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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 351

Reduction in Force Ratings for Retention—Longer Period to Credit Ratings; Clarification of Assignment Rights; Correction

AGENCY: Office of Personnel Management.

ACTION: Correcting amendments.

SUMMARY: This document corrects an error made in a final rule under 5 CFR part 351 published December 17, 1991 (56 FR 65415). A revision was made without reference to an amendment published on September 6, 1991 (56 FR 43995). This correction amends the December 17, 1991, final rule to conform to the earlier change.

EFFECTIVE DATE: January 16, 1992.

FOR FURTHER INFORMATION CONTACT: Thomas A. Glennon or Edward P. McHugh, (202) 606-0960.

SUPPLEMENTARY INFORMATION: On December 17, 1991, OPM published a final rule under 5 CFR part 351 that revised § 351.803(b). This revision was made without reference to an earlier revision published on September 6, 1991, which redesignated § 351.803 as § 351.802 and made a revision to paragraph (b). Correcting amendments are made to §§ 351.802(b) and 351.803(b) below.

List of Subjects in 5 CFR Part 351

Administrative practice and procedure, Government employees. Office of Personnel Management. Douglas A. Brook, Acting Director.

Accordingly, 5 CFR part 351 is corrected by making the following correcting amendments:

PART 351—REDUCTION IN FORCE

1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503.

2. In § 351.802, paragraph (b) is revised to read as follows:

§ 351.802 Content of notice.

(b) The employee's competitive area, competitive level, subgroup, service date, and annual performance ratings of record received during the last 4 years as provided in § 351.504 of this part;

3. In § 351.803, paragraph (b) is revised to read as follows:

§ 351.803 Notice of eligibility for reemployment and other placement assistance.

(b) When 50 or more employees in a competitive area receive separation notices under this part, the agency must provide notification of the action, at the same time it issues specific notices of separation to employees, to:

- (1) The State dislocated worker unit, as designated or created under title III of the Job Training Partnership Act;
- (2) The chief elected official of local government(s) within which these separations will occur; and
- (3) OPM.

[FR Doc. 92-17307 Filed 7-22-92; 8:45 am]
BILLING CODE 6325-01-M

5 CFR Part 842

RIN 3206-AE15

Federal Employees Retirement System—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is adopting, with amendments, its interim regulations governing the special retirement provisions for law enforcement officers, firefighters, and air traffic controllers employed under the Federal Employees Retirement System (FERS). These final regulations implement certain statutory changes enacted since the current regulations were issued; correct or clarify certain provisions; and put into effect a limited authority for Executive department heads to delegate the

authority to determine that a position qualifies as a law enforcement officer or firefighter position.

EFFECTIVE DATE: August 24, 1992.

FOR FURTHER INFORMATION CONTACT: John E. Landers, (202) 606-0299.

SUPPLEMENTARY INFORMATION: Sections 8412 (d) and (e) of title 5, United States Code, provide immediate and enhanced retirement benefits for FERS employees who (1) have attained age 50 and completed 20 years of service as a law enforcement officer, firefighter, or air traffic controller; or (2) have completed 25 years of such service (regardless of age). Employees who qualify as law enforcement officers (5 U.S.C. 8401(17)), firefighters (5 U.S.C. 8401(14)), or air traffic controllers (5 U.S.C. 2109) are subject to special rules regarding employee deductions and agency contributions (5 U.S.C. 8422 and 8423). They are also subject to mandatory separation based on age (5 U.S.C. 8425).

Note: Public Law 101-428, enacted October 15, 1990, extended benefits under 5 U.S.C. 8412(d) to members of the Capitol Police, not by including them in the definition of "law enforcement officer," but by identifying them separately in 5 U.S.C. 8412(d). OPM's regulations at 5 CFR part 842, subpart H, which are the focus of this rulemaking, do not address members of the Capitol Police.

On January 16, 1987, we published interim regulations (at 52 FR 2068) to implement the special retirement law provisions for FERS employees serving as law enforcement officers, firefighters, and air traffic controllers. Those regulations provided necessary definitions, standards and procedures, and also delegated certain authorities to employing agencies. We are now adopting the interim regulations, with changes, as final rules. The changes are necessary to implement certain statutory changes, correct or clarify certain provisions, and to revise a particular delegation limit.

The remainder of this supplementary information section is divided into four parts. The first part addresses comments on the interim regulations. The second part discusses regulatory changes required by law changes. The third part explains the regulatory changes made to correct or clarify certain provisions. The fourth part describes other changes being made in the interim regulations.

1. Comments on Interim Regulations

OPM received written comments from various Federal agencies, employee associations, and individuals regarding the January 16, 1987, interim regulations on FERS law enforcement officers, firefighters, and air traffic controllers. We have carefully considered these comments, as discussed below.

Maximum Entry Age

A number of commenters objected to the requirement that maximum entry ages be established for rigorous law enforcement officer and firefighter positions. (See § 842.804(a).) Several commenters expressed concern that agencies had hired FERS employees into rigorous positions for which they had not yet established a maximum entry age; a grace period was suggested. One agency asserted that the statutory requirement that law enforcement officer and firefighter positions be limited to "young" individuals was satisfied by having a mandatory separation age. This is not true since the mandatory separation age is triggered only if an employee has acquired 20 years of law enforcement officer or firefighter service.

We continue to believe that carrying out the law requires that maximum entry ages be established for all rigorous law enforcement officer and firefighter positions. At the same time, we recognize that there was an unavoidable lag between the promulgation of the requirement and actual establishment of the maximum entry ages in many agencies. As explained in part 2, the FERS law was amended to provide some flexibility in application of the maximum entry age requirement. (See discussion of section 103(a)(2) of Public Law 100-238 in part 2.)

Minimum Physical Qualifications

Some commenters were concerned about the requirement that minimum physical qualifications be established for rigorous law enforcement officer and firefighter positions. Some were confused as to whether the regulations required rigorous positions to have both maximum entry age limits and physical qualifications. The law states that employment opportunities in these positions are to be "limited to young and physically vigorous individuals." This language clearly implies use of both maximum entry age limits and physical qualifications. The interim regulations noted these requirements in § 842.804(a). This section specifically provides that physical qualifications are to be determined by the agency head based on the personnel management needs of

the agency. The physical qualifications may consist of either physical requirements or medical standards or a mix of the two, as long as the set of qualifications adopted ensures that the position in question is limited to physically vigorous individuals. Some commenters were concerned that agencies had hired FERS employees into rigorous positions for which they had not yet established physical qualifications. As discussed above relative to maximum entry ages, this problem was addressed by a subsequent law change. (See discussion of section 103(a)(2) of Public Law 100-238 in part 2.)

Definition of Primary Duties

Some commenters objected to the definition of the term "primary duties" as set forth in § 842.802—in particular, the statement that, in general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they can be considered his or her primary duties. A parallel statement was added to the CSRS regulations on law enforcement officers and firefighters on December 5, 1990, and this issue was fully addressed in the accompanying supplementary information (see 55 FR 50153). As explained there, the 50-percent standard is merely an optional substitute standard—in effect, a short-cut method of determining that an employee meets the regular definitional requirements without the need for further evidence or support. If, in a rare instance, an employee does not satisfy the 50-percent standard but does satisfy the regular definition requirements (duties are paramount, etc.), the employee's duties will qualify as primary duties.

Experience Requirement for Administrative Positions

A number of commenters objected to the regulatory requirement that an administrative secondary position (in which an employee can continue special retirement coverage) must be one where actual experience in the law enforcement or firefighting field is a mandatory prerequisite. (See the definition of "secondary position" in § 842.802.) Some preferred the old language used in the parallel CSRS regulations: "basic qualification" rather than "mandatory prerequisite." OPM's longstanding policy in administering the CSRS has been that an administrative secondary position must require past experience in a primary position. Coverage of administrative staff under the early retirement plan is justified only if it is necessary to fill the administrative positions with employees

covered under the plan, who, if not allowed to continue the special retirement coverage, would not be willing to accept administrative posts. Where past primary position experience is not needed in the administrative position, the employing agency's ability to staff its administrative functions is enhanced because it can hire from sources other than primary positions. An administrative position that does not require primary experience is not really in the law enforcement officer or firefighter career track, and it was the intent of the law that the special early retirement benefit be reserved for individuals remaining on that career track. The term "basic qualification" has consistently been interpreted by OPM to mean a fundamental or essential requirement; however, since some agencies appeared to be confused about the term's meaning, we sought to clarify our policy by using the term "mandatory prerequisite." This change was made in the CSRS regulations governing law enforcement officers and firefighters on December 17, 1987 (see 52 FR 47893). The regulation provided some liberalization in the policy by expressly allowing for the experience requirement to be satisfied by equivalent work outside the Federal Government. The FERS interim regulations simply establish a parallel rule for FERS law enforcement officers and firefighters.

It should be noted that, on rare occasions, a position may qualify for approval as an administrative secondary position even though the official position description does not identify rigorous experience as a mandatory prerequisite. This would be appropriate if, at the time the position is being filled, there is a valid organizational need that mandates filling the administrative position only with someone having rigorous experience; in this case, the position would be deemed to meet the mandatory prerequisite requirement during the tenure of the individual hired to meet that need. As a general rule, however, position descriptions should be revised to reflect such an organizational need.

Continuous Secondary Coverage Requirement

A number of commenters objected to § 842.803(b)(iii), which required that an employee be continuously employed in a secondary position without a break in service (excluding involuntary separations) after transferring from a rigorous position. A parallel requirement is found in the CSRS regulations published on December 17, 1987, and

this issue was addressed in the accompanying supplementary information (see 52 FR 47893). The continuous secondary coverage requirement supports a basic purpose of the early retirement provision which is to retain young and vigorous employees in a special Federal career track. We note that employees in secondary positions continue to be subject to mandatory separation (at age 55 for firefighters and at age 57 for law enforcement officers). Since mandatory separation is triggered only when an employee has 20 years of law enforcement officer or firefighter service, it is reasonable to require employees to remain continuously in the Federal law enforcement or firefighting career field as a condition of secondary coverage. Many of the concerns raised by agencies about this requirement—for example, the need for cross training and career development—can be addressed by use of details and temporary promotions. Other situations can be addressed by putting employees in a leave-without-pay status.

Redelegation of Approval Authority

Several commenters objected to the prohibition on agency head redelegation of the authority to approve positions as law enforcement officer or firefighter positions. In addition, representatives of the Inspector General community expressed concern about possible interference with their independence if agency heads had authority to make decisions regarding positions in their offices; they requested to be designated as "agency heads" for purposes of the regulations. As we explained in the supplementary information accompanying the interim regulations, we prohibited redelegation of the position approval authority because of the potentially significant impact of these decisions on an agency's budget. In addition, this redelegation limit ensures agency-wide consistency in coverage determinations. We continue to believe that the need for fiscal discipline and consistency argues for having this authority reside in a single high-level official who has responsibility for both personnel and budgetary matters for the entire agency. However, as explained in part 4 of this supplementary information, we are amending the regulations to allow Executive department heads to delegate position approval authority to a single headquarters-level official who is a direct subordinate.

OMP Oversight

Several commenters objected to § 842.808, which sets forth the

possibility that OPM may overrule an agency decision to approve a law enforcement officer or firefighter position. Some agencies requested that there be a time limit on such OPM reversals or that the reversals be prospective only. If OPM determines that an agency approval is not valid under the law or regulations, it must order a retroactive correction. While agency decisions will be given due deference within the bounds of the law and regulations, agency errors cannot create statutory rights that do not otherwise exist. (See *OPM v. Richmond*, 110 S.Ct. 2465 (1990).) In any event, OPM's oversight role is an inherent part of its underlying statutory authority to make these determinations and its continuing responsibility to determine whether continued delegation of this authority is appropriate.

2. Revisions Required Due to Changes in Law

Public Law 100-238, enacted January 8, 1988, made a number of technical corrections to the FERS Act, including several changes to the retirement law provisions respecting law enforcement officers and firefighters. These changes require corresponding changes in the regulations.

Section 103(c) of Public Law 100-238 reduced from 10 years to 3 years the period of time a law enforcement officer or firefighter must serve in a rigorous position before transferring to a secondary position (that is, a supervisory or administrative position) with entitlement to continue his or her coverage under the special FERS provisions for law enforcement officers and firefighters. This statutory change was made effective retroactive to January 1, 1987. Accordingly, we are revising § 842.803(b)(ii) of the interim regulations, as well as several references in § 842.809, to reflect the change.

Section 103(a)(2) of Public Law 100-238 amended the definitions of "law enforcement officer" and "firefighter" under FERS. Previously, one of the conditions under the definition was that the duties of the position are "sufficiently rigorous that employment opportunities are required to be limited to young and physically vigorous individuals." This condition was changed by replacing the words "are required to be" with the words "should be." The legislative history of Public Law 100-238 provides no explanation for this change (see House Report 100-374, October 15, 1987, page 21). However, during the months prior to the law's passage, OPM had received comments from some agencies who

expressed concern about the validity of their employees' coverage under 5 U.S.C. 8412(d) given the fact that they had not yet had time to establish maximum entry age limits or physical qualifications for their positions. Some agencies also expressed doubts about their authority to establish maximum entry age limits for FERS law enforcement officers and firefighters.

Section 103(a)(1) of Public Law 101-238 provided agency heads with express authority to establish maximum entry ages and the above-described change in section 103(a)(2) was labeled a "clarifying amendment." Since the law states that rigorous law enforcement officer and firefighter positions "should be" limited to young employees and since agencies have the power to ensure that this limiting occurs by establishing maximum entry ages, we conclude that agencies are obligated to establish maximum entry ages for rigorous positions as soon as reasonably possible. Given this, as well as the historical context of the law change, we are giving effect to the "should be" language by amending the interim regulations to allow a position to be considered a rigorous law enforcement officer or firefighter position during any temporary lag that is necessary in establishing a maximum entry age or physical qualifications for a position. The definition of "rigorous position" in section 842.802 of the interim regulations and § 842.804(a) (regarding position documentation requirements) are revised accordingly.

This regulatory change will have particular effect on FERS law enforcement officers and firefighters serving in rigorous positions when the FERS Act took effect or who were hired shortly afterward—before agencies were able to establish maximum entry ages or physical qualifications. It is anticipated that, in the future, agencies generally will be able to establish maximum entry age limits and physical qualifications at the time new rigorous positions are approved.

Section 103(c) of Public Law 100-238 also amended the definition of "law enforcement officer" by adding a new category of qualifying employees who are not subject to the normal definitional requirements. (See 5 U.S.C. 8401(17)(B).) This category consists of employees of the Department of Interior or the Department of Treasury (specifically, officers in the U.S. Park Police and the Uniformed Division of the Secret Service) who, but for enactment of the FERS Act, would be subject to the District of Columbia Police and Firefighters' Retirement System. This

provision was meant to ensure that a group of employees who had historically had eligibility for an early retirement benefit would continue such eligibility. We are therefore revising the regulatory definition of "law enforcement officer" in § 842.802 to include this category. A corresponding change is also made in the definition of "rigorous position" so that positions held by employees under 5 U.S.C. 8401(17)(B) are considered rigorous positions for the purpose of these regulations. In addition, § 842.808(a) is revised to note that determinations under 5 U.S.C. 8401(17)(B) are not subject to OPM review.

Public Law 100-92, which was enacted on August 18, 1987, provided that the definition of "air traffic controller" in 5 U.S.C. 2109 that took effect on January 1, 1987, was applicable to service performed before 1987, as long as the employee's annuity was based on a separation from service occurring on or after January 1, 1987. This allowed flight service station specialist service to be counted as air traffic controller service for employees separating for retirement on or after January 1, 1987, even though it did not qualify as air traffic controller service under the definition in effect at the time the service was performed. We are revising § 842.809(a) of the interim regulations accordingly.

Public Law 100-92 also provided that the Office of Personnel Management shall accept the certification of the "designee" of the Secretary of Transportation or the Secretary of Defense, as applicable, in determining the amount of service performed by any air traffic controller. Accordingly, we are revising the definition of "agency head" in § 842.802 to include such designees.

3. Revisions to Correct and Clarify

In § 842.802 of the interim regulations, we are removing an erroneous reference to 5 U.S.C. 8414(c), which deals with certain military reserve technicians who are eligible for early retirement. The regulations in subpart H do not address these military reserve technicians.

The definition of "air traffic controller" is revised to clarify that it includes only first-level supervisors of employees actively engaged in actual air traffic control duties. This is required by the law, which includes only "immediate supervisors" in the definition of "air traffic controller" (see 5 U.S.C. 2109).

A grammatical error in § 842.802 is corrected by inserting a paragraph break after the first sentence in the definition of "primary duties." (This same correction was made in the parallel

CSRS definition in a final rule published on December 5, 1990, at 55 FR 50153.)

The definition of "secondary position" is revised to be consistent with the parallel CSRS definition. As explained in the supplementary information accompanying the final CSRS regulation issued on December 17, 1987 (see 52 FR 47893), the revised language makes clear that a secondary position must be a position that is in the career track for a law enforcement officer or firefighter—that is, a position which requires actual experience in a rigorous position, or an equivalent position outside the Federal Government.

