may from time to time require, copies of the following:

(1) Audited financial statements or official State or local government documents (such as annual reports or budget documents), for the three most recent fiscal years, sufficient to show that the facility meets the criteria in paragraphs (b)(3)(i) or (ii) of this section.

(2) A complete description of its program(s) of discounted health services, including charging and collection policies of the facility, and eligibility criteria and notice and determination procedures used under its program(s) of discounted services.

(Approved by the Office of Management and Budget under control number 0915–0103)

(d) *Period of effectiveness.* (1) A certification by the Secretary under this section remains in effect until withdrawn. The Secretary may disallow credit under this subpart when the Secretary determines that there has been a material change in any factor upon which certification was based or substantial noncompliance with this subpart. The Secretary may withdraw certification where the change or noncompliance has not been adequately remedied or noncompliance otherwise continues.

(2) *Deficits*—(i) *Title VI-assisted facilities with assessed deficits.* Where a facility assisted under Title VI of the Act has been assessed pursuant to § 124.511(a) as having a deficit under § 124.503(b) that has not been made up prior to certification under this section, the facility may make up that deficit by either—

(A) Demonstrating to the Secretary's satisfaction, that it met the requirements of paragraph (b) of this section for each year in which a deficit was assessed; or

(B) Providing an additional period of service under this section on the basis of one (or portion of a) year of certification for each year (or portion of a year) of deficit assessed. The period of obligation applicable to the facility under § 124.501(b) shall be extended until the deficit is made up in accordance with the preceding sentence.

(ii) *Title VI-assisted facilities which have not been assessed.* Where any period of compliance under this Subpart of a facility assisted under Title VI of the Act has not been assessed pursuant to § 124.511(a), the facility will be presumed to have no allowable credit for such period. The facility may either—

(A) Make up such deficit in accordance with paragraph (d)(2)(i) of this section; or

(B) Submit an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained pursuant to § 124.510. If the audit establishes to the Secretary's satisfaction that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(i) of this section.

(iii) *Title XVI-assisted facilities.* (A) A facility assisted under Title XVI of the Act which has an assessed deficit pursuant to § 124.511(a) which was not made up prior to certification under this section shall make up that deficit in accordance with paragraph (d)(2)(i)(A) of this section. If it cannot make the showing required by that paragraph, it shall make up the deficit when its certification under this section is withdrawn.

(B) A facility assisted under Title XVI of the Act whose compliance with this subpart has not been completely assessed pursuant to § 124.511(a) will be presumed to have no allowable credit for the unassessed period. The facility may make up the deficit by—

(*1*) Following the procedure of paragraph (d)(2)(iii)(A) of this section; or

(*2*) Submitting an independent certified audit, conducted in accordance with procedures specified by the Secretary, of the facility's records maintained pursuant to § 124.510. If the audit establishes to the Secretary's satisfaction that no, or a lesser, deficit exists for the period in question, the facility will receive credit for the period so justified. Any deficit which the Secretary determines still remains must be made up in accordance with paragraph (d)(2)(iii)(A) of this section.

[FR Doc. 86–21028 Filed 9–17–86; 8:45 am]
BILLING CODE 4160-15-M

federal register

Thursday
September 18, 1986

Part IV

Department of Education

34 CFR Part 761

Leadership in Educational Administration Development Program; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Part 761

Leadership in Educational Administration Development Program

AGENCY: Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary of Education (the Secretary) proposes regulations for the Leadership in Educational Administration Development (LEAD) Program. The LEAD Program assists in the establishment or operation of technical assistance centers in each State to promote the development of leadership skills in elementary and secondary school administrators.

DATES: Comments must be received on or before October 20, 1986.

ADDRESSES: All comments concerning these proposed regulations should be addressed to Hunter Moorman, Department of Education, Office of Educational Research and Improvement, Programs for the Improvement of Practice, 555 New Jersey Avenue, NW., Washington, DC 20208.

A copy of any comments that concern information collection requirements should also be sent to the Office of Mangement and Budget at the address listed in the Paperwork Reduction Act section of this preamble.

FOR FURTHER INFORMATION CONTACT: Hunter Moorman, (202) 357-6173.

SUPPLEMENTARY INFORMATION:

Background

The Leadership in Educational Administration Development Act (the Act) was enacted as Title IX of the Human Services Reauthorization Act of 1984, Pub. L. 98-558. The Act was designed to provide assistance to eligible parties to establish technical assistance centers in each State to upgrade the skills of elementary and secondary school administrators.

Summary of Major Provisions

1. *Definition of State.* Section 902(b) of the Leadership in Educational Administration Development Act provides that "the Secretary shall make available such amount, not less than $150,000 for each State, as may be necessary for establishing and operating a technical assistance center in each State." While this statutory requirement does not restrict eligibility to States or their instrumentalities, it does mandate that the Secretary sponsor technical assistance centers that are located in each State. However, neither the Human Services Reauthorization Act of 1984 nor the Leadership in Educational Administration Development Act provides for a definition of the term "State." The Secretary is thus constrained to interpret the term "State" in accordance with its ordinary and plain meaning. As reflected in proposed § 761.4(b), the term "State" has been defined to mean a State admitted into the Union of the United States of America.

In the Secretary's view, this is the only plausible interpretation. The Secretary must imterpret statutes that he is entrusted to administer in a manner that does not expand the scope of his authority beyond that which Congress has granted. The Secretary does not possess authority to extend Federal sponsorship to technical assistance centers that may be located in jurisdictions that are not States such as the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands. By not providing a statutory definition of the term "State" that would embrace other governmental entities (*see, e.g.*, section 595 of the Education Consolidation and Improvement Act of 1981), Congress has precluded the Secretary from sponsoring technical assistance centers that may be located, for example, in the Trust Territory of the Pacific Islands. Indeed, Congress's recent legislative enactment in appropriating funds to implement the LEAD program corroborates the Secretary's view that Congress does not wish Federal sponsorship of centers that may be located in non-States. Title III of the Department of Education Appropriation Act, 1986, Pub. L. 99-178, provides for $7.5 million to implement the LEAD program; this amount, which has been further reduced to $7.176 million by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, was the irreducible minimum level of funds that could be appropriated to satisfy an allotment of not less than $150,000 for a technical assistance center in each of the 50 States, as provided in section 902(b) of the Leadership in Educational Administration Development Act.

2. *Types of Awards.* Under proposed § 761.10 the Secretary awards grants in the LEAD program. While the Act uses the term "contracts" to label the type of awards to be made under the Act, it makes clear in sections 901(b), 902(a), 903 (a) and (c), and 904(c) that the Secretary provides funding for improving the leadership skills of school administrators in each State. In addition, there is no evidence in statute or legislative history that indicates Congress intends to limit the LEAD program to a procurement relationship between the Federal Government and recipients. Under the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6308), the appropriate type of award instrument for an agency to use in establishing an assistance relationship is either grant or cooperative agreement. Since the Department intends to award funds under the LEAD program as assistance to recipients, the regulations specify that grants will be used to make the awards.

3. *Special considerations.* Under proposed § 761.32, in selecting new grants under this program, the Secretary may take into consideration the opportunity to improve the diversity of activities or projects to be funded under a particular competition or the need to assure the distribution of funds on a fair and equitable basis. For example, in order to promote diversity, the Secretary may choose to fund an application for a technical assistance center that proposes not only an acceptable program but also an unusually innovative approach with potential benefit to future leadership development activities across several States. Or, in the event that more than one award per State is to be made under some future competition, the Secretary may choose to fund a combination of technical assistance centers that would provide desirable breadth as well as quality of needed services in a State.

