D. All Other Special Nuclear Material	11	1%
2C. Other Source Materials	8	0.8%
3B. Manufacturing - Other	17	1.7%
3C. Radiopharmceuticals – Manuf./Process	17	1.7%
3D. Radiopharmceuticals – No Manuf./Process	2	0.2%
3E. Irradiators – Self-Shield	2	0.2%
3G. Irradiators – > 10,000 Ci	8	0.8%

3H. Exempt Distribution – Device Review	10	1.0%
3I. Exempt Distribution – No Device Review	14	1.4%
3J. Gen. License – Device Review	3	0.3%
3L. R&D – Broad	2	0.2%
3M. R&D – Other	40	4.0%
3N. Service License	26	2.6%
3O. Radiography	51	5.1%
3P. All other Byproduct Materials	345	34.2%
4B. Waste Receipt/Packaging	2	0.2%
4C. Waste Receipt – Prepackaged	1	0.1%
5A. Well Logging	7	0.7%
6A. Nuclear Laundry	1	0.1%
7A. Teletherapy	0	0.0%
7B. Medical – Broad	1	0.1%
7C. Medical Other	424	42.0%
9A. Device/Product Safety Evaluation – broad	15	1.5%
9C. Sealed Sources Safety Evaluation – broad	2	0.2%
TOTAL	1,009	100%

Since FY 2005, the seven fee categories with the highest number of small entity licensees accounted for at least 90 percent of the total small entity licensees. These seven fee categories were the same for fiscal years 2005 through 2007. In FY 2008, there was a shift in the seven highest categories, which removed 9A—Device and added 3C—Radiopharmaceutical. The other five fee categories used in the earlier analyses continue to have the highest percentage of upper tier small entity licensees.

3.2 Changes to OBRA-90, as amended

In FY 2000, at the time of the previous small entity annual fee analysis, OBRA-90, as amended, required that the NRC recover approximately 100 percent of its budget authority, less amounts appropriated from the Nuclear Waste Fund (NWF), by assessing license and annual fees. Given NRC's 100 percent cost recovery requirement, the portion of annual fees not recovered from small entities was recovered from other NRC licensees. The increasing disparity between the small entity fee and the portion of the NRC services included in the annual fee influenced the FY 2000 increase in the small entity annual fees.

The FY 2001 Energy and Water Development Appropriations Act amended OBRA-90 to decrease the NRC's fee recoverable budget by 2 percent per year beginning in FY 2001, until the fee recovery amount was 90 percent in FY 2005. This change provides a 10 percent fee relief to cover fee-relief activities such as the small entity subsidy. The 10 percent fee relief has influenced the amount of the small material users annual fees.

3.3 Changes to the Small Materials Annual Fees

The FY 2001 final fee rule stated that the NRC would re-examine the small entity fees in the same years as it conducts the biennial review of fees. The FY 2000 average was established as the base for future comparison. The FY 2001 Regulatory Flexibility Analysis did not specify the factors that should be used to determine if a change to the small entity annual fee was warranted.

Table 2 shows the base comparison for the FY 2000 and FY 2008 average fee of the seven fee categories established in both the FY 1991 and FY 1999 small entity fees analysis.

Table 2

Comparison of FY 2008 Annual Fees to Current Base Fee Categories (FY 2000)

Fiscal Year	R&D 3M	Services 3N	Industrial Radiography 3O	Gauges 3P	***Well Logging 5A***	***Tele-therapy 7A***	Nuclear Medicine 7C	Average
2000	5,000	5,300	14,900	2,600	***10,100***	***15,500***	5,900	8,471
2008	4,200	6,500	11,100	2,100	***3,400***	***10,500***	3,900	5,957
% Change	16.0%	22.6%	-25.5%	-19.2%	***-66.3%***	***-32.3%***	-33.9%	-29.7%

As discussed in Section 3.1 above, two of the seven categories no longer represent a large percentage of the small entity licensees (categories are in bold italics in Table 2). As noted in Table 2, the decrease in the annual fees for these two fee categories is causing a substantially skewed average.