Section 842.803(b)(ii) is revised to clarify that the 3-year rigorous service requirement can be met using service not covered by FERS deductions, if otherwise qualifying. Thus, nondeduction service—for example, service under a temporary or intermittent appointment—can count toward the 3-year requirement. This rule is based on 5 U.S.C. 8401 (14)(B) and (17)(C), which state that the 3-year requirement is met by an employee who transfers to a supervisory or administrative position "after performing duties" that met the conditions that would qualify a position as a rigorous position. Since an employee can perform the duties applicable to a rigorous position while not covered by FERS retirement deductions, nondeduction service in a qualifying Federal Government position can be counted toward the 3-year requirement.

For purposes of the 3-year requirement, it does not matter whether the service is actually made creditable by payment of a deposit or whether the service cannot be made creditable. Thus, even post-1988 nondeduction service (which can never be made creditable under FERS for annuity entitlement or computation purposes) can be used to meet the 3-year requirement. However, in all cases, to have the special benefit coverage while in a secondary position, the employee is still required to be serving in a rigorous position actually subject to FERS deductions at the time of transfer to a secondary position. (See § 842.803(b)(1).)

Several other revisions are made in § 842.803(b). Some of these are just a matter of reformatting the material. For example, the parenthetical phrase in § 842.803(b)(ii) dealing with first-level supervisors is removed and a new paragraph (a)(3) is added; this reformatting has no substantive effect. In addition, the language in paragraphs (a) and (b) dealing with details is broadened to expressly include temporary promotions.

A new § 842.805(g) is added to make clear that an employee occupying a law enforcement officer, firefighter, or air traffic controller position who is detailed or temporarily promoted to a position not conveying special retirement coverage continues to be covered under 5 U.S.C. 8412 (d) or (e).

Section 842.809 of the interim regulations provides transitional rules for employees with Federal service as law enforcement officers, firefighters, or air traffic controllers before becoming covered by FERS. We are making several revisions in the section to clarify when CSRS definitions and procedures apply in determining whether service qualifies as law enforcement officer or firefighter service. Generally, the FERS definitions of law enforcement and firefighter are more restrictive than those under CSRS. (See House Report 99-606, May 16, 1986, page 132.)

Section 842.809(b) provides that CSRS-covered service performed before an employee becomes covered under FERS (through automatic coverage or voluntary transfer) is not subject to the FERS definitions of law enforcement officer and firefighter. As stated in the supplementary information that accompanied the FERS interim regulations dated January 16, 1987 (52 FR 2068), the FERS definitions take effect on January 1, 1987, and "for employees under the current system [CSRS], the current definitions remain applicable until such time as he or she becomes subject to FERS, either automatically (for short-service employees) or by election * * *". Section 842.809(e) of the interim regulations states that determinations based on the CSRS definitions of law enforcement officer or firefighter must be made in accordance with the CSRS regulations, which require OPM approval. However, § 842.809(d) of the interim regulations appears to allow agency heads to make determinations regarding past CSRS-covered service that is now creditable under FERS (for annuity entitlement and computation purposes), even though the CSRS definitions apply. To eliminate any confusion, we are revising and consolidating § 842.809 (d) and (e) into a new paragraph (d).

The interim regulations in § 842.809 did not take into account the possibility of nondeduction service being performed before becoming covered under FERS. We are, therefore, revising the section to address when CSRS or FERS definitions apply to nondeduction service performed before an employee becomes covered by FERS. These

revisions are made in § 842.809(b) and (d).

These changes will make clear that the CSRS definitions of law enforcement officer and firefighter, as well as CSRS regulatory procedures, apply to all service before January 1, 1987 (when the FERS definition came into effect), and to post-1986 service that was subject to CSRS deductions at the time it was performed or that is creditable toward a CSRS component of a FERS annuity; conversely, FERS definitions and procedures apply to FERS-covered service and all other post-1986 service. (We note that even though post-1988 nondeduction service is not creditable under FERS rules, such service counts toward the 3-year requirement in § 842.803(b).)

4. Other Changes

Invoking its authority under 5 U.S.C. 1104, OPM delegated authority to employing agencies to approve positions as law enforcement officer or firefighter positions under FERS in the interim regulations. Because of the potentially significant impact of the coverage decisions on the Federal budget, coverage determination authority was delegated specifically to the head of the Executive agency—that is, a Cabinet-level Executive department, an independent establishment, or a Government corporation (see 5 U.S.C. 101–105)—with redelegation to lower levels expressly prohibited. (See § 842.803(d) of the interim regulations and supplementary information at 52 FR 2068.)

Upon further consideration, we believe that a very limited redelegation should be permitted. These final regulations would, by revising the definition of "agency head" in § 842.802 allow the head of an Executive department (as defined in 5 U.S.C. 101 to mean one of the 14 Cabinet-level departments in the Government) to delegate this coverage determination authority to a single headquarters-level official who reports directly to the department head. This change would allow Executive department heads to be relieved of this particular decision-making burden. At the same time, the deciding official would be at a level where he or she is sensitive to the long-term budget and personnel implications of these coverage determinations, and in a position to ensure department-wide consistency.

These regulations do not permit redelegation to any official below the head of a Federal agency except as explained above in the case of Executive departments. The head of a component of an Executive

department—such as one of the military departments or a component agency such as the Internal Revenue Service (Treasury Department)—is not permitted to make these determinations.

Section 842.804(c) allows an individual to request a determination as to whether his or her position qualifies as a law enforcement officer, firefighter, or air traffic controller position. Of course, any affirmative determination must be made by the agency head in accordance with § 842.803. However, a denial of an individual request for position approval may be made by the agency head's designated representative, in accordance with agency delegations of authority. Any final agency decision denying an individual's request for position approval may be appealed to the Merit Systems Protection Board.

We are amending § 842.807 to clarify that (1) only agency denial decisions made in response to individual requests under § 842.804(c) are subject to appeal and (2) agency denial decisions may be made by officials below the level of agency head. We are also adding a new paragraph in § 842.807 to expressly address individual appeal rights in cases where an agency denies secondary coverage to an employee serving in an approved secondary position because the employee was found not to meet all the requirements for continuation of coverage.

Finally, we are revising the interim regulations at § 842.808(a) to require agencies to provide additional information when they approve a position as a law enforcement officer or firefighter position. In addition to providing the position title and number of incumbents, agencies are required to identify whether the position was rigorous or secondary and, if rigorous, provide the established maximum entry age or the date by which the maximum entry age will be established.

Executive Order 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect Federal employees and agencies.

List of Subjects in 5 CFR Part 842

Air Traffic Controllers, Claims, Disability benefits, Firefighters, Government employees, Law

enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management,
Constance Berry Newman,
Director.

Accordingly, OPM is adopting its interim regulations under 5 CFR part 842 published at 52 FR 2068 on January 16, 1987, as final with the following changes:

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

1. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 and 5 U.S.C. 8402(c)(1); §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; § 842.707 also issued under section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203; § 842.708 also issued under section 4005 of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239 and section 7001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; subpart H also issued under 5 U.S.C. 1104.

Subpart H—Law Enforcement Officers, Firefighters, and Air Traffic Controllers

§ 842.801 [Amended]

2. In § 842.801, paragraph (a)(1) is amended by deleting the word "and 8414(c)".

§ 842.802 [Amended]

3. In § 842.802, the definition of *agency head* is amended by adding the following sentence at the end of the definition:

§ 842.802 Definitions.

* * * * *

Agency Head * * * For purposes of this subpart, "agency head" is also deemed to include the designated representative of the head of an executive department as defined in 5 U.S.C. 101, except that for provisions dealing with law enforcement officers and firefighters, the designated representative must be a department headquarters-level official who reports directly to the executive department head and who is the sole such representative for the entire department.

* * * * *

4. In § 842.802, the last sentence in the definition of "air traffic controller" is revised to read as follows:

§ 842.802 [Amended]

Air traffic controller * * * Also included in this definition is an employee who is the first-level supervisor of any air traffic controller as described above.

5. In § 842.802, the second sentence of the definition of *firefighter* is amended by removing the word "in" the second time it appears and adding in its place the word "is".

6. In § 842.802, the definition of "law enforcement officer" is amended by adding after the second sentence the following sentence:

§ 842.802 [Amended]

Law enforcement officer * * * *Law enforcement officer* also includes, as required by 5 U.S.C. 8401(17)(B), an employee of the Department of the Interior or the Department of the Treasury who occupies a position that, but for enactment of chapter 84 of title 5, United States Code, would be subject to the District of Columbia Police and Firefighters' Retirement System, as determined by the Secretary of the Interior or the Secretary of the Treasury, as appropriate. * * *

§ 842.802 [Amended]

7. In § 842.802, the definition of "primary duties" is amended by adding a paragraph break after the first sentence (ending with "basis") and redesignating the last two sentences as separate concluding text.

8. In § 842.802, the definition of "rigorous position" is amended by removing the words "are required to be limited" in the introductory text and adding in their place the words "should, as soon as reasonably possible, be limited (through establishment of a maximum entry age and physical qualifications)" and by adding the following sentence at the end of the definition:

§ 842.802 [Amended]

"Rigorous position" * * * "Rigorous position" is also deemed to include a position held by a law enforcement officer as identified in 5 U.S.C. 8401(17)(B) (related to certain employees in the Departments of the Interior and the Treasury).

9. In § 842.802, the definition of "secondary position" is revised to read as follows:

§ 842.802 [Amended]

Secondary position means a position that—

(a) Is clearly in the law enforcement or firefighting field;

(b) Is in an organization having a law enforcement or firefighting mission; and

(c) Is either—
(1) Supervisory; that is, a position whose primary duties are as a first-level supervisor or law enforcement officers or firefighters in rigorous positions; or
(2) Administrative; that is, an executive, managerial, technical, semiprofessional, or professional position for which experience in a rigorous law enforcement or firefighting position, or equivalent experience outside the Federal Government, is a mandatory prerequisite.

10. In § 842.803, paragraph (a), paragraph (b), and paragraph (d) are revised to read as follows:

§ 842.803 Conditions for coverage.

(a) *Rigorous positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a rigorous law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a rigorous position is not covered under the provisions of 5 U.S.C. 8412(d).

(3) A first-level supervisor position may be determined to be a rigorous position if it satisfies the conditions set forth in § 842.802.

(b) *Secondary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a secondary law enforcement officer or firefighter position is covered under the provisions of 5 U.S.C. 8412(d), if all of the following criteria are met:

(i) The employee, while covered under the provisions of 5 U.S.C. 8412(d), moves directly (that is, without a break in service exceeding 3 days) from a rigorous position to a secondary position;

(ii) The employee has completed 3 years of service in a rigorous position, including any such service during which no FERS deductions were withheld; and

(iii) The employee has been continuously employed in a secondary position or positions since moving from a rigorous position without a break in

service exceeding 3 days, except that a break in employment in secondary positions that begins with an involuntary separation (not for cause), within the meaning of 5 U.S.C. 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(2) An employee who is not a rigorous position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d).

(d) Except as specifically provided in this subpart, an agency head's authority under this section cannot be delegated.

11. In § 842.804, the second sentence of paragraph (a) is revised to read as follows:

§ 842.804 Evidence.

(a) * * * The official documentation for the position should, as soon as is reasonably possible, establish that the primary duties of the position are so rigorous that the agency does not allow individuals to enter the position if they are over a certain age or if they fail to meet certain physical qualifications (that is, physical requirements and/or medical standards), as determined by the employing agency head based on the personnel management needs of the agency for the positions in question. * * *

12. In § 842.805, paragraph (f) is amended by removing the word "detained" and adding in its place the words "detailed or temporarily promoted"; and paragraph (g) is added to read as follows:

§ 842.805 Withholding and contributions.

(g) While an employee who holds a rigorous, secondary, or air traffic controller position is detailed or temporarily promoted to a position that is not a rigorous, secondary, or air traffic controller position, the additional withholdings and agency contributions will continue to be made.

13. § 842.807 is revised to read as follows:

§ 842.807 Review of decisions.

(a) The final decision of an agency denying an individual's request for approval of a position as a rigorous, secondary, or air traffic controller position made under § 842.804(c) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of an agency denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.803(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

14. In § 842.808, paragraph (a) is revised to read as follows:

§ 842.808 Oversight of coverage determinations.

(a) Upon deciding that a position is a law enforcement officer or firefighter position, each agency head must notify OPM (Attention: Associate Director for Retirement and Insurance) stating the title of each position, the number of incumbents; whether the position is rigorous or secondary, and, if the position is rigorous, the established maximum entry age (or if no maximum entry age has yet been established, the date by which it will be established). The Director of OPM retains the authority to overrule an agency head's determination that a position is a rigorous or secondary position, except such a determination under 5 U.S.C. 8401(17)(B) (concerning certain employees in the Departments of the Interior and the Treasury) or under 5 U.S.C. 8401(17)(D) (concerning certain positions primarily involved in detention activities).

15. In § 842.809, paragraph (e) is removed; paragraph (a), the last sentence of paragraph (b) introductory text, and paragraph (d) are revised; and paragraphs (b)(1) and (2) are added to read as follows:

§ 842.809 Transitional provisions.

(a) Any service as an air traffic controller, within the meaning of this term under 5 U.S.C. 2109 as in effect on or after January 1, 1987—even if performed before that date—is included in determining an employee's length of air traffic controller service under 5 U.S.C. 8412(e) for the purposes of retirement eligibility and for mandatory separation under 5 U.S.C. 8425(a) as long as the annuity is based on a separation from service occurring after 1986.

(b) * * * The FERS definitions of firefighter under 5 U.S.C. 8401(14) and law enforcement officer under 5 U.S.C. 8401(17) are not applicable to service performed—

(1) Before 1987; or

(2) After 1986 and before an employee first becomes subject to chapter 84 (that is, subject to FERS deductions), unless that service was neither subject to CSRS

deductions nor creditable in a CSRS component as described in § 846.304(b).

(d) (1) The CSRS definitions of law enforcement officer under 5 U.S.C. 8331(20) and firefighter under 5 U.S.C. 8331(21) are applicable to service performed before an employee became subject to chapter 84 if the service was—

(i) Subject to CSRS deductions at the time it was performed (including service that becomes creditable under FERS annuity computation rules);

(ii) Performed before 1987 and not subject to retirement deductions; or

(iii) Performed after 1986 and not subject to retirement deductions but is creditable in a CSRS component as described in § 846.304(b).

(2) The determination of whether any service meets the CSRS definitions of law enforcement officer under 5 U.S.C. 8331 (20) or firefighter under 5 U.S.C. 8331(21) must be made in accordance with the provisions of Subpart I of Part 831 of this chapter.

§ 842.809 [Amended]

16. In § 842.809, the term "10-year" is revised to read "3-year" in paragraphs (b), (c)(1)(ii), and (c)(2)(ii).

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN 3150-AE20

Revision of Fee Schedules; 100% Fee Recovery, FY 1992

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the licensing, inspection, and annual fees charged to its applicants and licensees. The amendments are necessary to implement Public Law 101-508, signed into law on November 5, 1990, which mandates that the NRC recover approximately 100 percent of its budget authority in Fiscal Year (FY) 1992 less amounts appropriated from the Nuclear Waste Fund (NWF). The amount to be recovered for FY 1992 is approximately \$492.5 million.

EFFECTIVE DATE: August 24, 1992.

FOR FURTHER INFORMATION CONTACT: C. James Holloway, Jr., Office of the Controller, U.S. Nuclear Regulatory

Commission, Washington, DC 20555, Telephone 301-492-4301.

SUPPLEMENTARY INFORMATION:

I. Background.

II. Responses to Comments.

III. Final Action—Changes Included in Final Rule.

IV. Section-by-Section Analysis.

V. Environmental Impact: Categorical Exclusion.

VI. Paperwork Reduction Act Statement.

VII. Regulatory Analysis.

VIII. Regulatory Flexibility Analysis.

IX. Backfit Analysis.

I. Background

Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), signed into law on November 5, 1990, requires that the NRC recover approximately 100 percent of its budget authority less the amount appropriated from the Department of Energy (DOE) administered Nuclear Waste Fund (NWF) for FYs 1991 through 1995 by assessing license, inspection, and annual fees.

On July 10, 1991 (56 FR 31472), the NRC published a final rule in the Federal Register which established the part 170 professional hourly rate and the materials licensing and inspection fees as well as the part 171 annual fees to be assessed to recover approximately 100 percent of the FY 1991 budget. The July 10, 1991, final rule became effective August 9, 1991. In addition to establishing the FY 1991 fees, the August 9, 1991, final rule established the underlying basis and method for determining the part 170 hourly rate and fees and the part 171 annual fees.

This final rule includes the limited changes made to 10 CFR parts 170 and 171 which were issued as a final rule on April 17, 1992 (57 FR 13625), with an effective date of May 18, 1992. The limited change to part 170 allows the NRC to bill quarterly for those license fees that are currently billed every six months. The limited change to part 171 adjusts the maximum annual fee assessed a materials licensee who qualifies as a small entity under the NRC's size standards. The maximum annual fee of \$1,800 per licensed category is continued for FY 1992. However, a lower tier small entity fee of \$400 per licensed category has been established for small businesses and non-profit organizations with gross receipts of less than \$250,000 and small governmental jurisdictions with a population of less than 20,000.