The need to take into account fair and equitable distribution of funds may occur when funds beyond the anticipated $143,500 are available for award in each State. This situation could arise when no award was to be made in one or more States, because of the absence of qualified applicants or fundable applications, or when awards in one or more States were funded for less than the available amount per State. In this situation, the Secretary would have the discretion to select awardees in part on the basis of the extent to which proposed project budgets were consistent with fair and equitable distribution of program funds across the several States.

4. *Funding limitations.* Proposed § 761.33 implements statutorily required funding limitations for this program. As required by the Act, awards are limited to a term of three years. Each year's funding would be subject to satisfactory performance, availability of funds, and other conditions established in EDGAR (34 CFR 75.253). The Act provides that these awards are not renewable; however, the Secretary may issue a three-year supplemental grant under

certain conditions for one-half the amount of the original grant (§ 761.33 (b) and (c)). Proposed § 761.33(d) implements the statutory minimum amount of funds to be made available for awards to establish and operate technical assistance centers under this program.

Finally, under proposed § 761.33(e), the Secretary would provide funds only in amounts equal to matching funds contributed in cash or in kind by the grant recipient. Potential applicants are advised that the amount available for an award as set out in this proposed section has been reduced by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177. Under current appropriations, approximately $143,500 will be available for award in each State. The amount available in future years may also be affected by other legislation enacted after the Act. Consequently, potential applicants should refer to the notice which the Secretary will publsh in the **Federal Register** for each competition. This notice will state the level of funding actually available in the LEAD program if that information is available at the time.

Additional Information

Private school eligibility. Private schools operated as nonprofit organizations are eligible under § 761.2 to apply for assistance under the LEAD program.

Restriction on certain uses of project funds. Proposed § 761.40(b) would prohibit the use of project funds to supplant present expenditures for services and activities included in a center's program, to purchase equipment, or to construct, repair, remodel, or alter facilities or sites to be used in activities funded under this program. Under proposed § 761.40(c), the Secretary is authorized to restrict the amount of funds used to pay stipends to trainees for their participation in training activities.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the crieteria for major regulations established in the Order.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations will not have a significant economic impact on a substantial number of small entities.

Only a very small number of grants will be awarded, and these proposed regulations do not impose any excessively burdensome or unnecessary requirements.

Paperwork Reduction Act of 1980

Section 761.31 contains information collection requirements. As required by section 3504(h) of the Paperwork Reduction Act of 1980, the Department of Education will submit a copy of these proposed regulations to the Office of Management and Budget (OMB) for its review. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 3002, New Executive Office Building, Washington, DC 20503; Attention: Joseph F. Lackey, Jr.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide an early notification of the Department's specific plans and actions for this program.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 500K, 555 New Jersey Avenue, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m. Monday through Friday of each week except Federal holidays.

To assist the Department in complying with the specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce any regulatory burdens found in these proposed regulations.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 761

Education, Leadership skills, Grant Program Education, Reporting and recordkeeping requirements, Training Centers.

Citation of Legal, Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these proposed regulations.

(Catalog of Federal Domestic Assistance number 84.178—Leadership in Educational Administration Development)

Dated: September 15, 1986.

William J. Bennett,

Secretary of Education.

The Secretary proposes to amend Title 34 of the Code of Federal Regulations by adding a new Part 761 to read as follows:

PART 761—LEADERSHIP IN EDUCATIONAL ADMINISTRATION DEVELOPMENT PROGRAM

Authority: 20 U.S.C. 4201 to 4206, unless otherwise noted.

Subpart A—General

§ 761.1 What is the Leadership in Educational Administration Development Program?

The Leadership in Educational Administration Development (LEAD) Program provides financial assistance to eligible organizations that establish or operate technical assistance centers. The technical assistance centers funded under this program must promote development of certain leadership skills for school administrators, including attention to increasing access for minorities and women to administrative positions.

(Authority: 20 U.S.C. 4201)

§ 761.2 Who is eligible to apply for assistance under this program?

Local educational agencies, intermediate school districts, State educational agencies, institutions of higher education, private management organizations, nonprofit organizations, or consortia of those entities are eligible to apply for assistance under this program.

(Authority: 20 U.S.C. 4203)

§ 761.3 What regulations apply to this program?

The following regulations apply to the Leadership in Educational Administration Development Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions That Apply to Departmental Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this Part 761.

(Authority: 20 U.S.C. 4205)

§ 761.4 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR Part 77.1:

Applicant, Application, Award, Budget period, Department, EDGAR, Equipment, Facilities, Local educational agency (LEA), Nonprofit, Project, Private, Public, Secretary, State educational agency (SEA).

(b) *Other definitions that apply to this part.* The following definitions also apply to this part:

"Consortium" means an association or partnership of eligible parties formed for the establishment or operation of a technical assistance center.

(Authority: 20 U.S.C. 4205)

"Institution of higher education" means a public or private nonprofit institution of higher education as defined in 34 CFR 668.2.

"Leadership skills" means such skills as managerial, executive, administrative, evaluative, communication and disciplinary, and related techniques that enhance an individual's ability to carry out the functions and duties of a school administrator.

"School administrator" means a principal, assistant principal, district superintendent, and other local public or private school or district administrator who exercises supervision and control over the provision of an elementary or secondary education program, including its content, direction , support, facilities and related elements. The term also includes an individual who participates in educational, training, or developmental programs in preparation for responsibility as an elementary or secondary school administrator.

(Authority: 20 U.S.C. 4206)

"State" means a State of the United States of America.

"Technical assistance center" means an organization maintained by the recipient of assistance under the LEAD program to provide services, including training, to others for the purpose of enhancing the leadership skills of elementary and secondary school administrators in a State.

(Authority: 20 U.S.C. 4205, 4206)

Subpart B—What Services Does the Secretary Support Under This Program?

§ 761.10 What assistance does the Secretary provide under this program?

The Secretary provides financial assistance in the form of grants to eligible organizations that establish or operate a technical assistance center.

(Authority: 20 U.S.C. 4201, 31 U.S.C. 6304)

§ 761.11 What services are provided by a technical assistance center funded under the LEAD program?

(a) The Secretary funds technical assistance centers to provide the following services to school administrators in the State served by the center:

(1) Collecting information on school leadership skills.

(2) Assessing the leadership skills of school administrators that participate in programs sponsored by the center based on criteria ralated to effective leadership.

(3) Conducting training programs on leadership skills for new school administrators and for practicing school administrators, with particular emphasis on recruiting women and minority administrators to participate in those programs.

(4) Maintaining consultative programs that provide advice and guidance on leadership skills to clients at sites within school districts, as well as at the center.

(5) Establishing and maintaining training curricula and instructional materials on leadership skills, drawing on expertise in business and industry, educational institutions, civilian and military governmental agencies, and existing effective schools.

(6) Initiating programs that promote the improvement of leadership skills by—

(i) Making available the services of executives from business, scholars from various institutions of higher education, and practicing school administrators; and

(ii) Providing school administrators with internships in business, industry, and effective school districts.

(7) Disseminating information on leadership skills associated with effective schools.

(8) Establishing model projects for administrative leadership development that draw upon the most reliable and valid principles of effective educational administration.

(b) The applicant shall indicate in its application how the resources for which it is applying will be allocated among each of the services in paragraph (a) of this section, based upon the applicant's assessment of the needs of school administrators within its State and of alternative training programs available. In selecting applicants, the Secretary considers the applicant's justification as to why each service would receive the level of support proposed, including reasons for seeking minimal or no Federal funding for any service in paragraph (a) of this section.

(Authority: 20 U.S.C. 4203)

Subpart C—[Reserved]

Subpart D—How does the secretary Select an Applicant for Funding?

§ 761.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application submitted under this program on the basis of the selection criteria in § 761.31.

(b) The Secretary scores an application based on a 100-point scale.

(c) The maximum number of points for each criterion is indicated in parentheses after the heading of the criterion.