If the Well Logging and Teletherapy fee categories are eliminated from the evaluation, the comparison results in a 17.5 percent decrease in the average annual fee from FY 2000 to FY 2008 as indicated in Table 3.

Table 3

Comparison of FY 2008 Annual Fees to Revised Base Fee Categories (FY 2000)

Fiscal Year	R&D 3M	Services 3N	Industrial Radiography 3O	Gauges 3P	Nuclear Medicine 7C	Average
2000	5,000	5,300	14,900	2,600	5,900	6,740
2008	4,200	6,500	11,100	2,100	3,900	5,560
% Change	16.0%	22.6%	-25.5%	-19.2%	-33.9%	-17.5%

B. Alternatives

ASSUMPTIONS:

In discussing alternative methodologies for determining the NRC small entity annual fee, a change in the upper tier fee of $2,300 will be the focus of the discussion and analysis. It is assumed that the lower tier fee will continue to be a percentage of the upper tier (22 percent).

ALTERNATIVE 1:

(a) Use the current base of seven fee categories and the base year as FY 2000

Following the reasoning established in the FY 2000 process, NRC would reduce the small entity annual fee to reflect the average fee decrease for small materials users licensees. Table 2 shows a 29.7 percent reduction in small materials users average annual fees from FY 2000 to FY 2008. Applying the 29.7 percent decrease to the small entity annual fee would result in a small entity annual fee for FY 2009 of $1,600 (rounded).

Pros: This is consistent with the current methodology.

Cons: It does not consider the impact of the changes to the small materials fees.

(b) Use a base of five fee categories and the base year as FY 2000

Using a revised base of only five fee categories with the greatest number of small entity licensees, Table 3 shows a 17.5 percent reduction in small materials users average annual fees from FY 2000 to FY 2008. If the current small entity annual fee of $2,300 is reduced by 17.5 percent, the new annual fee would be $1,900 (rounded).

Pros: More accurate since it considers the changes in the distribution of the small entities within the fee categories and changes the FY 2000 base.

Cons: While this provides a more accurate comparison, it limits the average annual fee comparison to only five fee categories. It does not reflect the changes which have occurred since FY 2000.

ALTERNATIVE 2:

(a) *Eliminate FY 2000 as the fixed base year and use a two-year simple average comparison for 7 Fee Categories*

A two-year average would be computed using the prior two years for the seven fee categories that had the most upper tier small entity licensees. This two-year average would be compared to the previous biennial review two-year average. The percentage change would be applied to the current small entity annual fee to determine the new small entity annual fee. Using the 23% decrease in Table 4, the current Small Entity annual fee of $2,300 will decrease to $1,800 (rounded) for FY 2009 and FY 2010.

Table 4

Average Annual Fee based on a Two-Year Average

Average 7 Fee Categories FY 2008	**Average 7 Fee Categories FY 2007**	**2-year Average**	**Average 7 Fee Categories FY 2006**	**Average 7 Fee Categories FY 2005**	**2-year Average**	**% Change**
$6,257	$9,086	**$7,672**	$10,514	$9,414	$9.964	-23%

The “Average 7 Fee Categories” column shows the average of the Materials Users annual fee in the seven fee categories that had the most upper tier small entity licensees in the corresponding fiscal year.

Pros: Using a two-year average will help smooth the fluctuations caused by programmatic and budget variables. Also, a two-year average base would be consistent with the process used to determine 10 CFR Part 170 flat fees for materials licenses.

Cons: Different from the current methodology of comparing to the base year of FY 2000. Also uses simple average which does not reflect the importance of the fee categories with larger number of small entities

(b) *Eliminate FY 2000 as the fixed base year and use a two-year weighted average comparison for 7 Fee Categories*

A two-year weighted average would be computed using the prior two years for the seven fee categories that had the most upper tier small entity licensees. Using this average would result in a 16.3 percent decrease to the small entity fee, or $1,900 (rounded). The weighted average is more accurate. As shown in Table 5, using the weighted average substantially changes the average by eliminating the significance of a higher or lower annual fee for fee categories with few licensees.