On April 29, 1992 (57 FR 18095), the NRC published the proposed rule that presented the licensing, inspection, and annual fees necessary for the NRC to recover approximately 100 percent of its

budget authority for FY 1992 less the appropriation received from the NWF. The basic methodology used in the proposed rule was unchanged from that used to calculate the part 170 professional hourly rate, the specific materials licensing and inspection fees in part 170, and the part 171 annual fees in the final rule published July 10, 1991 (56 FR 31472). Because the public was provided an opportunity to comment on the basic approach, policies, and methodology used in the July 10, 1991, final rule and because these comments were fully addressed in that final rule, the NRC requested public comment only on the issue of whether the methodology adopted in FY 1991 was properly applied to the FY 1992 budget authority.

II. Responses to Comments

The NRC received nineteen public comments by the close of the comment period on May 29, 1992, and an additional ten comments by the close of business on June 22, 1992. These comments were evaluated in the development of this final rule.

Of the twenty-nine comments, two were from power reactor licensees or their representatives and twenty-seven were from persons concerned with other types of licenses, including eleven comment letters from the uranium industry or their representatives. Copies of all comment letters received are available for inspection in the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC.

Many of the comments were similar in nature. For evaluation purposes, these comments have been grouped, as appropriate, and addressed in the context of the narrow focus of this final rule.

A. Comments Regarding Application of the Methodology.

1. *Comment.* A few commenters indicated that the NRC has not provided sufficient information on which to evaluate the fees to be assessed for FY 1992. These commenters stated that the NRC violated the Administrative Procedure Act (APA) by failing to provide an explanation of how it arrived at its final determination of the annual fees, particularly as they apply to fuel cycle facilities. They also stated that the NRC did not provide sufficient detail concerning the NRC budget to verify the significant changes in the proposed rule. Commenters recommended that the NRC make publicly available its Five Year Plan or other documents with an equivalent level of detail to provide the information necessary to allow an effective evaluation of, and permit affected licensees to provide

constructive comments on, the proposed rule.

Response. The NRC believes it has provided sufficient information concerning the FY 1992 budget to allow effective evaluation and constructive comment on the proposed rule. In part III, the Section-by-Section Analysis of the proposed rule published April 29, 1992 (57 FR 18097), the NRC provided a detailed explanation of the FY 1992 budgeted costs for the various classes of licensees being assessed fees. In addition, the NRC workpapers pertinent to the development of the fees to be assessed were placed in the Public Document Room (PDR) on April 29, 1992, for public review. The workpapers provide additional information concerning the development of the fees, including the FY 1992 budgeted resources at the subactivity level for the major programs. The resources shown in the workpapers are the same as those identified in the Five Year Plan for FY 1992 and are displayed at the lowest level, the subactivity level, as in the Five Year Plan.

2. *Comment.* A few commenters indicated that the hourly rate of \$123 for FY 1992 (a seven percent increase over FY 1991) is not justified, and that the NRC had not indicated that it is incurring an increase in the area of salaries, benefits, and overhead but rather an increase in total NRC spending. The commenters pointed out that the NRC professional rate has increased by approximately 115 percent over a seven year period while the Consumer Price Index (CPI) has shown an inflation rate of about 22 percent for the same period. The commenters recommended that the NRC bring its FY 1992 hourly rate back in line with the increase in the CPI and the average wage increases in the industry it regulates. This would be three to four percent a year or an hourly rate of \$119 for FY 1992. These commenters suggested that it is inappropriate to raise the professional rate and inspection fees by 7 percent. The commenters recommended that the NRC use the CPI or other indices for determining future adjustments to its hourly rates.

Response. The NRC professional hourly rate is established to recover approximately 100 percent of the Congressionally approved budget, less the appropriation from the NWF, as required by OBRA-90. Both the method and budgeted costs used by the NRC in the development of the hourly rate of \$123 for FY 1992 are discussed in detail in the part III, Section-by-Section Analysis, for § 170.20 of the proposed rule (57 FR 18097). For example, Table II

shows the direct FTEs (full time equivalents) by major program for FY 1992 and Table III shows the budgeted costs (salaries and benefits, administrative support, travel and other G&A contractual support) which must be recovered through fees assessed for the hours expended by the direct FTEs. The budgeted costs have increased \$38.6 million as compared to FY 1991 levels. This increase reflects the amount required by the NRC to effectively accomplish the mission of the agency. The specific details regarding the budget for FY 1992 are documented in the NRC's publication "Budget Estimates, Fiscal Years 1992-1993" (NUREG-1100, Volume 7), which is available to the public. Given the increase in the budget it is necessary to increase the 1992 hourly rate to recover 100 percent of the budget as required by OBRA-90. The NRC is unable to use the CPI or other indices in the development of the NRC hourly rate or the fees to be assessed under 10 CFR parts 170 and 171 because if the hourly rate were increased by only three to four percent over the FY 1991 levels, the NRC could not meet the statutory mandate requirement of OBRA-90 to recover approximately 100 percent of the NRC budget authority through fees.

3. *Comment.* Several commenters indicated that the imposition of the annual fees in certain instances bears no "reasonable relationship to the cost of providing regulatory services" and therefore the fees violate OBRA-90 in that they have not been "fairly and equitably" allocated among licensees. Commenters argued, for example, that the NRC should not charge two fees for one process covered by two licenses or that a higher amount of generic safety costs should not have been allocated to high enriched uranium facilities as compared to low enriched uranium facilities. Another commenter stated that it is not fair and equitable to assess a higher fee for a UF₆ converter than for a mill license. One commenter suggested that it is not considered "practicable" to assess all licensees of a class to compensate for revenue lost from other classes of licensees because of license terminations and that he should be provided an accounting of the component costs for NRC generic activities, e.g., rulemaking, upgrading safeguards requirements, modifying standard review plans, overseeing regional programs and developing inspection programs.

Response. In the final rule published July 10, 1991 (56 FR 31480), the NRC indicated that it is not practical to allocate costs on the basis of such

factors as difference in processes and whether or not the facility has more safety problems than another facility at a specific point in time. It must be recognized that NRC generic safety and safeguards costs included in the annual fee are not related to a specific individual licensee. Costs related to a specific application, license or approval that provide an identifiable service are recovered under the fee regulations of 10 CFR part 170. For the generic and other regulatory costs not recovered under 10 CFR part 170, the NRC, in compliance with the requirements of OBRA-90, has allocated these costs to major classes of licensees. The law permits, and the NRC has established, a schedule of annual charges that assesses different annual charges for different licensees or classes of licensees. To the extent practicable and where necessary for a more fair and equitable allocation of costs, a major class of licensees was divided into subclasses. Within a class or subclass of licensees, the costs were uniformly allocated to each licensee in the class or subclass based on the premise that there is no significant difference in the generic and other regulatory services provided to each licensee within a class or subclass. This approach and principle were used for all classes of licensees. Therefore, the NRC cannot provide each licensee an accounting of the component costs for NRC generic and other regulatory activities. However, the activities associated with a specific class of licensees are summarized in this rule and detailed in publicly available fee workpapers. With respect to license terminations that occurred during FY 1991, it must be recognized that for FY 1992 the base or total number of licensees has decreased for some classes of licensees, and therefore the fees must be increased in FY 1992 in order for the NRC to recover approximately 100 percent of its budget. Because the costs are allocated to a class of licensees, any terminations that occur within the class will raise the fees for the remainder of the licensees within that class.

4. *Comment.* A few commenters indicated that the NRC may have inappropriately included certain budgeted costs in the fee base. One commenter indicated that the proposed rule did not show any offsets to FY 1992 salaries and expenses from revenues received from cooperative nuclear safety research programs, services rendered to foreign governments and international organizations, and the material and information access authorization program. This commenter noted that the FY 1992 authorization

language indicates that money from these programs may be retained and used for salaries and expenses associated with those activities. One commenter recommended that NRC review its FY 1992 allocation of funds and confirm that the Nuclear Waste Fund (NWF) appropriation of about \$20 million includes \$1.7 million in administrative costs for high level waste activities in order to avoid double payment by utilities, once through their mill/kwhr payment to the NWF and again through the annual charge that recoups total NRC administrative costs.

Response. The NRC provides some technical assistance to foreign governments and international organizations on a reimbursable basis and participates in cooperative research programs. For example, the Omnibus Budget Reconciliation Act, FY 1987, requires that the NRC certify containers that will be used to transport plutonium through United States air space and that all costs incurred for this certification be reimbursed by the foreign country involved. Examples of international cooperative research include the participation of Finland and Spain in severe accident research, Austria on source term research, and Korea on piping integrity research. These costs are not included in NRC's budget request but are paid for by the foreign government or international organization for which the work is being performed. These activities are therefore not included in the computation of 100 percent fee recovery for the funds appropriated to the NRC and are therefore not charged to licensees through the assessment of user fees. These monies are separately identified in the agency's financial systems, and are deposited and disbursed for the performance of the functions for which they are collected.

With respect to the NWF appropriation for the FY 1992 budget, \$1.7 million of the NRC's total administrative support funds was allocated to the High-Level Waste Regulation program based upon the full-time equivalent staffing budgeted for that program. Funds for the NRC High-Level Nuclear Waste Regulation program are appropriated from the Nuclear Waste Fund. Licensees are not charged fees for the administrative support costs which are allocated to the Nuclear Waste Fund.

5. *Comment.* One commenter indicated that to assess fee Category 2.A.(2), Class I, fees for sites undergoing reclamation amounts to double charging because these types of facilities are already charged fees under part 170 for

the full cost of regulatory services associated with the reclamation process.

Response: To recover 100 percent of the budget, the NRC assesses two types of fees. First, license and inspection fees are assessed under 10 CFR part 170 to recover the costs to the NRC of providing individual services to specific applicants for, and holders of, NRC licenses and approvals. The part 170 fees are billed for specific services rendered in response to an application filed with the NRC for review or an inspection conducted by the NRC. Second, annual fees are assessed under 10 CFR part 171 to recover NRC generic and other regulatory costs not recovered under 10 CFR part 170. This is the process used to charge uranium recovery licensees. Thus, there is no double charging of fees to uranium recovery licensees because the annual fee recovers only those costs not recovered under 10 CFR part 170.

6. *Comment.* A few commenters submitted comments on the methodology used by the NRC to develop the lower tier small entity fee of \$400 established by the NRC effective May 18, 1992. While applauding the NRC for developing a lower tier small entity fee, commenters recommended that the NRC —

(1) Expand the criteria as to what constitutes a "small entity" and that a sliding scale fee should be considered based on ability to pay;

(2) Reexamine the method of allocation of costs, particularly the lower tier small entity fee of \$400 because these commenters believe that it is inherently unfair to enable "mom and pop" operations to remain in business yet force modest companies, with comparably small radiographic testing departments, to subsidize them;

(3) Clarify whether the gross annual receipts are considered income generated only from the activities pertaining to the license or income generated from the entire entity composed of various departments; and

(4) Allow small county governmental jurisdictions to deduct the population of incorporated cities and villages not within the jurisdictional powers of the county.

Response. These types of comments were addressed by the NRC in section II, Responses to comments, item B., of the final limited rule published by the NRC on April 17, 1992 (56 FR 13626-13627). Briefly, the NRC indicated that any reduction in fees for small entities must be paid by other NRC licensees and that while the lower tier small entity fee of \$400 does not eliminate the impact of the fees on small entities, it

substantially reduces the impact for those licensees with relatively low gross annual receipts of less than \$250,000 and for small governmental jurisdictions with a relatively low population of less than 20,000. With respect to the question of what constitutes gross annual receipts, the NRC stated clearly in establishing the size standards and in the promulgation of the final rule establishing the lower tier small entity fee that the term "annual receipts" is used in the same manner as used by the Small Business Administration (SBA). In 13 CFR 121.402(b)(2), annual receipts are defined " * * * to include all revenue in whatever form received or assessed from whatever sources * * * " (54 FR 52647; December 21, 1989) (57 FR 13625; April 17, 1992). Therefore, the term "annual gross receipts" refers to the licensee's entire business, not solely receipts from licensed activities. For purposes of qualifying as a small governmental jurisdiction under the NRC fee regulations, the population of a county includes the population of all cities, towns, and villages within the county. The NRC finds no basis to modify our approach in this area.

7. Comment. One commenter indicated that he had submitted a petition for rulemaking to the NRC to review the FY 1991 methodology so that medical licensees could be treated like similar licensees. The commenter believes the NRC is obligated to address the concerns raised in the petition in terms of whether the proposed fee schedule for FY 1992 is consistent with the methodology adopted in FY 1991. The commenter suggests that the NRC institute an immediate moratorium freezing fees at FY 1991 levels until the petition is considered in its entirety.

Response. The NRC is not obligated to address the concerns raised in the petition of rulemaking filed with the NRC before adopting the final rule establishing fees for FY 1992. The NRC clearly stated when it published receipt of the petition for rulemaking in the *Federal Register* that "NRC intends to consider the issues raised by the petitioners after the rulemaking action necessary to establish the license and annual fees for FY 1992 is completed * * *". The petitioners' concerns will be considered within the context of the review and evaluation of the fee program for FY 1993 which will be conducted as part of the NRC's continued implementation of Public Law 101-508" (57 FR 20213; May 12, 1992). The NRC has not yet completed that evaluation. To adopt an immediate moratorium freezing fees at the FY 1991 level until the petition is considered

would result in the NRC not meeting the statutory requirements of OBRA-90 that NRC recover approximately 100 percent of its budget authority for FY 1992.

8. Comment. One commenter indicated that the NRC did not properly apply the methodology in FY 1991 to one of its licensees who conducts multiple activities under a single license. The commenter noted that one UF₆ converter operates multiple activities under a single license and therefore a substantially larger share of NRC budgeted costs allocated to UF₆ converters should be assessed to the one licensee that is conducting multiple activities. For the same reason, the commenter indicated that this licensee should be assessed a substantially larger portion of the low level waste (LLW) surcharge.

Response. The NRC has reexamined the allocation of costs to the UF₆ conversion licenses. This reexamination has been accomplished within the framework of the OBRA-90, accompanying Conference Report, and the fundamental principles used by the Commission in establishing annual fees for all classes of licensees.

OBRA-90 and the accompanying Conference Report provide that to the maximum extent practicable, the annual fee shall have a reasonable relationship to the cost of providing regulatory services to the licensees. Consistent with the law and the guidance in the Conference Report, the NRC allocated its budgeted generic and other regulatory costs not recovered from 10 CFR part 170 license fees to the major classes of licensees. To the extent practicable and where necessary for a more fair and equitable allocation of costs, a major class of licensees was further subdivided into subclasses. For example, NRC costs for the fuel facilities class of licensees were allocated further to UF₆ conversion, HEU fuel fabrication, LEU fuel fabrication and other licenses. Within a subclass, the cost was uniformly allocated to each license in the subclass based on the premise that there is no significant difference in the generic and other regulatory services provided to each license within a subclass. This approach and principle were used for all classes of licensees.

The costs allocated to the licenses within the UF₆ subclass are for the safety generic and other regulatory activities that are attributable to this subclass of licensees and that are not recovered by 10 CFR part 170 license and inspection fees. These costs were allocated uniformly to each of the two licenses within the UF₆ subclass, based on the premise that there is not a

significant difference in the generic and other regulatory services provided to each of the licenses.

The same NRC regulations (e.g., 10 CFR part 40), guidance (e.g., Regulatory Guides) and policies are applicable to both the license which authorizes deconversion activities (UF₆ to UF₄) and 1 UF₆ conversion and the license that only authorizes UF₆ conversion. The 10 CFR part 40 generic safety regulations are applied in the same manner to each of the two licenses in the subclass independent of the source material activities authorized by the two licenses.

The NRC costs attributable to the UF₆ subclass are more related to the fact that a license exists, not to the UF₆ manufacturing process. Thus a uniform allocation of costs to each license results in an annual fee that has a reasonable relationship to the generic and other regulatory services provided.

The surcharge portion of the annual fee includes NRC budgeted costs that are not attributable to the UF₆ subclass. However, it is assessed to the licensees in the subclass for policy reasons. For the UF₆ subclass of licensees, the surcharge includes a portion of low-level waste costs and costs not recovered from small entities. In the Conference Report, Congress indicated that these types of costs "may be recovered from such licensees as the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment." Following this guidance, the NRC decided to uniformly allocate these costs to each fuel facility resulting in the same surcharge for each license.

9. Comment. Several commenters indicated that it appeared as if uranium licensees are being billed for agency overhead that is not attributable to the regulation of the uranium mining industry. These commenters noted that a considerable amount of the agency resources are likely dedicated to interagency work for the Department of Energy (DOE), such as NRC review of DOE's reclamation plans for title 5 uranium mill tailings sites, and interaction with the Environmental Protection Agency (EPA) on the promulgation of regulations. The commenters noted that these agencies are not billed for these NRC activities which are associated with uranium recovery. The commenters disagreed with the NRC's position that all substantive review at DOE sites is essentially completed prior to the application for a general license for that site. The commenters also disagreed with NRC's interpretation of OBRA-90 that in order to be billed for annual fees one must be a licensee of the NRC. The

commenters argued that the test is whether "any person" receives a service or thing of value from the Commission because OBRA-90 allows the "collection of fees from any person" and "all licensees". That person, whether a licensee or not, commenters argued, is required to pay fees to cover the NRC's cost of providing the services or thing of value.