(Authority: 20 U.S.C. 4205)

§ 761.31 What selection criteria does the Secretary use to evaluate an application under this program?

The Secretary uses the following criteria in evaluating an application—

(a) *Plan of operation.* (10 Points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the design of the project;

(2) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The extent to which the proposed allocation of resources among the services listed in § 761.11(a) will address the needs of school administrators within the State;

(5) How well the project builds upon, complements or otherwise takes into account other related administrator leadership activities in the State; and

(6) The quality of the applicant's plans to use its resources and personnel to achieve each objective.

(b) *Quality of key personnel.* (20 Points)

(1) The Secretary reviews each application to determine the quality of key personnel, including but not restricted to consultants and other contractors, the applicant plans to use on the project, including—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project; and

(iii) The time that these key personnel will commit to the project.

(2) To determine the qualifications of these key personnel, the Secretary considers—

(i) Experience, training, and professional productivity, in fields related to the objectives of the project; and

(ii) Any other qualifications, including credentials relating to the development of human relations skills, that pertain to the quality of the project.

(c) *Budget and cost effectiveness.* (10 Points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project;

(2) The project supplements other related leadership development activities within the State; and

(3) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (5 Points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which—

(1) The applicant's design for evaluation specifies the relationship of program goals and activities to anticipated outcomes as well as how the outcomes would be assessed; and

(2) The applicant's methods of evaluation are appropriate to the project, and to the extent possible, are objective and produce data that are quantifiable, as well as valid and relevant.

Cross-reference—See 34 CFR 75.590 Evaluation by the grantee.

(e) *Adequacy of organizational resources and commitment.* (20 Points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project and of organizational commitment to carrying out the activities of the technical assistance center, demonstrated through—

(1) Facilities, equipment, and supplies;

(2) Matching funds for the proposed project in cash or in kind at least equal in amount to the amount of Federal funds available to a grant under this program;

(3) Plans and commitment to continue to operate the technical assistance center activities after expiration of Federal funding provided under this program; and

(4) Establishment of a policy advisory committee (including but not limited to members of the business community, private foundations, and local and State educational agencies) representative of groups whose support, guidance, and commitment will promote both accomplishment of the project's goals and continuation of the project after Federal funding terminates.

(Authority: 20 U.S.C. 4204)

(f) *Potential for enhancing the leadership skills of school administrators.* (20 Points) The Secretary reviews each application to determine the potential of the project for enhancing the leadership skills of school administrators, with particular attention to—

(1) The application of information on leadership skill development and executive performance, including but not restricted to information identified by graduate schools of management and information gained from research or knowledge of effective practice, to the design of the project's leadership development activities;

(2) The identification of leadership skills and knowledge pertinent to the needs of school administrators to serve as the focus of project activities;

(3) The extent to which proposed activities will improve leadership skills for project participants;

(4) The extent to which proposed training activities will contribute to increasing access of women and minorities to administrative positions; and

(5) The nature of human relations skills to be developed, their relationship to the problems school administrators face, and the manner in which they will be developed.

(Authority: 20 U.S.C. 4201, 4203, 4204 and 4205)

(g) *Organizational arrangements and capacity.* (15 Points) The Secretary reviews each application to determine the extent to which the applicant's organizational arragements and capacity—

(1) Reveal a record of successful organizational performance on previous activities similar in nature or related to proposed project services;

(2) Are likely to elicit commitment to project goals and services from intended participants and target groups;

(3) Make available to the project the organizational expertise and combinations of staff and organizational resources required for successful provision of project services;

(4) Involve private sector managers and executives in the conduct of the project; and

(5) Ensure that project staff have access to resources and activities needed in developing and providing the project services.

(Authority: 20 U.S.C. 4201, 4203, 4204, and 4205)

§ 761.32 What special considerations may the Secretary use in selecting an application for funding?

In determining the order of selection for new grants under this program, the Secretary may take into consideration the following:

(a) The extent to which an application will enhance the diversity of activities or projects funded under a particular competition.

(b) The need to distribute funds for projects on a fair and equitable basis.

(Authority: 20 U.S.C. 4205)

§ 761.33 What funding limitations apply to awards under this program?

(a) Grants under this program are for a term of three years.

(b) Grants are not renewable, except that a one-time three-year extension may be provided by the Secretary if the grantee maintains the same level of services it provided under the original grant.

(c) If an extension is granted, the Secretary issues a supplemental grant equal to one-half of the amount of the original award provided to the grantee.

(d) Subject to the availability of funds, of the amount appropriated for any fiscal year, the Secretary provides that not less than $150,000 for each State will be available from which to award a grant, in an amount consistent with the intended recipient's application and the provisions of paragraph (e) of this section, to establish or operate a technical assistance center in each State.

(e) The Secretary provides funds for each award in an amount not to exceed the recipient's contribution of matching funds in cash or in kind.

(Authority: 20 U.S.C. 4202, 4204)

Subpart E—What Conditions Must Be Met by a Grantee?

§ 761.40 What restrictions exist on the use of funds awarded under this program?

(a) A technical assistance center funded under this program shall make its services available to school administrators from any of the public and private educational agencies, including local educational agencies, nonpublic school districts, and independent schools, located within the State served by that center.

(b) Funds made available through an award under this program may not be used to—

(1) Supplant funds already used to support services and activities included in a technical assistance center's program;

(2) Purchase equipment; or

(3) Construct, repair, remodel, or alter facilities or sites for use in projects funded under this program.

(c) The Secretary may restrict the amount of funds used to pay stipends for educational personnel to participate in training activities.

(Authority: 20 U.S.C. 4204, 4205)

§ 761.41 What requirements must be met by a grantee?

A technical assistance center funded under this program shall do the following:

(a) Involve private sector managers and executives in the conduct of the center's program.

(b) Provide matching funds for the project in cash or in kind at least equal in amount to the amount of funds awarded under the grant.

(c) Demonstrate a commitment to continue to provide the services and activities of the center after the expiration of Federal funding under this program.

(d) Establish a policy advisory committee including but not limited to members of the business community, private foundations, and local and State educational agencies.

(e) Describe the nature of human relations skills to be developed, their relationship to problems school administrators face, the manner in which they will be developed, and credentials of project staff who may be responsible for developing these skills.

(f) Conduct an evaluation of the project.

(Authority: 20 U.S.C. 4204)

[FR Doc. 86-21148 Filed 9-17-86; 8:45 am]
BILLING CODE 4000-01-M

federal register

Thursday
September 18, 1986

Part V

Nuclear Regulatory Commission

10 CFR Parts 51 and 171

Annual Fee for Power Reactor Operating Licenses and Conforming Amendment; Final Rule

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 51 and 171

Annual Fee for Power Reactor Operating Licenses and Conforming Amendment

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is adding to its regulations a new regulation that will impose an annual fee on power reactors with operating licenses. This annual fee will recover allowable NRC budgeted costs for providing regulatory services to power reactors with operating licenses and will not alter the existing fee schedule under 10 CFR Part 170. The annual fee is necessary to comply with the statutory mandate of the Consolidated Omnibus Budget Reconciliation Act of 1985.

EFFECTIVE DATE: October 20, 1986.

FOR FURTHER INFORMATION CONTACT: Robert L. Fonner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301–492–8692.

SUPPLEMENTARY INFORMATION:

Contents

I. Background

A. Authority for the Rule

The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (Pub. L. 99–272, 1986) requires the Nuclear Regulatory Commission to assess and collect annual charges from persons licensed by the Commission pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) in an amount to approximate 33 percent of the Commission's estimated budget.

Section 7601 of the Budget Reconciliation Act states that the charges assessed shall be established by rule and, specifically, in paragraph (b)(I) that:

> * * * the Nuclear Regulatory Commission shall assess and collect annual charges from its licensees on a fiscal year basis, except that—
>
> (A) the maximum amount of the aggregate charges assessed pursuant to this paragraph in any fiscal year may not exceed an amount that, when added to other amounts collected by the Commission for such fiscal year under other provisions of law, is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year; and
>
> (B) any such charge assessed pursuant to this paragraph shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service.