Table 5

Weighted Average Annual Fee Based on a Two-Year Average

Weighted Average 7 Fee Categories FY 2008	**Weighted Average 7 Fee Categories FY 2007**	**2-year Average**	**Weighted Average 7 Fee Categories FY 2006**	**Weighted Average 7 Fee Categories FY 2005**	**2-year Average**	**% Change**
$3,869	$5,258	**$4,564**	$5,872	$5,026	$5,449	-16.3%

The same seven fee categories are used in the “Weighted Average 7 Fee Categories” column as in Table 4.

Pros: Using a two-year average will help smooth the fluctuations caused by programmatic and budget variables. Also, a two-year average base would be consistent with the procedures used to determine 10 CFR Part 170 flat fees for materials licenses. In addition, using the weighted average is more accurate since it reflects the importance of the fee categories with the greater number of small entities.

Cons: Complicated to implement especially if the distribution of the small entities within fee categories changes between years.

(c) *Eliminate FY 2000 as the fixed base year and use a two-year weighted average comparison for all fee categories that have an upper tier small entity licensee*

For the fiscal years shown in Table 6, the 1% difference between the two weighted average approaches would not result in a change in the outcome of $1,900.

Table 6

Weighted Average Annual Fee Based on a Two-Year Average

Weighted Average All Fee Categories FY 2008	Weighted Average All Fee Categories FY 2007	2-year Average	Weighted Average All Fee Categories FY 2006	Weighted Average All Fee Categories FY 2005	2-year Average	% Change
$4,398	**$5,544**	**$4,971**	**$6,291**	**$5,443**	**$5,867**	**-15.3%**

The "Weighted Average All Fee Categories" column includes all fee categories that had an upper tier small entity licensee.

Pros: Using the weighted average of all fee categories that had an upper tier small entity licensee would be a more accurate approach since it does not limit the comparison to only seven fee categories. Also, as noted earlier, the seven categories could be different each fiscal year.

Cons: Complicated to implement.

ALTERNATIVE 3

Eliminate FY 2000 as the fixed base year and use a percentage of the prior two-year weighted average for all fee categories that have an upper tier small entity licensee

The current small entity annual fee of $2,300 is 39 percent of the two-year weighted average for all fee categories in FY 2005 and FY 2006 that have an upper tier small entity licensee (see Table 7). The biennial review in FY 2005 found the small entity annual fee of $2,300 appropriate. Therefore, using a base of the two-year weighted average of all fee categories with small entity licensees for the fiscal years 2005 and 2006 was an appropriate starting point to determine the percentage.

Using 39 percent of the weighted average for fiscal years 2007 and 2008 would be $1,900. This is derived by taking the FY 2007/2008 weighted average (see Table 6) of $4,971 * 39% = $1,900 rounded.

Table 7

Comparison of Average Annual Fees to Small Entity Annual Fees
Using All Fee Categories with Upper Tier Small Entity Licensees

Fiscal Year	Weighted Average Total/Annual Fee (rounded)	Small Entity Annual Fee (rounded)	Small Entity % of Average
2005	$5,443	$2,300	42.2%
2006	$6,291	$2,300	36.6%
2005/2006 average	$5,867	$2,300	39.2%

Pros: Using the weighted average of all fee categories that have an upper tier small entity licensee is a more inclusive approach. Using the weighted average of the last two years will provide a more accurate base for reviewing the small entity fee.
This approach is very straight forward and eliminates a single year base comparison to a fixed-base. In addition, a percentage of a current two-year weighted average keeps the small entity annual fee in pace with changes to the small materials users Fees, and addresses the concern of the Office of Management and Budget (OMB) that fees adjust to reflect changes in cost. A Government Accountability Office (GAO) report explains, "To address these concerns, OMB Circular No. A-25 directs agencies to set fees as percentages of some appropriate base rather than fixed dollar amounts whenever possible. However, fees set at a percentage rate of some value (the basis) will not remain aligned with program costs if the value of the basis does not rise and fall in line with changes in the program costs."[2]

Cons: Different from the current methodology.

[2] See GAO, Federal User Fees: A Design Guide, GAO-08-386SP (Washington D.C.: May 29, 2008)