Response. With respect to the 10 CFR part 170 fees assessed pursuant to the Independent Offices Appropriation Act (IOAA) of 1952, the NRC is precluded, under the IOAA, from assessing fees to Federal agencies for specific services rendered. The OBRA-90 limits annual fee assessments to licensees of the NRC. Thus, the NRC does assess annual fees under 10 CFR part 171 to Federal agencies to the extent that those Federal agencies have a license or approval/certificate from the NRC. As indicated in the Conference Report accompanying OBRA-90, the Commission must collect approximately 100 percent of its budget through fees, even though in some instances certain activities are not attributable to an existing NRC licensee or class of licensees. With regard to NRC activities for DOE under the Uranium Mill Tailings Radiation Control Act (UMTRCA), the NRC is prohibited under the IOAA from assessing such part 170 fees to Federal agencies. The fees cannot be assessed to DOE under OBRA-90 and 10 CFR part 171 because DOE does not possess a license or approval. Thus, the NRC has assessed the costs for review of DOE's UMTRCA actions based on the Conference Report guidance that the costs be "recovered from such licensees as the Commission in its discretion determines can fairly, equitably and practicably contribute to their payment." These costs are being recovered from power reactor licensees, not from uranium recovery licensees as implied by the commenters. This was noted in the discussion in the final rule of the surcharge for power reactors (56 FR 31486; July 10, 1991). The interaction that NRC has with EPA is necessary for NRC to develop and execute NRC's generic safety regulatory programs, primarily as a result of the Clean Air Act. Thus, some of these costs are for NRC generic regulatory activities for uranium recovery facilities and have been appropriately included in the annual fee.

B. Other Comments

1. **Comment.** A few commenters stated that the short time frame (30 days) allowed by the NRC for comment on the proposed rule did not provide an adequate opportunity to comment on the proposed rule.

Response. The NRC indicated in section I, Background, of the proposed rule published April 29, 1992, that a 30 day public comment period was being provided because OBRA-90 requires that NRC collect the revised FY 1992 fees by September 30, 1992, and that in order to comply with the public law, fees would have to be assessed on an expedited basis to ensure collection of the required fees by the end of the fiscal year (57 FR 18095). Thirty days represents a sufficient time to provide comments particularly because the NRC is not changing the approach or methodology for assessing fees that it adopted in FY 1991.

2. **Comment.** One commenter indicated that sections of the proposed regulation should be included within President Bush's moratorium of new regulations. This commenter argued that the fees for source material licenses, especially fee Category 2.A.(2), Class I, do not meet key aspects of President Bush's regulatory initiative because they are burdensome, impede economic growth, do not incorporate market mechanisms and do not provide a strong, systematic cost benefit realization.

Response. OBRA-90 requires the NRC to promulgate each year a user fee schedule that will result in the collection by the end of the fiscal year of a sum approximating 100 percent of its budget, minus the appropriation received from the Nuclear Waste Fund. Any delay in the publication of this rule would result in the NRC's inability to meet its statutorily imposed deadline for collecting FY 1992 user fees. Therefore, the NRC must publish this rule at this time.

3. **Comment.** Several commenters addressed the proposed change to the § 171.16, Category 2.A.(2) for uranium recovery licensees. The commenters indicated that dividing the current Class I facilities into two classes, which has the effect of increasing the annual fee for a mill by 138 percent over the FY 1991 levels, does not seem justified or reasonable and that the proposed rule does not distinguish between active and inactive facilities. The commenters stated that because inactive mill sites undergoing reclamation do not generate uranium mill tailings but are included in fee Category 2.A.(2) Class I, the NRC has overstated the costs for the entire category and appropriate adjustments must be made. Commenters believe that any licensed facility that is serving solely as a cost center and not generating revenues should be exempt from fees. A few commenters indicated that the assessment of annual fees for

part 71 Quality Assurance (QA) Plans that have increased 200 percent over 1991 levels have no reasonable relationship to the cost of providing regulatory services, particularly when the licensee pays separately on an hourly basis for all other services received from the NRC. Commenters pointed out that no other licensees or class of licensees is subject to the same exorbitant level of increase as fee Category 10.B, QA Program Approval Holders.

Response. OBRA-90 and the accompanying Conference Report provide that to the maximum extent practicable, the annual fee shall have a reasonable relationship to the cost of providing regulatory services to the licensees. Consistent with the law and the guidance in the Conference Report, the NRC allocated its budgeted generic and other regulatory costs not recovered from 10 CFR part 170 license fees to the major classes of licensees. To the extent practicable and where necessary for a more fair and equitable allocation of costs, a major class of licensees was further subdivided into subclasses. For example, NRC costs for the uranium recovery class of licensees were allocated further to "Class I," "Class II," and "Other" facilities. Within a subclass, the cost was uniformly allocated to each license in the subclass based on the premise that there is no significant difference in the generic and other regulatory services provided to each license within a subclass. This approach and principle were used for all classes of licensees.

The costs allocated to the licenses within the Class I subclass are for the safety generic and other regulatory activities that are attributable to this subclass of licensees and that are not recovered by 10 CFR part 170 license and inspection fees. These costs were allocated uniformly to each of the eight licenses within the Class I subclass. Uniform allocation is based on the premise that there is no significant difference in the generic and other regulatory services provided to each of the eight licenses. The NRC has reexamined the allocation of costs to the Class I uranium recovery facilities. This reexamination has been accomplished within the framework of the OBRA-90, the accompanying Conference Report, and the fundamental principles used by the NRC in establishing annual fees for all classes of licensees. The NRC generic and other regulatory costs attributable to the Class I facilities subclass are related to the fact that a license authorizing operation exists, not to whether the mill is active or inactive.

Thus, a uniform allocation of costs to each license results in an annual fee that has a reasonable relationship to the generic and other regulatory services provided.

With respect to QA plan approvals, the NRC experienced a significant number of requests from QA approval holders to change their plans during the past year. Many QA approval holders amended their plans, within the window of opportunity provided by the NRC. These QA approval holders downgraded the authorized use of the plan from "fabrication and use" to "use" only. These changes have resulted in a significant decrease in the number of plans authorizing "fabrication and use" and an increase in the number of plans authorizing "use only". Therefore, in order to recover the costs for plans authorizing "fabrication and use" from fewer approval holders, it is necessary to assess a much higher annual fee than was assessed in FY 1991. Similarly, to recover the costs for plans authorizing "use only" from an increased number of plan holders has resulted in a lower annual fee for these approval holders.

4. *Comment.* One commenter objected to the NRC proposal to exempt from the FY 1992 annual fee those licensees who filed for termination or possession only during the period October 1, 1991, through December 31, 1991. This commenter indicated that it appeared arbitrary to establish such a deadline when changes to a license occur throughout the year and that licensees should be permitted to file exemption requests related to the FY 1992 fees after December 31, 1991. Another commenter indicated that in cases where the fees have substantially increased, licensees should now be given the option of canceling the license or approval and thus avoid the annual fee for FY 1992.

Response. In the proposed rule, the Commission indicated that during the one month period from the publication of the FY 1991 final rule on July 10, 1991, to August 9, 1991, the effective date of the rule, many licensees filed requests for termination with the NRC and were not subject to the FY 1991 annual fees. Many other licensees have either called or written to the NRC since the final rule became effective requesting further clarification and information concerning the annual fees assessed. The NRC is responding to these requests as quickly as possible but it was unable to respond and take appropriate action on all of the requests before the end of the fiscal year on September 30, 1991. Therefore, based on the number of requests filed, the Commission will exempt from the FY 1992 annual fees those licensees, and

holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage only licenses prior to January 1, 1992. All other licensees and approval holders who held a license or approval on October 1, 1991, will be subject to the FY 1992 annual fees. This would not, however, preclude a licensee from filing a specific exemption request with respect to the FY 1992 fees after December 31, 1991 and within ninety days of the effective date of this rule as specified in 10 CFR 171.11. An exemption request would be handled on a case-by-case basis. As in FY 1991, the NRC plans to continue a very high threshold of eligibility for exemption requests and reemphasizes its intent to grant exemptions sparingly. With respect to the comment that licensees now be given the option of canceling the license or approval and avoid the FY 1992 fee, the NRC notes that licensees were put on notice in the proposed rule published April 12, 1991, and again in the final rule published July 10, 1991, that the NRC would assess annual fees that would significantly impact a substantial number of its licensees in order to recover 100 percent of its budget authority for FY 1991 through FY 1995. The NRC mailed copies of both the proposed and final notices to each licensee.

5. *Comment.* A few commenters claimed that NRC intends to make the final rule establishing the FY 1992 license and annual fees effective upon publication in violation of section 553(b) of the Administrative Procedure Act.

Response. The NRC clearly stated in Section I, Background, of the proposed rule that, as in FY 1991, the final rule would become effective 30 days after publication in the Federal Register. The NRC will send a bill for the amount of the annual fee to the licensee or certificate, registration or approval holder upon publication of the final rule. Payment is due on the effective date of the rule (57 FR 18095; April 29, 1992). This fully satisfies all legal requirements.

C. Comments Beyond the Scope

There were four groups of comments that were not within the scope of the proposed rule, and therefore were not evaluated for the purposes of issuing this final rule. Briefly, they are—

The legality of the fees to be assessed by the NRC;

The appropriateness of the NRC budget and regulatory program;

The impact of the fees on licensees; and

The annual fee should be based on the amount of material, or the size of the licensee's operation.

1. Legality of Fees

Comment. Commenters indicated that OBRA-90 fails to set forth adequate standards to guide NRC's discretion in setting annual charges under part 171. Therefore, the fees amount to a "tax" rather than a "fee" and NRC lacks legal authority to promulgate and assess the charges.

Response. The legal issues, including the issue of "tax" vs. "fee", involved in the assessment of annual fees were fully addressed in the final rule published on July 10, 1991 (Section III, Responses to Comments, item A., Legal issues (56 FR 31473-31475). The NRC's approach satisfies all legal requirements.

2. Appropriateness of NRC Budget and Regulatory Program

Comment. There were several commenters who questioned the size of the NRC budget and regulatory program. Some commenters indicated that they would expect a decrease in the NRC budget because of the significant reduction in the number of licensees within the past year and the fact that Maine became an Agreement State during FY 1992. Other commenters do not believe the 42 percent increase in the budget for uranium recovery activities over the previous year is justified given the current size of the licensed uranium industry. These commenters noted that there are no active conventional uranium mines and mills in the United States and only three commercially operating in-situ leach facilities. They argued that the fee of \$238,700 appears grossly out-of-line with the degree of NRC involvement for uranium recovery sites. Commenters suggested that the NRC—

- (1) Freeze fees at FY 1991 levels;
- (2) Distribute copies of the NRC budget to licensees for approval or disapproval; and
- (3) Appoint an outside reviewer to evaluate the scope and effectiveness of the NRC medical program because the increases are tied to unnecessary and overly expensive medical regulation.

Response. OBRA-90 requires NRC to recover 100 percent of its budget authority through fees. The fees being assessed for FY 1992 fulfill this requirement. The budget is developed by the NRC, submitted by the President to the Congress, and approved by the Congress. The basis for the NRC FY 1992 resources are explained in the NRC's Budget Estimates, Fiscal Years 1992-1993 (NUREG-1100; Volume 7).

The basis for the resources are thoroughly addressed by the Congress through hearings and written questions and answers. The FY 1992 NRC hearings are documented, for example, in the publication *Energy and Water Development Appropriations for FY 1992—Hearings Before a Subcommittee on Appropriations, House of Representatives, One Hundred Second Congress, First Session Part 8*. The resources resulting from this review and decision process are those necessary for NRC to implement its statutory responsibilities. The fees must be consistent with this approved budget in order to comply with OBRA-90. The agency makes an extraordinary effort to ensure to the maximum extent possible that fees are related to the cost of providing services to the beneficiaries of the NRC activity. Questions relating to the NRC budget approval process were also addressed in the final rule published by the Commission on July 10, 1991, in Section III, Responses to Comments, item E, *Other comments*, (56 FR 31482).

3. Impact of Fees on Licensees

Comment. Several commenters expressed concern about the impact of the fees. Some commenters indicated that an exemption should be offered to nonprofit medical institutions similar to nonprofit educational institutions and that the previous exemption from fees for State and local governments be reestablished.

Response. The impact issues regarding the assessment of the annual fees were fully addressed by the Commission in the final rule published July 10, 1991 (see Section III., Response to comments, item B2. Major Policy Issues—Consideration of nonsafety impacts in assessing fees.) The NRC continues to believe that the previous assessment of impacts and resulting conclusions remain appropriate.

4. Fees Based on Material Possessed and Size of Operation

Comment. Commenters suggested that the NRC assess fees based on the amount of throughput of material, the size of the facility, the amount or type of material possessed, the sales generated by the licensed location, the competitive condition of certain markets including the assessment of fees to Agreement States and the effect of fees on domestic and foreign competition. Another commenter indicated that it is not fair and equitable, and is contrary to the intent of Congress, to assess UF₆ converters a fee that is larger than assessed for a mill. Another commenter stated that the methodology the NRC

has applied is unjustified because it results in increased fees of over 2,000 percent over 1990 fee levels to some medical licensees while the risk to the patient remains the same. The commenter suggested that some consideration be given to the commensurate risk to the patient before exercising such exorbitant fees on the industry which has not increased the risk of radiation exposure to the public or to its patients.

Response. The issues of basing fees on the amount of material possessed, the frequency of use of the material, and the size of the facilities, were addressed by the NRC in the Regulatory Flexibility Analysis in appendix A to the final rule published July 10, 1991 (56 FR 31511–31513). The Commission did not adopt that approach, and finds no basis for altering its approach at this time.

III. Final Action—Changes Included in Final Rule

OBRA-90 requires that the NRC recover approximately 100 percent of its FY 1992 budget authority, including the funding of its Office of the Inspector General, less the appropriations received from the NWF, by assessing license and annual fees.

For FY 1992, the NRC's budget authority is \$512.5 million, of which approximately \$20.0 million has been appropriated from the NWF. Therefore, OBRA-90 requires that the NRC collect approximately \$492.5 million in FY 1992 through part 170 licensing and inspection fees and part 171 annual fees. The NRC estimates that approximately \$105 million will be recovered in FY 1992 from the fees assessed under part 170. This estimate represents an increase of \$15 million over that estimated in the proposed rule because of one additional quarterly billing in FY 1992. This is the result of the rule change effective May 18, 1992, which permits the NRC to bill licensees on a quarterly rather than a semiannual basis (April 17, 1992; 57 FR 13625). The remaining \$387.5 million would be recovered through the FY 1992 part 171 annual fees.

The Commission has not changed the basic approach, policies, or methodology for calculating the part 170 professional hourly rate, the specific materials licensing and inspection fees in part 170, and the part 171 annual fees set forth in the final rule published July 10, 1991 (56 FR 31472). The public was provided an opportunity to comment fully on the basic approach, policies, and methodology used in the July 10, 1991, final rule. Those comments were fully addressed by the Commission in its final rule. That rule has been challenged in Federal court by several parties and

those lawsuits are pending. Under this final rule, fees for most licenses will increase because —

(1) NRC's budget has increased. This has resulted in a corresponding increase in the professional hourly rate; and

(2) Approximately 2,000 licensees have requested that their licenses be terminated or combined since the FY 1991 final rule was adopted. This has resulted in fewer licensees to pay for the costs of regulatory activities not recovered under 10 CFR part 170.

A. Amendments to Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services

Four amendments have been made to part 170. These amendments do not change the underlying basis for the regulation—that fees be assessed to applicants, persons, and licensees for specific identifiable services rendered. These revisions also comply with the guidance in the Conference Committee Report on OBRA-90 that fees assessed under the Independent Offices Appropriation Act (IOAA) recover the full cost to the NRC of all identifiable regulatory services each applicant or licensee receives.

First, the agency-wide professional hourly rate, which is used to determine the part 170 fees, is increased from \$115 per hour to \$123 per hour (\$214,509 per direct FTE). The rate is based on the FY 1992 direct FTEs and that portion of the FY 1992 budget that is not recovered through the appropriation from the NWF.

Second, the current part 170 licensing and inspection fees in §§ 170.21 and 170.31 for all applicants and licensees are increased by seven percent to reflect this increase in the professional hourly rate.

Third, the NRC is amending §§ 170.21, Facility Category K, and 170.31, Category 15, to make further refinements to the existing fee categories for import and export license applications and amendments.

Fourth, the NRC is amending § 170.3 to add a definition for nonprofit educational institutions.

B. Amendments to Part 171: Annual Fees for Reactor Operating Licenses, and Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals and Government Agencies Licensed by NRC

Five amendments have been made to part 171. First, §§ 171.15, and 171.16 are amended to increase the annual fees for

FY 1992 to recover approximately 100 percent of the FY 1992 budget less fees collected under part 170 and funds appropriated from the NWF. It should be noted that the amount of the annual fees for several classes of licensees has decreased from the amount shown in the proposed rule. The reason for the decrease in annual fees is that an additional \$15 million is estimated to be collected from part 170 fees in FY 1992 because of the change in the part 170 rule effective May 18, 1992, which permits the NRC to bill licensees on a quarterly rather than a semiannual basis.