The legislative history shows that Congress intended the authority of this mandate to go beyond that contained in the Independent Offices Appropriation Act (IOAA) of 1952 (65 Stat. 290; 31 U.S.C. 9701). The Congressional Managers of COBRA, in describing this legislative provision, asserted:

> The charges assessed pursuant to this authority shall be reasonably related to the regulatory service provided by the Commission and fairly reflect the cost to the Commission of providing such service. This is intended by the conferees to establish a standard separate and distinct from the Commission's existing authority under the Independent Offices Appropriation Act of 1952 in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees.

See 132 Cong. Rec. H879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S2725 (Daily Ed. March 14, 1986).

The NRC is construing this legislation to permit it to charge licensees not only for special benefits provided to individual licensees, as that term has been used in construing the IOAA, but also to recover the cost of any Commission activity reasonably related to regulating power reactors licensed to operate.

B. Revisions and Effect on Existing Fee Schedule

The proposed rule (July 1, 1986; 51 FR 24078) provided that applicants for power reactor operating licenses or holders of power reactor operating licenses and major material licensees would pay an annual fee in lieu of all other fees.

The final rule will impose an annual fee on power reactors with operating licenses. The annual fee under 10 CFR Part 171 will be based on NRC budgeted costs for providing the following regulatory services to power reactors with operating licenses: (1) Research activities directly related to the regulation of power reactors on a generic basis, (2) power reactor plant regulation (except licensing and inspection activities, and Part 55 operator licensing and instructor certification), and (3) safeguards activities for power reactors (other than those activities directly associated with plant-specific licensing and amendments). This fee will include cost for many operating reactor-related regulatory costs not recovered under NRC's existing fee schedule, 10 CFR Part 170 (49 FR 21293; May 21, 1984), which established fees for some regulatory services that NRC provides its licensees.

The proposed rule provided that Part 170 would be suspended and, therefore, no fees would be collected under the IOAA. This proposal also relieved small materials licensees of all fees. The final rule provides that Part 171 will not affect the existing 10 CFR Part 170 fee schedule. This means that all fees currently collected under 10 CFR Part 170 will continue to be collected, including those from small materials licensees. Thus, under the final rule, holders of power reactor operating licenses will pay an annual charge (COBRA) under Part 171 and IOAA fees under Part 170. Other applicants and licensees will pay fees only under Part 170.

The Commission has placed in its Public Document Room at 1717 H Street, NW., Washington, D.C., data used in developing the proposed 10 CFR Part 171, copies of the comments received, and a separate document that categorizes and summarizes these comments by facilities, Agreement States, and materials licensees.

II. Summary of Comments

Only three commenters supported the proposed rule; the majority of the sixty-one comments discussed eleven common concerns:

1. Constitutionality of the Annual Fee
2. Exclusion of Some Licenses from Fees
3. Collection of One-Third of the NRC Budget
4. Inclusion of Research Costs in Fee Base
5. Fines, Penalties, Interest, and Reimbursements
6. Basing the Fee on Size of Reactor
7. High-Level Waste Fund
8. Exemption Provision
9. Quarterly Assessments
10. Adjustments
11. Comment Period

Twelve commenters thought the proposed fees to be unconstitutional, and four commenters said no annual fees should be assessed to recover NRC costs for providing regulatory services, but, rather that the public, as the real beneficiary of NRC regulatory services, should support the regulatory costs of the NRC. Thirty-four commenters, in opposition to the proposed rule, requested that small materials licenses be subject to fees charged by the NRC.

Two commenters stated that relief should be given from the proposed fees for uranium mills licenses. One commenter thought that suspended license applications, with minimal activity, should not be subject to the proposed annual fee because the fee would be disproportionately large in relation to the profit realized in that circumstance. One commenter also thought that operating license (OL) applicants would not be receiving a benefit from the activities upon which the proposed fee was based and would, in effect, have a double fee burden because they would pay the annual fee in addition to fees previously paid under Part 170. One commenter asserted that "Architect-Engineers, vendors, test reactors, waste repositories and others . . ." should pay annual fees.

Several commenters expressed the view that the NRC was not required to collect a full 33 percent of its budget. Eleven commenters held the view that agency research costs should not be included in the cost basis for determining the annual fee. Two commenters asserted that fines, interest, and penalties should be included in the cost basis for the proposed fees. Ten commenters thought the annual fee should be assessed on the basis of power rating in thermal megawatts (one commenter opposed this suggestion). One commenter thought that the Department of Energy high-level waste program fund should be subject to fees. One commenter said that an exemption provision was needed for small and expensive-to-operate reactors because of the disproportionate burden that the proposed rule would impose on the resources generated from these reactors. Six commenters thought that fees should be collected on a quarterly or a monthly basis. Commenters urged that, should excess fees be collected, a provision for refunds be included in the rule. Finally, several commenters thought that the comment period for the proposed rule was too short.

No comments were received regarding the proposed amendment to 10 CFR Part 51, which provides that promulgation of Part 171, and future amendments thereto, does not require preparation of an environmental impact statement or assessment.

III. Resolution of Comments

1. Constitutionality of the Annual Fee

Comment: Many of the commenters argued that the Commission was imposing an unconstitutional tax.

Response: The thrust of commenters' arguments was that the Commission's proposal violated constraints on user fees established by the Supreme Court in *National Cable Television v. United States*, 415 U.S. 336 (1974) and *Federal Power Commission v. New England Power*, 415 U.S. 345 (1974) and further developed in subsequent decisions by courts of appeals. In *National Cable* and *New England Power*, the Supreme Court examined agency authority to assess fees pursuant to a particular statute, the Independent Officers Appropriation Act of 1952. The Court there adopted a limiting construction of the IOAA to avoid a Constitutional question of whether certain language of the IOAA amounted to a delegation to assess "taxes" rather then "fees." The Court indicated that the legislative history of the IOAA did not reveal an intention on the part of Congress to delegate its taxing authority to Federal agencies. In short, the Court's analysis was largely limited to the IOAA itself. The commenters, however, appear to read these cases as establishing general Constitutional limitations on an agency's power to assess fees. Accordingly, many of the commenters argued that because the NRC was not only charging for "special benefits" provided to identifiable recipients of NRC services, but also recovering the costs of its generic rulemaking and research activities, the NRC was imposing an unconstitutional tax.

The Commission finds these legal arguments to be unpersuasive. The commenters' arguments are based on the faulty premise that the only legally acceptable standard for assessing fees is that contained in the IOAA. In Section 7601(b)(B) of COBRA, Congress provided that annual charges assessed by the NRC ". . . shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." The underlying legislative history makes clear that this provision is intended by the conferees to establish a standard separate and distinct from the Commission's existing authority under IOAA in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees. Statement of Managers Re NRC Fees, 132 Cong. Rec. H. 879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S. 2725 (Daily Ed. March 14, 1986). Congress undeniably has the authority to provide a fee standard distinct from the IOAA, provided that the standard satisfies Constitutional requirements.

In numerous cases the Supreme Court has addressed the issue of whether Congress has unconstitutionally delegated legislative power to administrative agencies. A reading of those cases indicates that Congress may delegate its authority to administrative agencies provided that it sets forth intelligible standards for the agency to follow in carrying out the Congressionally prescibed policy. *Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). A delegation is not unconstitutional simply because the determination of facts and the inferences to be drawn from them in light of the statutory standards and declaration of policy call for the exercise of judgment and for the formulation of subsidiary administrative policy within the prescribed statutory framework. *Yakus v. United States*, 321 U.S. 414, 425 (1944).