Second, § 171.16, Category 2.A.(2), is amended to divide Class I facilities in the uranium recovery class of licensees into two classes. The additional category (Class II) would recognize those licensees who do not generate uranium mill tailings.

Third, § 171.11 is amended to require that licensees who wish to be considered for an exemption from the annual fees file their respective exemption requests within ninety (90) days from the effective date of the rule establishing the annual fees. As in FY 1991, the NRC plans to continue a very high threshold of eligibility for exemption requests and reemphasizes its intent to grant exemptions sparingly.

The NRC notes that during the one-month period from the publication of the FY 1991 final rule on July 10, 1991, to the effective date of the rule on August 9, 1991, many licensees filed requests for termination with the NRC and were not subject to the FY 1991 annual fees. Many other licensees have either called or written to the NRC since the final rule became effective requesting further clarification and information concerning the annual fees assessed. The NRC is responding to these requests as quickly as possible but was unable to respond and take action on all of the requests prior to the end of the fiscal year on September 30, 1991. Therefore, based on the number of requests filed, the Commission, for FY 1992, is exempting from the FY 1992 annual fees those licensees, and holders of certificates, registrations, and approvals who either filed for termination of their license or approval or filed for a possession only/storage only license during the period October 1, 1991, through December 31, 1991. All other licensees and approval holders who held a license or approval on October 1, 1991, are subject to the FY 1992 annual fees.

Fourth, § 171.19 is amended to credit the quarterly partial payments made by certain licensees in FY 1992 toward their FY 1992 annual fees.

Fifth, § 171.5 is amended to add a definition for nonprofit educational institutions.

The NRC notes that the impact of this final rule on small entities has been evaluated in the Regulatory Flexibility Analysis (see appendix A to this final rule). Based on this analysis, the NRC is continuing for FY 1992 a maximum annual fee of \$1,800 per licensed category for those licensees who qualify as a small entity under the NRC's size standards. The lower tier small entity annual fee of \$400 per licensed category for certain materials licensees, which was adopted by the NRC and became effective on May 18, 1992, will apply for FY 1992 (57 FR 13625; April 17, 1992).

The amounts to be collected through annual fees in the amendments to part 171 are based on the increased professional hourly rate. The part 171 annual fees have been determined using the same method used to determine the FY 1991 annual fees. These amendments to part 171 do not change the underlying basis for part 171; that is, charging a class of licensees for NRC costs attributable to that class of licensees. The changes are consistent with the Congressional guidance in the Conference Committee Report, which states that the "conferees contemplate that the NRC will continue to allocate generic costs that are attributable to a given class of licensee to such class" and the "conferees intend that the NRC assess the annual charge under the principle that licensees who require the greatest expenditures of the agency's resources should pay the greatest annual fee." 136 Cong. Rec., at H12692-93.

C. FY 1992 Budgeted Costs

The FY 1992 budgeted costs by major activity, relating to the amendments to parts 170 and 171 are shown in Table I.

TABLE I.—RECOVERY OF NRC'S FY 1992 BUDGET AUTHORITY

Recovery method	Estimated amount (\$ in millions)
Nuclear Waste Fund	\$20.0
Part 170 (license and inspection fees) ..	105.0
Part 171 (annual fees):	
Power Reactors	309.6
Nonpower Reactors	.6
Fuel Facilities	9.9
Spent Fuel Storage	.2
Uranium Recovery	2.0
Transportation	5.0
Material Users	31.3
Subtotal	358.6
Costs remaining to be recovered not identified above	28.9
Total	512.5

¹ Includes \$6.2 million that will not be recovered from small materials licensees because of the reduced small entity fees.

The \$28.9 million identified for those activities which are not identified as either part 170 or part 171 or the NWF in Table I are distributed among the NRC classes of licensees as follows:

\$25.1 million to operating power reactors;

\$1.9 million to fuel facilities; and

\$1.9 million to other materials licensees.

In addition, approximately \$6.2 million must be collected as a result of continuing the \$1,800 maximum fee for small entities and the lower tier small entity fee of \$400 for certain licensees. In order for the NRC to recover 100 percent of its budget authority in accordance with OBRA-90, the NRC will recover \$5.4 million of the \$6.2 million from operating power reactors and the remaining \$8 million from large entities that are not reactor licensees.

This distribution results in an additional charge (surcharge) of approximately \$272,000 per operating power reactor; \$155,100 for each HEU, LEU, and U₂F₆ fuel facility; \$38,800 for each other fuel facility license and waste disposal license in Category 4A; \$1,600 for each materials licensee in a category that generates a significant amount of low level waste; and \$150 for other materials licensees. When added to the base annual fee of approximately \$2.8 million per reactor, this will result in an annual fee of approximately \$3.1 million per operating power reactor. The total fuel facility annual fee would be between approximately \$0.1 million and \$2.3 million. The total annual fee for materials licenses would vary depending on the fee category(ies) assigned to the license.

These additional charges not directly or solely attributable to a specific class of NRC licensees or costs not recovered from all NRC licensees on the basis of previous Commission policy decisions would be recovered from the designated classes of licensees previously identified. A further discussion and breakdown of the specific costs by major classes of licensees are shown in section IV of this final rule.

The NRC notes that in prior litigation over NRC annual fees, the U.S. Court of Appeals for the District of Columbia Circuit concluded that the NRC "did not abuse its discretion by failing to impose the annual fee on all licensees," *Florida Power & Light Co. v. NRC*, 846 F.2d 765, 770 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 1952 (1989). As noted earlier, the conferees on Public Law 101-508 have acknowledged the D.C. Circuit's holding

that the Commission was within its legal discretion not to impose fees on all licensees.

IV. Section-by-Section Analysis

The following analysis of those sections that are affected under this final rule provides additional explanatory information. All references are to title 10, chapter I, U.S. Code of Federal Regulations.

Part 170

Section 170.3 Definitions

The definition of a nonprofit educational institution is added to more specifically identify those applicants and licensees that are exempt from fees under § 170.11(a)(4) of the Commission regulations. Since the FY 1991 final rule was published, many licensees have commented that the NRC has not defined the term and that the criteria used by the NRC to classify licensees as nonprofit educational institutions are not clear. The NRC is defining the term "nonprofit educational institution" as a public or nonprofit educational institution whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

Section 170.20 Average Cost Per Professional Staff Hour

This section is amended to reflect an agency-wide professional staff-hour rate based on FY 1992 budgeted costs. Accordingly, the NRC professional staff-hour rate for FY 1992 for all fee categories that are based on full cost is \$123 per hour, or \$214,509 per direct FTE. The rate is based on the FY 1992 direct FTEs and NRC budgeted costs that are not recovered through the appropriation from the NWF. The rate is calculated using the identical method established for FY 1991. The method is as follows:

1. All direct FTEs are identified in Table II by major program.

TABLE II.—ALLOCATION OF DIRECT FTEs BY MAJOR PROGRAM

Major program	Number of direct FTEs ¹
Reactor Safety & Safeguards Regulation.....	1070.4
Nuclear Safety Research.....	154.1

TABLE II.—ALLOCATION OF DIRECT FTEs BY MAJOR PROGRAM—Continued

Major program	Number of direct FTEs ¹
Nuclear Material & Low-Level Waste Safety & Safeguards Regulation.....	294.5
Special and Independent Reviews, Investigations, and Enforcement.....	71.0
Nuclear Material Management and Support.....	23.0
Total direct FTE.....	² 1613.0

¹ FTE (full time equivalent) is one person working for a full year. Regional employees are counted in the office of the program each supports.

² In FY 1992, 1,613 FTEs of the total 3,261 FTEs are considered to be in direct support of NRC non-NWF programs. The remaining 1,648 FTEs are considered overhead and general and administrative.

2. NRC FY 1992 budgeted costs are allocated, in Table III, to the following four major categories:

- (1) Salaries and benefits.
- (2) Administrative support.
- (3) Travel.
- (4) Program support.

3. Direct program support, the use of contract or other services in support of the line organization's direct program, is excluded because these costs are charged directly through the various categories of fees.

4. All other costs (i.e., Salaries and Benefits, Travel, Administrative Support, and Program Support contracts/services for G&A activities) represent "in-house" costs and are to be collected by allocating them uniformly over the total number of direct FTEs.

Using this method, which was described in the final rule published July 10, 1991 (56 FR 31472), and excluding direct Program Support funds, the remaining \$346.0 million allocated uniformly to the direct FTEs (1613) results in a rate of \$214,509 per FTE for FY 1992. The Direct FTE Hourly Rate is \$123 per hour (rounded to the nearest whole dollar). This rate is calculated by dividing \$346.0 million by the number of direct FTEs (1613 FTE) and the number of productive hours in one year (1,744 hours) as indicated in OMB Circular A-76, "Performance of Commercial Activities."

TABLE III.—FY 1992 BUDGET AUTHORITY BY MAJOR CATEGORY

(Dollars in millions)

Salaries and benefits.....	\$238.4
Administrative support.....	86.5
Travel.....	13.4
Total nonprogram support obligations.....	338.3
Program Support.....	154.2
Total Budget Authority.....	492.5

TABLE III.—FY 1992 BUDGET AUTHORITY BY MAJOR CATEGORY—Continued

(Dollars in millions)

Less Program support (Direct Program).....	146.5
Budget Allocated to Direct FTE.....	346.0
Professional Hourly Rate.....	\$123/hour

Section 170.21 Schedule of Fees for Production and Utilization Facilities, Review of Standard Reference Design Approvals, Special Projects, Inspections and Import and Export Licenses.

The licensing and inspection fees in this section, which are based on full-cost recovery, are revised to reflect the FY 1992 budgeted costs and to more completely recover costs incurred by the Commission in providing licensing and inspection services to identifiable recipients. The fees assessed for services provided under the schedule are based on the professional hourly rate as shown in § 170.20 and any direct program support (contractual services) cost expended by the NRC. Any professional hours expended on or after the effective date of this rule would be assessed at the FY 1992 rate shown in § 170.20.

Since July 10, 1991, the NRC has continued to receive comments regarding the fees assessed for import and export licenses in accordance with § 170.21, Facility Category K. Based on experience in implementing these fees for the first time, the Commission is amending the existing fee categories in this section to provide for more equitable flat fees by expanding the number of fee categories.

Footnote 2 of § 170.21 is revised to provide that for those applications currently on file and pending completion, the professional hours expended up to the effective date of this rule will be assessed at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, and July 10, 1991, rules as appropriate. For topical report applications currently on file which are still pending completion of the review, and for which review costs have reached the applicable fee ceiling established by the July 2, 1990, rule, the costs incurred after any applicable ceiling was reached through August 8, 1991, will not be billed to the applicant. Any professional hours expended for the review of topical report applications, amendments, revisions or supplements to a topical report on or after August 9, 1991, are assessed at the applicable rate established by § 170.20.

Section 170.31 Schedule of Fees for Materials Licenses and Other Regulatory Services, Including Inspections and Import and Export Licenses.

The licensing and inspection fees in this section are modified to recover more completely the FY 1992 costs incurred by the Commission in providing licensing and inspection services to identifiable recipients. Those flat fees, which are based on the average time to review an application or conduct an inspection, are increased by seven percent across the board to reflect the increase in the professional hourly rate from \$115 per hour in FY 1991 to \$123 per hour in FY 1992. After application of the seven percent increase to the flat materials fees, the amounts were rounded, as in FY 1991, by applying standard rules of arithmetic so that the amounts rounded would be de minimus and convenient to the user. Fees that are greater than \$1,000 are rounded to the nearest \$100. Fees under \$1,000 are rounded to the nearest \$10.

For example, an industrial radiography licensee (Category 3.0.) will pay revised license and inspection fees as follows:

Type of fees	Current fees	Increase (per-cent)	FY 1992 fees
Application.....	\$3,000	7	\$3,200
Renewal.....	1,800	7	1,900
Amendment.....	490	7	520
Routine Inspection.....	1,200	7	1,300
Nonroutine Inspection.....	2,500	7	2,700

The increase is applicable to fee categories 1.C and 1.D; 2.B and 2.C; 3.A through 3.P; 4.B through 9.D, 10.B and 16. The increased fees are assessed for applications filed or inspections conducted on or after the effective date of this rule. Based on experience in implementing the import and export license fees assessed under fee Category 15, the Commission is amending the existing fee categories to provide for more equitable flat fees by expanding the number of fee categories.

For those licensing, inspection, and review fees assessed that are based on full-cost recovery (cost for professional staff hours plus any contractual services), the revised hourly rate of \$123, as shown in § 170.20, applies to those professional staff hours expended on or after the effective date of this rule.

Part 171

Section 171.5 Definitions

The definition of a nonprofit educational institution is added to provide clarification and to more specifically identify those licensees that are exempt from the annual fees under § 171.11(a). Since the final rule was published, many licensees have commented that NRC has not defined the term and that the criteria used by the NRC to classify licensees as nonprofit educational institutions are not clear. The NRC is defining the term "nonprofit educational institution" as a public or nonprofit educational institution whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

Section 171.11 Exemptions

Paragraph (a) of this section is amended to require that requests for exemption from the annual fees be filed by the licensee within ninety (90) days from the effective date of the final rule establishing the annual fees. Based on the NRC's experience with the filing of exemption requests under the FY 1991 final rule, a defined time period must be established for the prompt filing of exemption requests. The NRC is, therefore, limiting the filing of exemption requests to the 90 day period immediately following the effective date of the rule establishing the annual fees. Absent extraordinary circumstances, any exemption requests filed beyond that date will not be considered. The NRC, in making this change, is not intending to change its exemption policy. As in FY 1991, the NRC plans to continue a very high eligibility threshold for exemption requests and reemphasizes its intent to grant exemptions sparingly. Therefore, the NRC strongly discourages the filing of exemption requests by licensees who have previously had exemption requests denied unless there are significantly changed circumstances.

Exemption requests, or any requests to clarify the bill, will not, per se, extend the interest-free period for payment of the bill. Bills are due on the effective date of the final rule. Therefore, only

payment will ensure avoidance of interest, administrative, and penalty charges.

The NRC notes that during the one month period from the publication of the FY 1991 final rule on July 10, 1991, to August 9, 1991, the effective date of the rule, many licensees filed requests for termination with the NRC and were not subject to the FY 1991 annual fees. Many other licensees have either called or written to the NRC since the final rule became effective requesting further clarification and information concerning the annual fees assessed. The NRC is responding to these requests as quickly as possible but it was unable to respond and take appropriate action on all of the requests before the end of the fiscal year on September 30, 1991. Therefore, based on the number of requests filed, the NRC is exempting from the FY 1992 annual fees those licensees, and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage only licenses during the period October 1, 1991, through December 31, 1991. All other licensees and approval holders who held a license or approval on October 1, 1991, are subject to the FY 1992 annual fees.

Section 171.15 Annual Fee: Reactor Operating Licenses

The annual fees in this section are revised to reflect the FY 1992 budgeted costs. Paragraphs (b)(3), (c)(2), (d), and (e) are revised to comply with the requirement of OBRA-90 to recover approximately 100 percent of the NRC budget for FY 1992. Table IV shows the budgeted costs that have been allocated to operating power reactors. They have been expressed in terms of the NRC's FY 1992 programs and program elements. The resulting total base annual fee amount for power reactors is also shown. On the average, the power reactor base annual fees for FY 1992 have increased about seven percent above the FY 1991 annual fees. It is noted that the power reactor annual fees have decreased from the amount shown in the proposed rule. The decrease in power reactor annual fees is the result of additional collections which are estimated from part 170 power reactor fees because of the rule change effective May 18, 1992, which permits the NRC to bill licensees on a quarterly rather than a semiannual basis.

TABLE IV.—ALLOCATION OF NRC FY 1992 BUDGET TO POWER REACTORS BASE FEES ¹

	Program element total		Allocated to power reactors	
	Program support (\$, k)	Direct FTE	Program support (\$, k)	Direct FTE
Reactor Safety and Safeguards Regulation (RSSR):				
Power Reactor Applications Reviews.....	\$1,100	14.9	1,100	14.9
Standard Reactor Designs Reviews.....	2,438	56.4	2,438	56.4
Other Reviews.....	350	8.2		5.9
Reactor License Renewal.....	1,913	13.7	1,913	13.7
Improvements to Regulations.....	2,800	14.5	2,800	14.5
Reactor Performance Evaluation.....	718	33.2	718	33.2
Evaluation of Licensee Performance.....	600	33.4	600	33.4
Reactor Accident Management.....	400	10.1	400	10.1
Human Performance Evaluation.....	600	3.2	600	3.2
Reactor Operator Examinations.....	6,620	55.9	6,255	53.7
Resident Inspections.....		203.9		203.9
Region-Based Inspections.....	5,258	285.7	5,258	280.5
Specialized Inspections.....	3,197	69.5	3,197	69.5
Project Management.....		156.6		156.6
Licensing Activities Safety.....	6,816	87.0	6,816	87.0
Evaluations.....				
Regulatory Improvements.....	335	24.2	335	23.1
RSSR Program Total.....			32,430	1,059.6
Nuclear Safety Research (NSR):				
Integrity of Reactor Components.....	27,650	17.5	26,150	17.4
Prevent Damage to Reactor Cores.....	19,655	26.5	19,455	26.2
Reactor Containment Performance.....	13,922	10.5	13,922	10.5
Advanced Reactor Research.....	13,050	22.5	13,050	22.5
Generic Safety Issue Resolution.....	4,313	24.1	4,313	24.1
Developing and Improving Regulations.....	6,450	22.0	5,200	13.4
Severe Accident Implementation.....	2,125	6.0	2,125	6.0
Radiation Protection/Health Effects.....	6,285	17.5	3,119	8.6
NSR Program Total.....			87,334	128.7
Nuclear Material and Low Level Waste Safety and Safeguards Regulation:				
Safeguards Licensing and Inspection.....	465	8.8		.1
Threat and Event Assess./International Safeguards.....	525	13.2	405	6.8
Decommissioning.....	1,000	28.1	125	3.7
NMLLWSSR Program Total.....			530	10.6
Special and Independent Reviews, Investigations, and Enforcement:				
Diagnostic Evaluations.....	350	7.0	350	7.0
Incident Investigations.....	50	3.0	50	3.0
NRC Incident Response.....	1,980	27.0	1,980	27.0
Operational Data Analysis.....	2,187	25.0	2,087	23.0
Performance Indicators.....	1,047	4.0	1,047	4.0
Operational Data Collection/Dissemination.....	2,016	5.0	2,016	5.0
SIRIE Program Total.....			7,530	69.0
Total.....			127,824	1,267.9

¹ Base annual fees include all costs attributable to the operating power reactor class of licensees. The base fees do not include costs allocated to power reactors for policy reasons.

Note: Total Base Fee Amount Allocated to Power Reactors, \$399.8 million; less Estimated Part 170 Power Reactor Fees, 90.2 million; part 171 Base Fees for Operating Power Reactors, 309.6 million.

² Amount is obtained by multiplying the direct FTE times the rate per FTE and adding the program support funds.

Based on the information in Table IV, FY 1992 are the amounts shown in Table V below for each nuclear power operating license.

TABLE V.—BASE ANNUAL FEES FOR OPERATING POWER REACTORS

Reactors	Containment type	Annual fee
Westinghouse:		
1. Beaver Valley 1.....	PWR Large Dry Containment.....	\$2,855,000
2. Beaver Valley 2.....	do.....	2,855,000
3. Braidwood 1.....	do.....	2,855,000
4. Braidwood 2.....	do.....	2,855,000
5. Byron 1.....	do.....	2,855,000
6. Byron 2.....	do.....	2,855,000
7. Callaway 1.....	do.....	2,855,000
8. Comanche Peak 1.....	do.....	2,855,000

TABLE V.—BASE ANNUAL FEES FOR OPERATING POWER REACTORS—Continued

Reactors	Containment type	Annual fee
9. Diablo Canyon 1.....	do.....	2,849,000
10. Diablo Canyon 2.....	do.....	2,849,000
11. Farley 1.....	do.....	2,855,000
12. Farley 2.....	do.....	2,855,000
13. Ginna.....	do.....	2,855,000
14. Haddam Neck.....	do.....	2,855,000
15. Harris 1.....	do.....	2,855,000
16. Indian Point 2.....	do.....	2,855,000
17. Indian Point 3.....	do.....	2,855,000
18. Kewaunee.....	do.....	2,855,000
19. Millstone 3.....	do.....	2,855,000
20. North Anna 1.....	do.....	2,855,000
21. North Anna 2.....	do.....	2,855,000
22. Point Beach 1.....	do.....	2,855,000
23. Point Beach 2.....	do.....	2,855,000
24. Prairie Island 1.....	do.....	2,855,000
25. Prairie Island 2.....	do.....	2,855,000
26. Robinson 2.....	do.....	2,855,000
27. Salem 1.....	do.....	2,855,000
28. Salem 2.....	do.....	2,849,000
29. San Onofre 1.....	do.....	2,855,000
30. Seabrook 1.....	do.....	2,855,000
31. South Texas 1.....	do.....	2,855,000
32. South Texas 2.....	do.....	2,855,000
33. Summer 1.....	do.....	2,855,000
34. Surry 1.....	do.....	2,855,000
35. Surry 2.....	do.....	2,849,000
36. Trojan.....	do.....	2,855,000
37. Turkey Point 3.....	do.....	2,855,000
38. Turkey Point 4.....	do.....	2,855,000
39. Vogtle 1.....	do.....	2,855,000
40. Vogtle 2.....	do.....	2,855,000
41. Wolf Creek 1.....	do.....	2,855,000
42. Zion 1.....	do.....	2,855,000
43. Zion 2.....	do.....	2,850,000
44. Catawba 1.....	PWR—Ice Condenser.....	2,850,000
45. Catawba 2.....	do.....	2,850,000
46. Cook 1.....	do.....	2,850,000
47. Cook 2.....	do.....	2,850,000
48. McGuire 1.....	do.....	2,850,000
49. McGuire 2.....	do.....	2,850,000
50. Sequoyah 1.....	do.....	2,850,000
51. Sequoyah 2.....	do.....	2,850,000
Combustion Engineering:		
1. Arkansas 2.....	PWR Large Dry Containment.....	2,850,000
2. Calvert Cliffs 1.....	do.....	2,850,000
3. Calvert Cliffs 2.....	do.....	2,850,000
4. Ft. Calhoun 1.....	do.....	2,850,000
5. Maine Yankee.....	do.....	2,850,000
6. Millstone 2.....	do.....	2,850,000
7. Palisades.....	do.....	2,844,000
8. Palo Verde 1.....	do.....	2,844,000
9. Palo Verde 2.....	do.....	2,844,000
10. Palo Verde 3.....	do.....	2,844,000
11. San Onofre 2.....	do.....	2,844,000
12. San Onofre 3.....	do.....	2,850,000
13. St. Lucie 1.....	do.....	2,850,000
14. St. Lucie 2.....	do.....	2,850,000
15. Waterford 3.....	do.....	2,850,000
Babcock & Wilcox:		
1. Arkansas 1.....	PWR Large Dry Containment.....	2,866,000
2. Crystal River 3.....	do.....	2,866,000
3. Davis Besse 1.....	do.....	2,866,000
4. Oconee 1.....	do.....	2,866,000
5. Oconee 2.....	do.....	2,866,000
6. Oconee 3.....	do.....	2,866,000
7. Three Mile Island 1.....	do.....	2,866,000
General Electric:		
1. Browns Ferry 1.....	Mark I.....	2,810,000
2. Browns Ferry 2.....	do.....	2,810,000
3. Browns Ferry 3.....	do.....	2,810,000
4. Brunswick 1.....	do.....	2,810,000
5. Brunswick 2.....	do.....	2,810,000
6. Clinton 1.....	Mark III.....	2,810,000
7. Cooper.....	Mark I.....	2,810,000
8. Dresden 2.....	do.....	2,810,000
9. Dresden 3.....	do.....	2,810,000
10. Duane Arnold.....	do.....	2,810,000
11. Fermi 2.....	do.....	2,810,000
12. Fitzpatrick.....	do.....	2,810,000

TABLE V.—BASE ANNUAL FEES FOR OPERATING POWER REACTORS—Continued

Reactors	Containment type	Annual fee
13. Grand Gulf 1.....	Mark III.....	2,810,000
14. Hatch 1.....	Mark I.....	2,810,000
15. Hatch 2.....	do.....	2,810,000
16. Hope Creek 1.....	do.....	2,810,000
17. LaSalle 1.....	Mark II.....	2,821,000
18. LaSalle 2.....	do.....	2,821,000
19. Limerick 1.....	do.....	2,821,000
20. Limerick 2.....	do.....	2,821,000
21. Millstone 1.....	Mark I.....	2,810,000
22. Monticello.....	do.....	2,810,000
23. Nine Mile Point 1.....	do.....	2,810,000
24. Nine Mile Point 2.....	Mark II.....	2,821,000
25. Oyster Creek.....	Mark I.....	2,810,000
26. Peach Bottom 2.....	do.....	2,810,000
27. Peach Bottom 3.....	do.....	2,810,000
28. Perry 1.....	Mark III.....	2,810,000
29. Pilgrim.....	Mark I.....	2,810,000
30. Quad Cities 1.....	do.....	2,810,000
31. Quad Cities 2.....	do.....	2,810,000
32. River Bend 1.....	Mark III.....	2,810,000
33. Susquehanna 1.....	Mark II.....	2,821,000
34. Susquehanna 2.....	do.....	2,821,000
35. Vermont Yankee.....	Mark I.....	2,810,000
36. Washington Nuclear 2.....	Mark II.....	2,814,000
Other Reactors:		
1. Big Rock Point.....	GE Dry Containment.....	2,810,000
2. Yankee Rowe.....	Westinghouse PWR Dry Containment.....	2,855,000
3. Rancho Seco.....	B&W PWR-Dry Containment.....	2,860,000
4. Three Mile Island 2.....	B&W PWR-Dry Containment.....	2,866,000

The "Other Reactors" listed in Table V have not been included in the fee base because historically they have been granted either full or partial exemptions from the annual fees. With respect to Big Rock Point and Yankee Rowe, the NRC, in this final rule, hereby grants partial exemptions from the FY 1992 annual fees based on requests filed with the NRC in accordance with § 171.11. The total amount of \$781,300 to be paid by the two licensees has been subtracted from the total amount to be assessed operating reactors as a surcharge. The NRC, in this final rule, hereby grants full exemptions from the FY 1992 annual fees for Rancho Seco and Three Mile Island 2 based on the fact that these reactors are either permanently or prematurely shut down and do not intend to operate in the future.

Paragraph (b)(3) is revised to change the fiscal year references from FY 1991 to FY 1992. Paragraph (c)(2) is amended to show the amount of the surcharge for FY 1992, which is added to the base annual fee for each operating power reactor shown in Table V. This surcharge recovers those NRC budgeted costs that are not directly or solely attributable to operating power reactors, but nevertheless must be recovered to comply with the requirements of OBRA-90. The NRC has continued its previous policy decision to recover these costs from operating power reactors.

The FY 1992 budgeted costs related to the additional charge and the amount of the charge are calculated as follows:

Category of costs	FY 1992 budgeted costs (\$ in millions)
1. Activities not attributable to an existing NRC licensee or class of licensee:	
a. Reviews for DOE/DOD reactor projects, West Valley Demonstration Project, DOE Uranium Mill Tailing Radiation Control Act (UMTRCA) actions.....	\$4.1
b. International cooperative safety program and international safeguards activities.....	7.9
c. 60% of low level waste disposal generic activities.....	5.8
d. Uranium enrichment generic activities.....	.7
2. Activities not assessed part 170 licensing and inspection fees or part 171 annual fees based on Commission policy:	
a. Activities associated with nonprofit educational institutions.....	6.6
b. Costs not recovered from part 171 for small entities.....	5.4
Subtotal budgeted costs.....	30.5
Less amount to be assessed to small older reactors with partial exemption under part 171.....	.8
Total budgeted costs.....	29.7

The annual additional charge is determined as follows:

Total budgeted costs ÷ Total number of operating power reactors = \$29.7

million ÷ 109 = \$272,000 per operating power reactor.

On the basis of this calculation, an operating power reactor, Beaver Valley 1, for example, would pay a base annual fee of \$2,855,000 and an additional charge of \$272,000 for a total annual fee of \$3,127,000 for FY 1992.

Paragraph (d) is revised to show, in summary form, the amount of the total FY 1992 annual fee, including the surcharge, to be assessed for each major type of operating power reactor.

Paragraph (e) is revised to show the amount of the FY 1992 annual fee for non-power (test and research) reactors. In FY 1992, \$557,000 in costs are attributable to those commercial and Federal government licensees that are licensed to operate test and research reactors. Applying these costs uniformly to those nonpower reactors which are not exempt from fees results in an annual fee of \$55,700 per operating license.

Section 171.16 Annual Fees: Materials Licensees, Holders of Certificates of Compliance, Holders of Sealed Source and Device Registrations, Holders of Quality Assurance Program Approvals, and Government Agencies Licensed by the NRC

The introduction to paragraph (c) is being revised to include educational institutions in the list identifying the types of small entities that may be eligible to pay a reduced annual fee. The

change in this paragraph is necessary because educational institutions were inadvertently omitted from the final rule published on April 17, 1992 (57 FR 13625), relating to reduced annual fees for certain small entities. Paragraph (c)(4) is revised to indicate that the maximum annual fee per licensed category is \$1,800 for a small entity in FY 1992.

Paragraph (d) is revised to reflect the FY 1992 budgeted costs for materials licensees, including Government agencies licensed by the NRC. These fees are necessary to recover the FY 1992 generic costs totalling \$48.4 million applicable to fuel facilities, uranium recovery facilities, holders of transportation certificates and QA program approvals, and other materials licensees, including holders of sealed source and device registrations. It is noted that the amount of the annual fees for some classes of licensees has

decreased from the amount shown in the proposed rule. The decrease is the result of the additional collections which are estimated from part 170 fees because of a rule change effective May 18, 1992, which permits the NRC to bill licensees on a quarterly rather than a semiannual basis.

Tables VI and VII show the NRC program elements and resources that are attributable to fuel facilities and materials users, respectively. The costs attributable to the uranium recovery class of licensees are those associated with uranium recovery licensing and inspection. For the uranium recovery class of licensees, the current Category 2.A.(2) for Class I facilities is further divided into Class I and Class II facilities. Class II facilities are those solution mining licensees, primarily in-situ and heap leach facilities, which do not generate uranium mill tailings. The NRC has reexamined the uniform

allocation of costs to Class I facilities in the current rule to determine whether there is a significant difference between the regulatory services provided to operating in-situ facilities that do not generate mill tailings as compared to other licensees in Class I. The NRC is dividing the current Class I facilities into two classes to differentiate between those facilities that generate uranium mill tailings and those facilities that do not generate uranium mill tailings because there are generic regulatory activities (e.g., appendix A to 10 CFR part 40) that are necessary to regulate uranium mill tailings.

For transportation, the costs are those budgeted for transportation research, licensing, and inspection. Similarly, the budgeted costs for spent fuel storage are those for spent fuel storage research, licensing, and inspection.

TABLE VI.—ALLOCATION OF NRC FY 1992 BUDGET TO FUEL FACILITY BASE FEES ¹

	Total program element		Allocated to fuel facility	
	Program support \$,K	FTE	Program support \$, K	FTE
Nuclear Safety Research:				
Environmental policy and decommissioning	\$2,675	8.5	\$180	.6
NSR Program Total			180	.6
Nuclear Material and Low Level Waste Safety and Safeguards Regulation:				
Fuel facilities lic./inspections	\$2,460	39.1	\$1,260	27.2
Event evaluation		25.0		3.6
Safeguards licensing/inspection	665	21.9	615	16.7
Policy, threat and event assessment	525	13.2	45	.6
Decommissioning	1,000	28.1	54	4.7
NMLLWSSR Program Total			1,974	52.8
Total	2,154	53.4		
Total Base Fee Amount Allocated to Fuel Facilities				² \$13.6 million
Less Part 170 Fuel Facility Fees				3.7 million
Part 171 Base Fees for Fuel Facilities				\$9.9 million

¹ Base annual fee includes all costs attributable to the fuel facility class of licensees. The base fee does not include costs allocated to fuel facilities for policy reasons.

² Amount is obtained by multiplying the direct FTE times the rate per FTE and adding the program support funds.

TABLE VII.—ALLOCATION OF FY 1992 BUDGET TO MATERIAL USERS BASE FEES ¹

	Total		Allocated to materials users	
	Program support \$,K	FTE	Program support \$,K	FTE
Nuclear Safety Research Mission Area:				
Human factors	\$5,750	5.2	\$180	.3
Radiation protection/health effects	6,285	17.5	3,677	13.3
Total			3,857	13.6
Nuclear Material and Low Level Waste Safety and Safeguards Regulation:				
Licensing/inspection of materials users	\$2,190	110.5	\$1,971	99.5
Event evaluation		18.2		13.1
Decommissioning	1,000	28.1	446	15.3
NMLLWSSR program total			2,417	127.9

TABLE VII.—ALLOCATION OF FY 1992 BUDGET TO MATERIAL USERS BASE FEES ¹—Continued

	Total		Allocated to materials users	
	Program support \$,K	FTE	Program support \$,K	FTE
Special and Independent Reviews, Investigations, and Enforcement:				
Operational data analysis (PE).....			100	2.0
Total.....			6,374	143.5
Base Amount Allocated to Materials Users (\$,M).....			* \$37.1 million	
Less Part 170 Material Users Fees.....			\$5.8 million	
Part 171 Base Fees for Material Users.....			\$31.3 million	

¹ Base annual fee includes all costs attributable to the materials class of licensees. The base fee does not include costs allocated to materials licensees for policy reasons.

* Amount is obtained by multiplying the direct FTE times the rate per FTE and adding the program support funds.