In COBRA, Congress has laid down an intelligible standard for the Commission to apply and has articulated its policy objectives. Simply put, the NRC is to recover approximately 33 percent of its budget from user fees (see Statement of Managers Re NRC Fees) and is to assess fees based on the standard articulated above. We believe this delegation of authority to the NRC satisfies all Constitutional requirements.

The courts have previously considered the issue of whether a fee can be charged for a service provided by the Government that benefits not only the licensee, but also the general public. The Courts have held that the mutual benefit of a Government service to the recipient and to the public is not a legal bar to the imposition of fees. Prorating of costs on the basis of benefit to the public is not required. *Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission*, 601 F.2d 223 (1979), *cert. denied* 444 U.S. 1102 (1980).

Thus the only question that remains is whether the fee schedule promulgated by the NRC falls within the parameters authorized by Congress. We believe that it clearly does. Following the Congressional mandate, we are attempting to collect a third of our budget in fees and, as explained elsewhere in this notice, have carefully developed a schedule which ensures that fees assessed are reasonably related to the NRC costs of providing regulatory services.

2. Exclusion of Some Licenses From Fees

Comment: Agreement States and some other commenters asserted that the proposed rule, in eliminating fees for small materials licensees, would have a severe adverse effect on State fee programs and that 10 CFR Part 170 should be retained in order to maintain reasonable fees for materials licensees.

Many commenters asserted that the Commission had misconstrued Congressional intent by proposing the suspension of collections under the IOAA—the authority for the current Part 170. Commenters argued that the Congress contemplated that the NRC would continue to collect fees under the IOAA, as well as CORBA. Specifically, many commenters vigorously argued that Congress contemplated that all licensees should pay fees and that the NRC lacked authority to exempt all small materials licenses from payment of fees.

Response: The Commission believes it did not misread the Congressional intent, and that it has the authority under COBRA to suspend collections under Part 170 and not charge fees to small materials licensees. The Commission, nonetheless, has decided to retain Part 170 as a means of more equitably distributing the agency costs among those receiving services.

The final rule will not affect materials licensees; they will continue to pay only fees chargeable under part 170. Major materials licensees will not be subject to an annual fee, as previously proposed. OL applicants similarly will remain subject only to fees under Part 170. With the issuance of an operating license, a former OL applicant will be subject to the annual fee required under this final rule in addition to the other fees collected for services covered by Part 170. If an OL applicant receives its OL license during the year, it will pay only a prorated annual fee for that year, because, under the final rule, Part 170 will remain in effect, and fees will be collected under Part 170 up to the time of issuance of the OL. The applicants for licenses and holders of these licenses for test and research reactors and waste repositories will also continue to pay fees under that part. Vendors will also continue to pay fees under Part 170.

3. Collection of One-Third of the NRC Budget

Comment: The Commission is not required by Section 7601 of the COBRA to collect the full 33 percent of its budget.

Response: The Budget Reconciliation Act provides that the "maximum amount of the aggregate charges assessed may not exceed an amount that . . . is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year. . . ." On its face, this is a ceiling, i.e., it would permit the Commission to charge user fees of less than 33 percent. However, the legislative history clearly indicates that Congress expected the NRC to charge the full amount authorized by the statute. The Statement of Managers, which was drafted to reflect the views of the Conference Committee that considered the legislation and was inserted into the *Congressional Record* as part of the floor debate on the measure, states:

> The conferees agreed to require the NRC to assess and collect annual charges from its licensees in an amount that, when added to other amounts collected by the Commission shall not exceed 33 percent of the Commission's budget for each fiscal year. Assuming the current level of NRC expenditures, this is expected to result in the collection of additional fees in an amount up to approximately $80 million per year for each fiscal year.

132 Cong. Rec. H. 879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S. 2725 (Daily Ed. March 14, 1986).

We read this limited legislative history as indicating that Congress expected this legislation to result in approximately $80 million in collections each year above that already collected by the NRC under Part 170. To meet this target, collecting a full third of the NRC budget is required.

Such an interpretation is also consistent with the President's request to Congress that the NRC recover a far greater amount of its budget from user fees. The President in his proposed budget to Congress for fiscal year 1987 had suggested that 50 percent of the NRC budget be recovered through user fees, a figure adopted by the House of Representatives, but reduced in Conference Committee.

4. Inclusion of Research Costs in Fee Base

Comment: Commenters argued that the NRC research costs should not be recovered through fees.

Response: Commenters argued for instance that a boiling water reactor (BWR) licensee under the proposed rule would be paying for research on a pressurized water reator (PWR) and vice versa. This could result in one group of licensees subsidizing another. It was also argued that other research costs may be relevant only to future generations of reactors, but of no benefit to the current reactors. The Commission has reviewed again the research portion (as well as the Nuclear Materials Safety and Safeguards, Nuclear Reactor Regulation, Inspection and Enforcement, and Analysis and Evaluation of Operational Data portions) of the cost basis for the annual fee. The purpose of this review was to ensure that only generic costs associated with all power reactors, with operating licenses, regardless of type, were included in the cost basis. Costs for research rulemaking and other activities not relevant to all reactors will not be recovered through fees. A detailed breakdown of costs to be recovered is available in the NRC Public Document Room in Washington, D.C. Based on this review, the cost basis for the annual fee has been revised as follows:

FISCAL YEAR 1987 PROJECTIONS OF NRC COSTS FOR NUCLEAR POWER REACTOR REGULATORY GENERIC PROGRAMS

[Dollars in thousands]

Programs	Costs for regulatory services
Research	$74,356
Safeguards	2,326
Reactor regulation	24,346
Inspection and enforcement	15,482
Analysis and evaluation of operational data	7,720
Total	$124,230

Because the costs listed above apply to all power reactors, the costs have been divided equally for purposes of calculating the annual fee. This approach is consistent with the Congressional directive that all fees be reasonably related to the cost of providing services.

5. Fines, Penalties, Interest, and Reimbursements

Comment: Commenters said that fines, interest, penalties, and reimbursements should be included in the cost basis as collections under other laws.

Response: The commenters argued that COBRA provides that the maximum total of fees to be collected by the NRC may not exceed, when added to other amounts collected by the Commission, 33 percent of the Commission's budget. Accordingly, they believe the 33 percent total is to be derived by adding fees collected to fines, interest, penalties, and reimbursements collected. The Commission rejects this argument. Fines and penalties are charged because of the failure of a licensee to adhere to prescribed standards or requirements. No public policy would be served by reducing a power reactor's annual fee because a utility violated NRC's requirements. We are unwilling to attribute such an intent to Congress. Nor do we believe Congress contemplated reducing fees to account for interest paid to the NRC. Interest is assessed only for late payment of monies due the United States. Accordingly, interest is not included in the cost base.

Finally, the NRC receives reimbursements from other Federal agencies of approximately $50,000 per year. We have not included this sum in the fee base. The purpose of COBRA was to generate additional Federal revenue as compensation for services rendered by the NRC. The transfer of funds from one Federal agency to another does not result in increased Federal revenue. Accordingly, Congress did not contemplate that reimbursements would be in the fee base.

6. Basing the Fee on Size of Reactor

Comment: The annual fee should be based upon the power rating in thermal megawatts for each reactor.

Response: The Commission has considered calculating the annual fee on power reactors with operating licenses on the thermal megawatt ratings of those reactors. An argument can be made that the larger the reactor, the greater the licensee's ability to generate income to pay the annual fee. The COBRA, however, requires that the fees be reasonably related to the agency's costs of providing services to the licensee. As discussed in the proposed rule (51 FR 24078, 24082–3), the Commission has examined the relationship between megawatt rating and the costs of NRC regulation. The NRC finds no necessary relationship or predictive trend between the thermal megawatt rating of a reactor and NRC regulatory costs (see Memorandum to Files,[1] entitled "Reactor Inspection, Licensing and Part 55 Fees Assessed for One-Year Period," dated July 7, 1986, from James Holloway, Acting Director, License Fee Management Staff, Office of Administration). Accordingly, the Commission has determined that fees should not be based on the size of the reactor. Nevertheless, in recognition of the problem that some licensees of smaller reactors may have in paying substantially increased fees, the Commission has provided for fee exemptions. This issue is discussed in item 8, Exemption Provision.