The allocation of the NRC's \$9.9 million in budgeted costs to the individual fuel facilities is based, as in FY 1991, primarily on the conferees' guidance that licensees who require the greatest expenditure of NRC resources should pay the greatest annual fee. Because the two high-enriched fuel manufacturing facilities possess strategic quantities of nuclear materials, more NRC generic safety and safeguards costs (e.g., physical security) are attributable to these facilities.

Using this approach, the base annual fee for each facility is shown below.

	Annual fee (\$ in thousands)		
	Safeguards	Safety	Total
High Enriched Fuel:			
Nuclear Fuel Services.....	\$1,073	\$1,097	\$2,170
Babcock and Wilcox.....	1,073	1,097	2,170
Subtotal.....	2,146	2,194	4,340
Low Enriched Fuel:			
Siemens Nuclear Power.....	150	533	683
Babcock and Wilcox.....	150	533	683
General Electric.....	150	533	683
Westinghouse.....	150	533	683
Combustion Engineering (Hematite).....	150	533	683
Combustion Engineering (Windsor).....	150	533	683
Subtotal.....	900	3,198	4,098
UF ₆ Conversion:			
Allied Signal Corp.....		381	381
Sequoyah Fuels Corp.....		381	381
Subtotal.....		762	762
Other fuel facilities (9 facilities at \$72,000 each).....		648	648
Total.....	3,046	6,802	9,848

The allocation of the costs attributable to uranium recovery is also based on the conferees' guidance that licensees who require the greatest

expenditure of NRC resources should pay the greatest annual fee. It is estimated that approximately 60 percent of the \$2.0 million for uranium recovery is attributable to uranium mills (Class I facilities). Approximately 20 percent of the \$2.0 million for uranium recovery is attributable to those solution mining licensees who do not generate uranium mill tailings (Class II facilities). The remaining 20 percent is allocated to the other uranium recovery facilities (e.g. extraction of metals and rare earths). The resulting annual fees for each class of licensee are:

Class I facilities—\$167,500;
Class II facilities—\$73,200;
Other facilities—\$58,800.

For spent fuel storage licenses, the generic costs of \$172,000 has been spread uniformly to those licensees who hold specific or general licenses for receipt and storage of spent fuel at an ISFSI. This results in an annual fee of \$43,000.

To equitably and fairly allocate the \$31.3 million attributable to the approximately 7,100 diverse material users and registrants, the NRC has continued to base the annual fee on the Part 170 application and routine inspection fees. Because the application and inspection fees are indicative of the complexity of the license, this approach continues to provide a proxy for allocating the costs to the diverse categories of licensees based on how much it costs NRC to regulate each category. The fee calculation also continues to consider the inspection frequency because the inspection frequency is indicative of the safety risk and resulting regulatory costs associated with the categories of licensees. In summary, the annual fee for each category of license is developed as follows:

Annual Fee = (Application Fee + Inspection Fee/Inspection Priority) × Constant + (Unique Category Costs)

The constant is the multiple necessary to recover \$31.3 million and is 2.8 for FY 1992. The unique costs are any special costs that the NRC has budgeted for a specific category of licensees. For FY 1992, unique costs of approximately \$2.5 million were identified for the medical improvement program which is attributable to medical licensees; about \$200,000 in costs were identified as being attributable to radiography licensees; and about \$100,000 was identified as being attributable to irradiator licensees. On the average, the materials annual fees for FY 1992 are increased about 50 percent above the FY 1991 annual fees. The reason for this significant increase is twofold. First, the FY 1992 budgeted amount attributable to materials licensees is about 20 percent higher than the FY 1991 amount. Second, the number of licensees to be assessed annual fees in FY 1992 has decreased about 21 percent below the FY 1991 levels (from about 9,000 to about 7,000). The materials fees must be established at these levels in order to comply with the mandate of OBRA-90 to recover approximately 100 percent of the NRC's FY 1992 budget authority. A materials licensee may pay a reduced annual fee if the licensee qualifies as a small entity under the NRC's size standards and certifies that it is a small entity on NRC Form 526.

To recover the \$5.0 million attributable to the transportation class of licensees, \$1.2 million will be assessed to the Department of Energy (DOE) to cover all of its transportation casks under Category 18. The remaining transportation costs for generic activities (\$3.8 million) are allocated to holders of approved QA plans. The annual fee for approved QA plans is \$62,800 for users and fabricators and \$1,500 for users only.

The amount or range of the FY 1992 base annual fees for all materials licensees is summarized as follows:

MATERIALS LICENSES BASE ANNUAL FEE RANGES

Category of license	Annual fees
Part 70—High enriched fuel.	\$2.2 million.
Part 70—Low enriched fuel.	\$683,000.
Part 40—U ²³⁵ conversion....	\$381,000.
Part 40—Uranium recovery.	\$58,800 to \$167,500.
Part 30—Byproduct Material.	\$430 to \$16,400.
Part 71—Transportation of Radioactive Material.	\$1,500 to \$62,800.
Part 72—Independent Storage of Spent Nuclear Fuel.	\$43,000.

¹ Excludes the annual fee for a few military "master" materials licenses of broad-scope issued to Government agencies which is \$300,000.

Paragraph (e) is amended to establish the additional charge which is added to the base annual fees shown in paragraph (d) of this final rule. This surcharge continues to be shown, for convenience, with the applicable categories in paragraph (d). The additional charge recovers approximately 40 percent of the NRC budgeted costs of \$3.8 million relating to LLW disposal generic activities because 40 percent of the LLW is generated by these licensees. Although these NRC LLW disposal regulatory activities are not directly attributable to materials licensees, the costs nevertheless must be recovered in order to comply with the requirements of OBRA-90. The Commission has continued the previous policy decision to recover approximately 40 percent of these LLW costs from materials licensees. The FY 1992 budgeted costs related to the additional charge and the amount of the charge are calculated as follows:

Category of costs	FY 1992 budgeted costs (\$ in millions)
1. Activities not attributable to an existing NRC licensee or class of licensee, i.e., 40% of LLW disposal generic activities.....	\$3.8

Of the \$3.8 million in budgeted costs shown above for LLW activities, 50 percent of the amount (\$1.9 million) are allocated to fuel facilities included in part 171 (19 facilities), as follows: \$155,100 per HEU, LEU, and U²³⁵ facility and \$38,800 for each of the other 9 fuel facilities. The remaining 50 percent (\$1.9 million) are allocated to the material licensees in categories that generate low level waste (1,090 licensees) as follows: \$1,600 per materials licensee except for those in Categories 4A and 17. Those

licensees that generate a significant amount of low level waste for purposes of the calculation of the \$1,600 surcharge are in fee Categories 1.B, 1.D, 2.C, 3.A, 3.B, 3.C, 3.L, 3.M, 3.N, 4.B, 4.C, 5.B, 6.A, and 7.B. The surcharge for Categories 4A and 17, which also generate and/or dispose of low level waste, is \$38,800 for Category 4A and \$36,000 for Category 17.

Of the \$6.2 million not recovered from small entities, \$8 million is allocated to fuel facilities and other materials licensees. This results in a surcharge of \$150 per category for each licensee that is not eligible for the small entity fee.

On the basis of this calculation, a fuel facility, a high enriched fuel fabrication licensee, for example, pays a base annual fee of \$2,170,000 and an additional charge of \$155,250 for LLW activities and small entity costs. A medical center with a broad-scope program pays a base annual fee of \$12,200 and an additional charge of \$1,750, for a total annual fee of \$13,950 for FY 1992.

Section 171.19 Payment

This section is revised to give credit for those partial payments made by certain licensees in FY 1992 toward their FY 1992 annual fees. The NRC anticipates that the first, second, and third quarterly payments for FY 1992 will have been made by operating power reactor licensees and some materials licensees before the final rule is effective. Therefore, NRC will credit payments received for those three quarters toward the total annual fee to be assessed. The NRC will adjust the fourth quarterly bill in order to recover the full amount of the revised annual fee. As in FY 1991, payment of the annual fee is due on the effective date of the rule and interest accrues from the effective date of the rule. However, interest will be waived if payment is received within 30 days from the effective date of the rule.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental impact assessment has been prepared for the final regulation.

VI. 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.).

VII. Regulatory Analysis

With respect to part 170, this final rule was developed pursuant to title V of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines the Commission took into account guidance provided by the U.S. Supreme Court on March 4, 1974, in its decision of *National Cable Television Association, Inc. v. United States*, 415 U.S. 36 (1974) and *Federal Power Commission v. New England Power Company*, 415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia, *National Cable Television Association v. Federal Communications Commission*, 554 F.2d 1094 (D.C. Cir. 1976); *National Association of Broadcasters v. Federal Communications Commission*, 554 F.2d 1118 (D.C. Cir. 1976); *Electronic Industries Association v. Federal Communications Commission*, 554 F.2d 1109 (D.C. Cir. 1976) and *Capital Cities Communication, Inc. v. Federal Communications Commission*, 554 F.2d 1135 (D.C. Cir. 1976). These decisions of the Courts enabled the Commission to develop fee guidelines that are still used for cost recovery and fee development purposes.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in *Mississippi Power and Light Co. v. U.S. Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (1980). The Court held that (1) the NRC had the authority to recover the full cost of providing services to identifiable beneficiaries; (2) the NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act and with applicable regulations; (3) the NRC could charge for costs incurred in conducting environmental reviews required by NEPA; (4) the NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule; (5) the NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and (6) the NRC's fees were not arbitrary or capricious.

With respect to Part 171, on November 5, 1990, Congress passed Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90). For FYs 1991 through 1995, OBRA-90 requires that approximately 100 percent of the NRC budget authority be recovered. To accomplish this statutory requirement, the NRC, in accordance with § 171.13, is publishing the final amount of the FY 1992 annual fees for operating reactor licensees, fuel cycle licensees, materials licensees, and holders of Certificates of Compliance, registrations of sealed source and devices and QA program approvals, and Government agencies. OBRA-90 and the Conference Committee Report specifically state that (1) the annual fees be based on the Commission's FY 1992 budget of \$512.5 million less the amounts collected from part 170 fees and the funds directly appropriated from the NWF to cover the Commission's high level waste program; (2) the annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and (3) the annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment. Therefore, when developing the annual fees for operating power reactors the Commission continued to consider the various reactor vendors, the types of containment, and the location of the reactor. The annual fees for fuel cycle licensees, materials licensees, and holders of certificates, registrations and approvals and for licenses issued to Government agencies take into account the type of facility or approval and the classes of the licensees.

Part 171, which established annual fees for operating power reactors effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in *Florida Power and Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

Parts 170 and 171, which established fees based on the FY 1989 budget, were also legally challenged. As a result of the Supreme Court decision in *Skinner v. Mid-American Pipeline Co.*, 109 S. Ct. 1726 (1989), and the denial of certiorari in *Florida Power and Light*, all of the lawsuits were withdrawn.

VIII. Regulatory Flexibility Analysis

The NRC is required by the Omnibus Budget Reconciliation Act of 1990 to recover approximately 100 percent of its

budget authority through the assessment of user fees. This Act further requires that the NRC establish a schedule of charges that fairly and equitably allocates the aggregate amount of these charges among licensees.

This final rule establishes the schedules of fees that are necessary to implement the Congressional mandate for FY 1992. The final rule results in an increase in the fees charged to all licensees, and holders of certificates, registrations, and approvals, including those licensees who are classified as small entities under the Regulatory Flexibility Act. The Regulatory Flexibility Analysis, prepared in accordance with 5 U.S.C. 604, is included as appendix A to this final rule.

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and that a backfit analysis is not required for this final rule. The backfit analysis is not required because these amendments do not require the modification of or additions to systems, structures, components, or design of a facility or the design approval or manufacturing license for a facility or the procedures or organization required to design, construct or operate a facility.

List of Subjects

10 CFR Part 170

Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

10 CFR Part 171

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

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 170 and 171.

PART 170—FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: 31 U.S.C. 9701, 96 Stat. 1051; sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201w); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

2. In § 170.3, the definition *nonprofit educational institution* is added to read as follows:

§ 170.3 Definitions.

Nonprofit educational institution means a public or nonprofit educational institution whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

3. Section 170.20 is revised to read as follows:

§ 170.20 Average cost per professional staff-hour.

Fees for permits, licenses, amendments, renewals, special projects, part 55 requalification and replacement examinations and tests, other required reviews, approvals, and inspections under §§ 170.21 and 170.31 that are based upon the full costs for the review or inspection will be calculated using a professional staff-hour rate equivalent to the sum of the average cost to the agency for a professional staff member, including salary and benefits, administrative support, travel, and certain program support. The professional staff-hour rate for the NRC based on the FY 1992 budget is \$123 per hour.

4. In § 170.21, the introductory paragraph, Category K, and footnotes 1 and 2 to the table are revised to read as follows:

§ 170.21 Schedule of fees for production and utilization facilities, review of standard referenced design approvals, special projects, inspections and import and export licenses.

Applicants for construction permits, manufacturing licenses, operating licenses, import and export licenses, approvals of facility standard reference designs, requalification and replacement examinations for reactor operators, and special projects and holders of construction permits, licenses, and other approvals shall pay fees for the following categories of services.

SCHEDULE OF FACILITY FEES

[See footnotes at end of table]

Facility categories and type of fees	Fees ^{1,2}
K. Import and export licenses:	
Licenses for the import and export only of production and utilization facilities or the import and export only of components for production and utilization facilities issued pursuant to 10 CFR Part 110.	
1. Application for import or export of reactors and other facilities and components which must be reviewed by the Commission and the Executive Branch, for example, actions under 10 CFR 110.40(b).	
Application—new license	\$8,000
Amendment	8,000
2. Application for import or export of reactor components and initial exports of other equipment requiring Executive Branch review only, for example, those actions under 10 CFR 110.41(a)(1)–(8).	
Application—new license	\$4,900
Amendment	4,900
3. Application for export of components requiring foreign government assurances only.	
Application—new license	\$3,100
Amendment	3,100
4. Application for export or import of other facility components and equipment not requiring Commission review, Executive Branch review or foreign government assurances.	
Application—new license	\$1,200
Amendment	1,200

SCHEDULE OF FACILITY FEES—Continued

[See footnotes at end of table]

Facility categories and type of fees	Fees ^{1,2}
5. Minor amendment of any export or import license to extend the expiration date, change domestic information, or make other revisions which do not require analysis or review.	
Amendment	\$120

¹ Fees will not be charged for orders issued by the Commission pursuant to § 2.202 of this chapter or for amendments resulting specifically from the requirements of such Commission orders. Fees will be charged for approvals issued pursuant to a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., §§ 50.12, 73.5) and any other sections now or hereafter in effect regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. Fees for licenses in this schedule that are initially issued for less than full power are based on review through the issuance of a full power license (generally full power is considered 100% of the facility's full rated power). Thus, if a licensee received a low power license or a temporary license for less than full power and subsequently receives full power authority (by way of license amendment or otherwise), the total costs for the license will be determined through that period when authority is granted for full power operation. If a situation arises in which the Commission determines that full operating power for a particular facility should be less than 100% of full rated power, the total costs for the license will be at that decided lower operating power level and not at the 100% capacity.

² Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For those applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review or the application up to the effective date of this rule

will be determined at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, and July 10, 1991 rules, as appropriate. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990, rules but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports whose costs exceed \$50,000. Costs which exceed \$50,000 for each topical report, amendment, revision or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in § 170.20. In no event will the total review costs be less than twice the hourly rate shown in § 170.20.

5. Section 170.31 is revised to read as follows:

§ 170.31 Schedule of fees for materials licenses and other regulatory services, including inspections, and import and export licenses.

Applicants for materials licenses, import and export licenses, and other regulatory services and holders of materials licenses, or import and export licenses shall pay fees for the following categories of services. This schedule includes fees for health and safety and safeguards inspections where applicable.

SCHEDULE OF MATERIALS FEES

[See footnotes at end of table]

Category of materials licenses and type of fees ¹	Fees ^{2,3}
1. Special nuclear material:	
A. Licenses for possession and use of 200 grams or more of plutonium in unsealed form or 350 grams or more of contained U-235 in unsealed form or 200 grams or more of U-233 in unsealed form. This includes applications to terminate licenses as well as licenses authorizing possession only.	
License, Renewal, Amendment	Full Cost.
Inspections:	
Routine	Full Cost.
Nonroutine	Full Cost.
B. Licenses for receipt and storage of spent fuel at an independent spent fuel storage installation (ISFSI):	
License, Renewal, Amendment	Full Cost.
Inspections:	
Routine	Full Cost.
Nonroutine	Full Cost.
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers: ⁴	
Application—New license	\$540
Renewal	540
Amendment	410
Inspections:	
Routine	490
Nonroutine	1,400
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those for Category 1A: ⁴	
Application—New license	740
Renewal	740
Amendment	250
Inspections:	
Routine	740
Nonroutine	860
E. Licenses for construction and operation of a uranium enrichment facility	
Application	125,000
License, Renewal, Amendment	Full Cost
Inspections:	
Routine	Full Cost.
Nonroutine	Full Cost.