7. High-Level Waste Fund

Comment: The Department of Energy (DOE) should be assessed fees, payable from the high-level waste fund, for NRC services provided toward high-level waste management.

Response: The Commission has no legal authority to charge the DOE fees for NRC staff work associated with high-level waste. The IOAA and the Atomic Energy Act of 1954, as amended, do not authorize the NRC to charge the DOE fees. The Commission does not construe COBRA as augmenting NRC authority in such a way as to permit the NRC to collect fees from the DOE.

8. Exemption Provision

Comment: One commenter, a holder of a license for a small reactor, requested that provision for exemptions from the full annual fee be included in the final rule.

Response: While the Commission is concerned with recovering its costs, it is not the intent of the Commission to promulgate a fee schedule that would have the effect of imposing fees at such a level that the owners of the handful of small, older reactors would find it in their best economic interest to shut their reactors down. Therefore, the Commission has included an exemption provision that takes reactor size and age and other factors into consideration in determining whether a license should be exempted from the full annual fee.

9. Quarterly Assessments

Comment: Several commenters were concerned with the size of the annual fee and its effect on their cash flow. The commenters also suggested that the NRC not require payment of fees in a single lump sum.

Response: In recognition of these concerns, the Commission will collect the annual fee under Part 171 in equal quarterly installments. Fees collected under Part 170 will continue to be collected under the payment schedule set forth under that part.

10. Adjustments

Comment: Provision should be made for refunds if the total of fees collected exceds 33 percent of the NRC budget enacted by Congress.

Response: The Commission agrees with commenters that the possibility exists, under both the proposed and final rules, that the aggregate of collections under Parts 170 and 171 could exceed the statutory limit of 33 percent of the NRC budget in a given fiscal year. Therefore, a section has been added to the final rule which requires that any such overpayment be returned on a prorata basis to those who pay fees under Part 171. Provision is also made for adjusting the refund to take into account any power reactors that were given an operating license during the course of the fiscal year and thus did not pay the full fee. If the prorata share of the overpayment is $10,000 or less, it will be credited against the annual fee for the following fiscal year.

Finally, if a final appropriation for the NRC has not been passed at the time the annual fee is set and if the final appropriation is greater or less than the projection, the annual fee would be raised or reduced, as appropriate, and an adjustment to the remaining quarterly installments or a refund would be made, as appropriate.

11. Comment Period

Comment: Some commenters argued that the Commission should have provided for more than a 15-day comment period on the proposed rule.

Response: The Commission was under a statutory mandate to promulgate final fee regulations 45 legislative days after submission of its July 7, 1986, report to Congress on user fees. A longer comment period would have prevented the Commission from meeting the Congressionally mandated deadline. Under the circumstances, the comment period was reasonable, particularly because licensees were on notice in April when COBRA was enacted that the NRC would be proposing substantially higher fees. Moreover, based on the thoroughness of the comments received and the numerous issues raised in them, the Commission is convinced that all relevant issues of importance to this rulemaking have been identified and that the commenters have not demonstrated that they have been prejudiced by the 15-day comment period.

IV. Section-by-Section Revision

Section 171.1 Purpose.

The purpose section is revised to state that Part 171 sets out the fee to be charged persons licensed to operate a power reactor as defined in the new part.

Section 171.3 Scope.

The scope is revised to state that Part 171 applies only to persons licensed to operate a power reactor.

Section 171.5 Definitions.

In the final rule, the definitions for "Materials license," "Source material," and "Special nuclear material" have been deleted because licenses for these materials will remain subject to the appropriate fee schedules under 10 CFR Part 170. The definition for "Nuclear power reactor" has been modified to conform with the definition for "Power reactor" in 10 CFR Part 170.

Section 171.11 Exemption.

As stated in the proposed rule (51 FR 24078, 24082), the Congress urged the Commission to consider the impact of its fee schedule on certain licensees. Based on comments received, the Commission

---

[1] A copy of this memorandum is available for review at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

has determined that it is appropriate to take a similar approach in setting the fee schedule for power reactors with operating licenses. Accordingly, the added Exemption section provides that the holder of a license to operate a power reactor who believes that the annual fee is unfair or overly burdensome may apply to the Commission for partial relief from the annual fee. The Commission may grant such relief, if it is persuaded by the licensee that factors such as age and size of the plant and size and impact on its customer rate base substantially reduce the NRC's regulatory costs for that plant and the benefits bestowed on that licensee below that of the other power reactors. Nevertheless, the agency's intent is to grant exemptions sparingly.

Section 171.13 Notice.

This section, which was § 171.11 in the proposed rule, is revised to reflect that only power reactors licensed to operate are covered by the final rule.

Section 171.15 Annual fee: Power reactor operating licenses.

The proposed § 171.15, Annual Fee: Materials Licenses, has been deleted. This renumbered section on computing the annual fee is revised to reflect that only power reactors will be subject to the annual fee under Part 171. The formula was also revised to deduct the estimated fees to be collected under Part 170. The fees under Part 170 are estimated for fiscal year 1987 to be $37 million. It is estimated that approximately $30 million of this amount will come from power reactors with operating licenses. The annual fee will be charged to every power reactor unit licensed to operate as of October 1, 1986 (assumed to be 101 reactors), and, on a prorata basis, to any power reactor licensed to operate during the fiscal year. If a power reactor licensee has only the authority to possess nuclear material and the Commission has received a request from the licensee to amend its license to permanently withdraw its authority to operate the reactor, or the Commission has permanently revoked such authority, the licensee is not subject to the annual fee under this part for that power reactor. Such reactors no longer benefit from the regulatory services that are the basis for the annual fee. Plants within this latter category, such as Dresden 1, Humboldt Bay, Peach Bottom 1, and Indian Point 1 will not be charged fees under this part (though they remain subject to any applicable fees pursuant to Part 170 of this chapter).

The annual fee is calculated as follows:

$405 million (NRC FY 87 budget) × .33 = $133 million (rounded down to the nearest million)

$133 million minus $37 million (est. fees Part 170, FY 87) = $96 million

$96 million divided by 101 licensed reactors = $950 thousand per license (rounded down to the nearest thousand).

Section 171.17 Proration.

Section 171.17 in the proposed rule addressed the annual fee and its calculation for major materials licenses. As they will not be subject to fees under this part, that section is deleted and a new § 171.17 is added to the final rule for the purpose of addressing the issue of prorating fees for power reactors that are licensed to operate after the beginning of a fiscal year. No such provision was necessary in the proposed rule. As revised, applications for operating licenses under review will still be subject to fees chargeable under Part 170. It would not be fair to holders of new operating licenses to charge them the full annual fee in addition to fees which might have accrued under Part 170 during a fiscal year but prior to issuance of an operating license. The annual fee would be prorated by first dividing the annual fee by 365 and then multiplying the quotient by the number of days remaining in the fiscal year after the operating license issuance date. For example, if an operating license were issued on January 15 of fiscal year 1987, the annual fee for that fiscal year would be $950,000 divided by 365, which is $2,603, and then multiplied by 258 (the number of days remaining in FY), which is $671,574.

Section 171.19 Payment.

This section, which was § 171.17 in the proposed rule, is revised in the final rule to allow the NRC to prescribe only those collection mechanisms that are acceptable to the U.S. Treasury Department. At this time, such mechanisms include checks, drafts, money orders, or the Electronic Funds Transfer System. This section also has been revised in the final rule to provide for payment in quarterly installments of the Part 171 fee rather than payment in a single lump sum as proposed.

Section 171.21 Refunds.

Section 171.21, in the proposed rule was Enforcement and is renumbered § 171.23 in the final rule. This new § 171.21 is added to address the contingency that by the end of a given fiscal year, the aggregate of collections under Parts 170 and 171 might exceed the statutory limit on collections of 33 percent of the NRC budget. For example, several plants could be licensed to operate during the fiscal year and thereby pay a prorata share of the annual fee, or the number of amendments, inspections, or other activities subject to fees under Part 170 could be greater than estimated at the beginning of the fiscal year.

The purpose of the annual fee pursuant to Part 171 is to collect that portion of costs to the agency of providing regulatory services to power reactors, but with a ceiling on those collections equal to the difference between collections under Part 170 and 33 percent of the NRC budget. Accordingly, any collection of fees exceeding this ceiling will be refunded under this part. Refunds will be adjusted to allow for the fact that some licenses may only have been subject to a portion of the annual fee because the license to operate was issued during the fiscal year. However, it is anticipated that overpayments will arise under this provision rarely, if at all, and will probably not exceed $10,000 per license. Because of the administrative costs associated with making a refund from the U.S. Treasury, any overpayment of $10,000 or less will be credited against the annual fee for the following year.

Section 171.25 Collection, interest, penalties, and administrative costs.

This renumbered section, which was § 171.23 in the proposed rule, is modified slightly to reflect the requirement under 4 CFR Part 102 that, in addition to interest and penalties, administrative costs of collection also are recoverable by the NRC. The section is also modified in recognition of the authority given under § 171.19 to pay the annual fee in quarterly installments. If the quarterly installment is not paid on time in accordance with the schedule provided in § 171.19, then the full annual fee becomes immediately due and payable. Interest, penalties (if applicable), and administrative costs of collecting the fee will be calculated from the date that the late quarterly installment was due.

Unchanged Sections.

Sections 171.7, Interpretations, 171.9, Communications, and renumbered 171.23, Enforcement, are in this final rule as they were in the proposed rule.

10 CFR 51.22 Categorical exclusion.

The amendment to 10 CFR Part 51 to include Part 171 as a categorical exclusion is unchanged.

Commissioner Thomas M. Roberts abstained. The separate views of

Commissioner Frederick M. Bernthal follow:

While this final rule is a distinct improvement over the Commission's earlier proposed rule, it still suffers from several technical deficiencies, and more importantly, from fundamental infirmities which I noted in my previous views on this subject.

Whether or not the user fee idea is conceptually sound, one cannot justify the assessment of one class of licensee to pay for "services" which benefit another. The user fee concept should be permitted to sink or swim in court on its own merits, unburdened by questions of equity in implementation.

The final rule advanced by the Commission is so burdened to the extent that it (1) singles out one class of licensee for payment of the "extra fee" over and above the Part 170 fee schedule, and (2) charges the same "extra" fee to all holders of operating licenses, despite the fact that good performers will be subsidizing poor performers on whose behalf the NRC must frequently put forth extraordinary efforts.

Further, this final rule does not assess the Department of Energy, via the nuclear waste fund or other appropriate machanism, for NRC services related to the Nuclear Waste Policy Act. Absent extraordinary accounting precaution by Congress in its annual appropriations, the rule would thus indirectly require utilities to subsidize the regulatory costs attendant to the geologic disposal of defense high level waste. If the user fee concept is to be applied at all, it ought to be applied in a manner such that, insofar as possible, all entities which derive a "benefit" from NRC services share equally the costs of providing that benefit.

Technical deficiencies of this rule aside, however, there are elemental reasons for concern with all rules such as this. User fees have an undeniable philosophical and popular appeal—after all, who can be against the benefactors of federal regulatory services paying the cost of such services? But the user fee principle must proceed from a single premise: namely, that such fees be required of *all* entities which are subject to government regulatory activity—in short, that there be a level playing field.

The playing field is not level. Nuclear utilities are now to be singled out for payment of a user fee tax, while Congress has not seen fit to levy corresponding charges on other utilities which are the "beneficiaries" of similar Federal regulatory activity. I make no judgment on the merits of the many and diverse regulatory activities of the Federal Government. But I fail to see how our licensees benefit more from regulatory services than do the coal-burning utilities upon whom the EPA conferred the "benefit" of requirements for scrubber installation to reduce stack emissions, or for that matter, than do the pharmaceutical houses regulated by the FDA, or than do a host of other industries now subject to the regulatory requirements of the government.

Indeed, I question the theory (and the Congress should be concerned, lest the impression be created) that our licensees are the principal beneficiaries of the services provided by this agency; the prime beneficiary is the public at large, whom we are mandated to protect. But if that is so, should our licensees then be required to pay not only for an NRC-mandated nuclear powerplant backfit, for example, but also for the costs of a belated agency decision to require the backfit (because earlier regulatory standards were found to be inadequate)?

In passing the 1954 Atomic Energy Act, Congress found that:

> [R]egulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is *necessary* . . . to *protect the health and safety of the public.* [emphasis added]

In the Energy Reorganization Act of 1974, Congress declared that the promotional and regulatory functions of the Atomic Energy Commission should be separated, because it was "in the public interest", that the purpose of the Act was, among other things, "to assure public health and safety."

These Congressional findings and statements of purpose strongly suggest that the responsibilities of this agency are to be carried out for the benefit of the general public, and not for the benefit of any single enterprise, public or private. If there *were* any direct benefits to be conferred upon those whom we regulate, it seems clear that those vanished (and appropriately so) when the AEC was split and its promotional responsibilities assigned to agencies other than the NRC.

The American public, through its elected representatives, has thus charged the NRC with regulating the nuclear industry to promote safety and security. Yet the Commission is now required to implement legislation, the premise of which appears to be contrary to the stated purposes of this agency's enabling legislation.

I therefore approve this final rule only to permit the Commission to promulgate implementing regulations in fulfillment of its Congressional mandate.

Environmental Impact: Categorical Exclusion

The action required under this final rule is administrative and would not impact the environment. The Commission has determined pursuant to 10 CFR 51.22(a) that this final rule would be the type of action that is described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The NRC's predecessor, the Atomic Energy Commission, adopted its first license fee schedule in the fall of 1968, as codified in 10 CFR Part 170. The authority to collect fees was based on Title V of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701). That fee schedule covered power reactors, test and research reactors, fuel reprocessing plants, and materials licenses. It was revised and updated in 1978 and 1984.

The license fees were designed to recover a part of the costs of services attributable to identifiable recipients. Only those costs that were associated with the review of a license application and related to a specific identifiable beneficiary were used in the cost base for the establishment of the fee schedule. Certain costs under the Commission's 1984 revised fee schedule in 10 CFR Part 170 (49 FR 21293) continued to be excluded from fees. Some of the costs that were excluded from the fee base were those associated with: (1) Research, (2) generic licensing activities, (3) standards and code development, (4) contested hearings, (5) the Office of International and State programs, (6) the Office of Inspector and Auditor, (7) the Office of Congressional Affairs, and (8) the Office of Public Affairs.

Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 requires the NRC to establish by rule an annual charge for its licensees that, when added to other amounts collected, is estimated to be equal to 33 percent of the estimated costs incurred by the Commission. This section authorizes NRC to expand its fee base to recover costs previously excluded, such as research and generic licensing activities. This final rule reflects NRC's interpretation of the intent of Section 7601.

Regulatory Flexibility Certification

This rule is not a major rule for the purpose of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), and NRC Size Standards (50 FR 50241, December 20, 1985), the Commission hereby certifies that this final rule does not have a significant impact on small business entities. This rule affects only nuclear power plants licensed to operate. The companies that own these companies do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act.

List of Subjects

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 171

Annual charges, Power plants and reactors, Penalty.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is amending 10 CFR Chapter I as follows:

1. A new Part 171 is added to read as follows:

PART 171—ANNUAL FEE FOR POWER REACTOR OPERATING LICENSES

Authority: Sec. 7601, Pub. L. 99-272, 100 Stat. 146; sec. 301, Pub. L. 92-314, 86 Stat. 222, (42 U.S.C. 2201(w)); sec. 201, 82 Stat. 1242, as amended (42 U.S.C. 5841).

§ 171.1 Purpose.

The regulations in this part set out the annual fee charged to persons licensed by the United States Nuclear Regulatory Commission to operate a power reactor as defined in this part.

§ 171.3 Scope.

The regulations in this part apply to any person holding an operating license for a power reactor as defined in this Part.

§ 171.5 Definitions.

"Budget" means the funds appropriated by Congress for the NRC for each fiscal year, and if that appropriation is not passed on or before September 1 for that fiscal year, the funds most recently appropriated by Congress for the most recent fiscal year.

"Commission" means the United States Nuclear Regulatory Commission or its duly authorized representatives.

"Federal fiscal year" means a year that begins on October 1 of each calendar year and ends on September 30 of the following calendar year. Federal fiscal years are identified by the year in which they end (e.g., fiscal year 1987 begins in 1986 and ends in 1987).

"Nuclear reactor" means an apparatus, other than an atomic weapon, used to sustain fission in a self-supporting chain reaction.

"Operating license" means having a license issued pursuant to § 50.57 of this chapter. It does not include licenses that only authorize possession of special nuclear material after the Commission has received a request from the licensee to amend its licensee to permanently withdraw its authority to operate or the Commission has permanently revoked such authority.

"Person" means: (1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission; any state or any political subdivision of, or any political entity within, a state; any foreign Government or nation or any political subdivision of any such government or nation; or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

"Power reactor" means a nuclear reactor designed to produce electrical or heat energy and licensed by the Commission under the authority of section 103 or subsection 104b of the Atomic Energy Act of 1954, as amended, and pursuant to the provisions of § 50.21(b) or § 50.22 of this chapter.

§ 171.7 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the regulations in this part by an officer or employee of the Commission, other than a written interpretation by the General Counsel, will be recognized as binding on the Commission.

§ 171.9 Communications.

All communications regarding the regulations in this part should be addressed to the Executive Director of Operations, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555. Communications may be delivered in person to the Commission's offices at 1717 H Street NW., Washington, DC.

§ 171.11 Exemption.

The Commission may, upon application, grant an exemption, in part, from the annual fee required pursuant to this part. An exemption under this provision may be granted by the Commission taking into consideration the following factors:

(a) Age of the reactor;
(b) Size of the reactor;
(c) Number of customers in rate base;
(d) Net increase in KWh cost for each customer directly related to the annual fee assessed under this part; and
(e) Any other relevant matter which the licensee believes justifies the reduction of the annual fee.

§ 171.13 Notice.

The first installment of the annual fee for fiscal year 1987 will become due and payable 30 days after the effective date of this final rule. Thereafter, the annual fee, applicable to a power reactor with a license to operate and calculated in accordance with § 171.15 of this part, will be published in the **Federal Register** on or before September 1 each year. The fee will become due and payable to the NRC in accordance with § 171.19 of this part, except as provided in § 171.17 of this part. If the annual fee is based on the amount appropriated by the Congress for the prior fiscal year and Congress, during the fiscal year, enacts an appropriation different from that used in setting the fee, the annual fee will be revised to reflect the actual amount appropriated by Congress for the fiscal year. Notice of this revision will be published in the **Federal Register.**

§ 171.15 Annual Fee: Power reactor operating licenses.

(a) Each person licensed to operate a power reactor shall pay an annual fee for each power reactor unit for which the person holds an operating license at any time during the Federal Fiscal Year (FY) in which the fee is due.

(b) The basis for the annual fee shall be the sum of NRC costs budgeted for each FY for: (1) Research activities directly related to the regulation of power reactors, (2) power reactor regulation (except licensing and inspection activities, and Part 55 operator licensing and instructor certification), and (3) safeguards activities for power reactors (other than those activities directly associated with plant-specific licensing and amendments).

(c) If the basis for the annual fee is greater than 33 percent of the NRC budget less the total estimated fees chargeable under Part 170 of this chapter, then the maximum annual fee for each nuclear power reactor that is licensed to operate shall be calculated as follows:

(NRC FY Budget x.33) minus Est. Fees Part 170 divided by No. of Operating Licenses for Power Reactors equals Fee per License

(d) If the basis for the annual fee is less than the total NRC budgeted costs times 33 percent minus the estimated fees payable under Part 170, then the annual fee shall be calculated as follows:

Basis for Annual Fee divided by No. of Operating Licenses for Power Reactors equals Fee per License

(e) The annual fee for each power reactor licensed to operate as of October 1, 1986, is $950.00. Thereafter, annual fees will be assessed in accordance with § 171.13.

§ 171.17 Proration.

The annual fee for a power reactor granted its license to operate after October 1 of a FY shall be prorated on the basis of the number of days remaining in that FY. Thereafter, the full fee would be due and payable each subsequent FY. Licenses revoked, suspended, or for which the licensee has requested amendment to permanently withdraw operating authority during the FY will not result in any refund of the annual fee or any portion thereof.

§ 171.19 Payment.

Fee payments may be made in any manner allowed under U.S. Department of Treasury regulations and described in the **Federal Register** notice published pursuant to § 171.13 of this part. The annual fee shall be paid in quarterly installments of 25 percent. A quarterly installment is due on October 1, January 1, April 1, and July 1 of each year.

§ 171.21 Refunds.

If at the end of an FY, the aggregrate of collections under 10 CFR Part 170 and this part exceeds 33 percent of the NRC budget, the overpayment will be refunded on a prorata basis to those licensees who have fees under this part, but with an appropriate adjustment for any reduced payments pursuant to § 171.17 of this part. Any overpayment of $10,000 or less (per license) will be credited against the annual fee for the following FY.

§ 171.23 Enforcement.

If any person required to pay the annual fee fails to pay when the fee is due, the Commission may refuse to process any application submitted by or on behalf of the person with respect to any license issued to the person and may suspend or revoke any licenses held by the person.

§ 171.25 Collection, interest, penalties, and administrative costs.

The annual fee will be collected pursuant to the procedures of 10 CFR Part 15. Interest, penalties, and administrative costs for late payments will be assessed in accordance with 10 CFR Part 15 of this chapter, 4 CFR Part 102, and other relevant regulations of the United States Government, as appropriate. In the event a quarterly installment is not made by the appropriate due date specified in § 171.19, the full fee becomes due and payable, with interest, penalties, and administrative costs of collection calculated from the date that quarterly installment was due.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

2. The authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, 202, as amended, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Protection Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95–604, Title II, 92 Stat. 3033–3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021).

3. In § 51.22, the introductory text of paragraph (c) is republished and a reference to Part 171 is added to paragraph (c)(1), which is revised to read as follows:

§ 51.22 Criterion for and identification of licensing and regulatory actions eligible for categorical exclusion.

* * * * *

(c) The following categories of actions are categorical exclusions:

(1) Amendments to Parts 0, 1, 2, 4, 7, 8, 9, 10, 11, 14, 19, 21, 25, 55, 75, 95, 110, 140, 150, 170, or 171 of this chapter, and actions on petitions for rulemaking relating to these amendments.

* * * * *

Dated at Washington, DC, this 16th day of September 1986.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 86-21307 Filed 9-17-86; 8:45 am]

BILLING CODE 7590-01-M