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees ¹	Fee ^{2,3}
2. Source material:	
A. Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, refining uranium mill concentrates to uranium hexafluoride, ore buying stations, ion exchange facilities and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode:	
License, Renewal, Amendment	Full Cost.
Inspections:	
Routine	Full Cost.
Nonroutine	Full Cost.
B. Licenses for possession and use of source material for shielding:	
Application—New license	120
Renewal	120
Amendment	120
Inspections:	
Routine	310
Nonroutine	370
C. All other source material licenses:	
Application—New license	850
Renewal	800
Amendment	480
Inspections:	
Routine	860
Nonroutine	1,600
3. Byproduct material:	
A. Licenses of broad scope for possession and use of byproduct material issued pursuant to parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution:	
Application—New license	2,500
Renewal	1,500
Amendment	250
Inspections: ⁵	
Routine	2,200
Nonroutine	2,200
B. Other licenses for possession and use of byproduct material issued pursuant to part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution:	
Application—New license	1,400
Renewal	2,500
Amendment	590
Inspections: ⁵	
Routine	1,100
Nonroutine	2,100
C. Licenses issued pursuant to §§ 32.72, 32.73, and/or 32.74 of this chapter authorizing the processing or manufacturing and distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources and devices containing byproduct material:	
Application—New license	3,600
Renewal	1,500
Amendment	490
Inspections:	
Routine	1,500
Nonroutine	2,000
D. Licenses and approvals issued pursuant to §§ 32.72, 32.73, and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material:	
Application—New license	1,200
Renewal	540
Amendment	330
Inspections:	
Routine	860
Nonroutine	740
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units):	
Application—New license	540
Renewal	510
Amendment	270
Inspections:	
Routine	490
Nonroutine	740
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes:	
Application—New license	1,300
Renewal	430
Amendment	370
Inspections:	
Routine	620
Nonroutine	1,400
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes:	
Application—New license	4,900
Renewal	2,000
Amendment	490

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees ¹	Fee ^{2,3}
Inspections:	
Routine	1,100
Nonroutine	1,500
H. Licenses issued pursuant to subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter:	
Application—New license	2,200
Renewal	1,200
Amendment	270
Inspections:	
Routine	740
Nonroutine	740
I. Licenses issued pursuant to subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter:	
Application—New license	2,800
Renewal	1,300
Amendment	370
Inspections:	
Routine	490
Nonroutine	740
J. Licenses issued pursuant to subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter:	
Application—New license	2,700
Renewal	620
Amendment	420
Inspections:	
Routine	740
Nonroutine	740
K. Licenses issued pursuant to subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter:	
Application—New license	2,000
Renewal	1,000
Amendment	310
Inspections:	
Routine	740
Nonroutine	740
L. Licenses of broad scope for possession and use of byproduct material issued pursuant to parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution:	
Application—New license	2,500
Renewal	2,100
Amendment	540
Inspections:	
Routine	1,000
Nonroutine	1,300
M. Other licenses for possession and use of byproduct material issued pursuant to part 30 of this chapter for research and development that do not authorize commercial distribution:	
Application—New license	1,200
Renewal	1,200
Amendment	670
Inspections:	
Routine	860
Nonroutine	1,000
N. Licenses that authorize services for other licensees, except (1) licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3P, and (2) licenses that authorize waste disposal services are subject to the fees specified in fee Categories 4A, 4B, and 4C:	
Application—New license	1,500
Renewal	860
Amendment	430
Inspections:	
Routine	740
Nonroutine	740
O. Licenses for possession and use of byproduct material issued pursuant to part 34 of this chapter for industrial radiography operations:	
Application—New license	3,200
Renewal	1,900
Amendment	520
Inspections: ⁴	
Routine	1,300
Nonroutine	2,700
P. All other specific byproduct material licenses, except those in Categories 4A through 9D:	
Application—New license	540
Renewal	540
Amendment	410
Inspections:	
Routine	1,300
Nonroutine	1,300

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees ¹Fee ^{2,3}

4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material:	
License, renewal, amendment	Full Cost.
Inspections:	
Routine	Full Cost.
Nonroutine	Full Cost.
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material:	
Application—New license	3,000
Renewal	2,000
Amendment	210
Inspections:	
Routine	2,200
Nonroutine	1,700
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material:	
Application—New license	2,000
Renewal	1,000
Amendment	250
Inspections:	
Routine	1,700
Nonroutine	2,200
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies:	
Application—New license	3,600
Renewal	2,100
Amendment	580
Inspections:	
Routine	860
Nonroutine	860
B. Licenses for possession and use of byproduct material for field flooding tracer studies:	
License, renewal, amendment	Full Cost.
Inspections:	
Routine	740
Nonroutine	1,100
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material:	
Application—New license	1,500
Renewal	1,500
Amendment	370
Inspections:	
Routine	1,300
Nonroutine	2,000
7. Human use of byproduct, source, or special nuclear material:	
A. Licenses issued pursuant to parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	3,600
Renewal	850
Amendment	460
Inspections:	
Routine	1,300
Nonroutine	2,000
B. Licenses of broad scope issued to medical institutions or two or more physicians pursuant to parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	2,500
Renewal	2,200
Amendment	380
Inspections:	
Routine	1,700
Nonroutine	1,900
C. Other licenses issued pursuant to parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	760
Renewal	1,100
Amendment	460
Inspections:	
Routine	1,100
Nonroutine	1,600
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities:	
Application—New license	620
Renewal	430
Amendment	330

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees ¹	Fee ^{2,3}
Inspections:	
Routine.....	740
Nonroutine.....	740
9. Device, product, or sealed source safety evaluation:	
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution:	
Application—each device.....	3,500
Amendment—each device.....	1,300
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
B. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices:	
Application—each device.....	1,700
Amendment—each device.....	620
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
C. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution:	
Application—each source.....	740
Amendment—each source.....	250
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
D. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel:	
Application—each source.....	370
Amendment—each source.....	120
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
10. Transportation of radioactive material:	
A. Evaluation of casks, packages, and shipping containers:	
Approval, Renewal, Amendment.....	Full Cost.
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
B. Evaluation of 10 CFR part 71 quality assurance programs:	
Application—Approval.....	250
Renewal.....	250
Amendment.....	250
Inspections:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
11. Review of standardized spent fuel facilities:	
Approval, Renewal, Amendment.....	Full Cost.
Inspections.....	Full Cost.
12. Special projects:	
Approvals and preapplication/licensing activities.....	Full Cost.
Inspections.....	Full Cost.
13. A. Spent fuel storage cask Certificate of Compliance:	
Approvals.....	Full Cost.
Amendments, revisions, and supplements.....	Full Cost.
Reapproval.....	Full Cost.
B. Inspections related to spent fuel storage cask Certificate of Compliance:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
C. Inspections related to storage of spent fuel under § 72.210 of this chapter:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
14. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities pursuant to 10 CFR parts 30, 40, 70, and 72 of this chapter:	
Approval, Renewal, Amendment.....	Full Cost.
Inspection:	
Routine.....	Full Cost.
Nonroutine.....	Full Cost.
15. Import and Export licenses:	
Licenses issued pursuant to 10 CFR part 110 of this chapter for the import and export only of special nuclear material, source material, byproduct material, heavy water, tritium, or nuclear grade graphite.	
A. Application for import or export of HEU and other materials which must be reviewed by the Commission and the Executive Branch, for example, those actions under 10 CFR 110.40(b).	
Application—new license.....	8,000
Amendment.....	8,000
B. Application for import or export of special nuclear material, heavy water, nuclear grade graphite, tritium, and source material, and initial exports of materials requiring Executive Branch review only, for example, those actions under 10 CFR 110.41(a)(2)–(8).	
Application—new license.....	4,900
Amendment.....	4,900
C. Application for export of routine reloads of LEU reactor fuel and exports of source material requiring foreign government assurances only.	

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees ¹	Fee ^{2,3}
Application—new license.....	3,100
Amendment.....	3,100
D. Application for export or import of other materials not requiring Commission review, Executive Branch review or foreign government assurances.	
Application—new license.....	1,200
Amendment.....	1,200
E. Minor amendment of any export or import license to extend the expiration date, change domestic information or make other revisions which do not require analysis or review.	
Amendment.....	120
16. Reciprocity:	
Agreement State licensees who conduct activities in a non-Agreement State under the reciprocity provisions of 10 CFR 150.20.	
Application (each filing of Form 241).....	640
Renewal.....	N/A
Amendment.....	N/A
Inspections:	
Routine and nonroutine.....	(⁴)

¹ Types of fees—Separate charges as shown in the schedule will be assessed for preapplication consultations and reviews and applications for new licenses and approvals, issuance of new licenses and approvals, amendments and renewals to existing licenses and approvals, safety evaluations of sealed sources and devices, and inspections. The following guidelines apply to these charges:

(a) Application fees—Applications for new materials licenses and approvals; applications to reinstate expired licenses and approvals except those subject to fees assessed at full cost; and applications filed by Agreement State licensees to register under the general license provisions of 10 CFR 150.20, must be accompanied by the prescribed application fee for each category, except that:

(1) Applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category; and

(2) Applications for licenses under Category 1E must be accompanied by an application fee of \$125,000.

(b) License/approval/review fees—Fees for applications for new licenses and approvals and for preapplication consultations and reviews subject to full cost fees (see Categories 1A, 1B, 1E, 2A, 4A, 5B, 10A, 11, 12, 13A, and 14) are due upon notification by the Commission in accordance with § 170.12 (b), (e), and (f).

(c) Renewal/reapproval fees—Applications for renewal of licenses and approvals must be accompanied by the prescribed renewal fee for each category, except that fees for applications for renewal of licenses and approvals subject to full cost fees (see Categories 1A, 1B, 1E, 2A, 4A, 5B, 10A, 11, 12, 13A, and 14) are due upon notification by the Commission in accordance with § 170.12(d).

(d) Amendment fees—

(1) Applications for amendments to licenses and approvals, except those subject to fees assessed at full costs, must be accompanied by the prescribed amendment fee for each license affected. An application for an amendment to a license or approval classified in more than one fee category must be accompanied by the prescribed amendment fee for the category affected by the amendment unless the amendment is applicable to two or more fee categories in which case the amendment fee for the highest fee category would apply. For those licenses and approvals subject to full costs (see Categories 1A, 1B, 1E, 2A, 4A, 5B, 10A, 11, 12, 13A, and 14), amendment fees are due upon notification by the Commission in accordance with § 170.12(c).

(2) An application for amendment to a materials license or approval that would place the license or approval in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for the new category.

(3) An application for amendment to a license or approval that would reduce the scope of a licensee's program to a lower fee category must be accompanied by the prescribed amendment fee for the lower fee category.

(4) Applications to terminate licenses authorizing small materials programs, when no dismantling or decontamination procedure is required, are not subject to fees.

(e) Inspection fees—Separate charges will be assessed for each routine and nonroutine inspection performed, including inspections conducted by the NRC of Agreement State licensees who conduct activities in non-Agreement States under the reciprocity provisions of 10 CFR 150.20. Inspections resulting from investigations conducted by the Office of Investigations and nonroutine inspections that result from third-party allegations are not subject to fees. If a licensee holds more than one materials license at a single location, a fee equal to the highest fee category covered by the licenses will be assessed if the inspections are conducted at the same time, unless the inspection fees are based on the full cost to conduct the inspection. The fees assessed at full cost will be determined based on the professional staff time required to conduct the inspection multiplied by the rate established under § 170.20 to which any applicable contractual support services costs incurred will be added. Licenses covering more than one category will be charged a fee equal to the highest fee category covered by the license. Inspection fees are due upon notification by the Commission in accordance with § 170.12(g). See Footnote 5 for other inspection notes.

² Fees will not be charged for orders issued by the Commission pursuant to 10 CFR 2.202 or for amendments resulting specifically from the requirements of such Commission orders. However, fees will be charged for approvals issued pursuant to a specific exemption provision of the Commission's regulations under title 10 of the Code of Federal Regulations (e.g., 10 CFR 30.11, 40.14, 70.14, 73.5, and any other sections now or hereafter in effect) regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9A through 9D.

³ Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For those applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of this rule will be determined at the professional rates established for the June 20, 1984, January 30, 1989, July 2, 1990, and July 10, 1991, rules, as appropriate. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990 rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 28, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports whose costs exceed \$50,000. Costs which exceed \$50,000 for each topical report, amendment, revision, or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in § 170.20. In no event will the total review costs be less than twice the hourly rate shown in § 170.20.

⁴ Licensees paying fees under Categories 1A, 1B, and 1E are not subject to fees under Categories 1C and 1D for sealed sources authorized in the same license except in those instances in which an application deals only with the sealed sources authorized by the license. Applicants for new licenses or renewal of existing licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application or renewal fee for fee Category 1C only.

⁵ For a license authorizing shielded radiographic installations or manufacturing installations at more than one address, a separate fee will be assessed for inspection of each location, except that if the multiple installations are inspected during a single visit, a single inspection fee will be assessed.

⁶ Fees as specified in appropriate fee categories in this section.

PART 171—ANNUAL FEES FOR REACTOR OPERATING LICENSES, AND FUEL CYCLE LICENSES AND MATERIALS LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC

6. The authority citation for part 171 is revised to read as follows:

Authority: Sec. 7601, Pub. L. 99-272, 100 Stat. 146, as amended by sec. 5601, Pub. L. 100-203, 101 Stat. 1330, as amended by Sec. 3201, Pub. L. 101-239, 103 Stat. 2106 as amended by sec. 6101, Pub. L. 101-508, 104 Stat. 1368 (42 U.S.C. 2213); sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201(w)); sec. 201, 88 Stat. 1242 as amended (42 U.S.C. 5841).

7. In § 171.5 the definition *nonprofit educational institution* is added to read as follows:

§ 171.5 Definitions.

Nonprofit educational institution means a public or nonprofit educational institution whose primary function is education, whose programs are accredited by a nationally recognized

accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

8. In § 171.11, paragraph (b) is revised to read as follows:

§ 171.11 Exemptions.

(b) The Commission may, upon application by an interested person, or upon its own initiative, grant such exemptions from the requirements of this part as it determines are authorized by law or otherwise in the public interest. Requests for exemption must be filed with the NRC within 90 days from the effective date of the final rule establishing the annual fees for which the exemption is sought in order to be considered. Absent extraordinary circumstances, any exemption requests filed beyond that date would not be considered. The filing of an exemption request does not extend the date on which the bill is payable. Only the timely payment in full ensures

avoidance of interest and penalty charges. If a partial or full exemption is granted, any overpayment will be refunded.

9. In § 171.15, paragraphs (b)(3), (c)(2), (d), and (e) are revised to read as follows:

§ 171.15 Annual Fees: Reactor operating licenses.

(b) * * *
(3) Generic activities required largely for NRC to regulate power reactors, e.g., updating part 20 of this chapter, or operating the Incident Response Center. The base FY 1992 annual fees for each operating power reactor subject to fees under this section and due before September 30, 1992, are shown in paragraph (d) of this section.

(c) * * *
(2) The FY 1992 surcharge to be added to each operating power reactor is \$272,000. This amount is calculated by dividing the total cost for these activities (\$29.7 million) by the number of operating power reactors (109).

(d) The FY 1992 part 171 annual fees for operating power reactors are as follows:

PART 171 ANNUAL FEES BY REACTOR CATEGORY ¹

(Fees in millions)

Reactor vendor	Number	Base fee	Added charge	Total fee	Estimated collections
Babcock/Wilcox	7	\$2,866	.272	\$3,138	\$22.0
Combustion Eng	15	2,850	.272	3,122	46.8
GE Mark I	24	2,810	.272	3,082	74.0
GE Mark II	8	2,821	.272	3,093	24.7
GE Mark III	4	2,810	.272	3,082	12.3
Westinghouse	51	2,855	.272	3,127	159.5
Totals	109				339.3

¹ Fees assessed by reactor vendor will vary for plants west of the Rocky Mountains and for Westinghouse plants with ice condensers.

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

Research reactor \$55,700
Test reactor 55,700

§ 171.16 Annual Fees: Materials Licensees, Holders of Certificates of Compliance, Holders of Sealed Source and Device Registrations, Holders of Quality Assurance Program Approvals and Government agencies licensed by the NRC.

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification, the licensee may pay reduced annual fees for FY 1992 as follows:

	Maximum annual fee per licensed category
Small businesses and small not-for-profit organizations (gross annual receipts):	
\$250,000 to \$3.5 million	\$1,800
Less than \$250,000	400
Private practice physicians (gross annual receipts):	
\$250,000 to \$1.0 million	1,800
Less than \$250,000	400
Small governmental jurisdictions (including publicly supported educational institutions) (population):	
20,000 to 50,000	\$1,800
Less than 20,000	400
Educational institutions that are not State or publicly supported, and have 500 employees or less	1,800

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

(4) The maximum annual fee (base annual fee plus surcharge) a small entity is required to pay for FY 1992 is \$1,800

for each category applicable to the license(s).

(d) The FY 1992 annual fees for materials licensees and holders of

certificates, registrations or approvals subject to fees under this section are as follows:

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC

[See footnotes at end of table]

Category of materials licenses			Annual fees 1, 2, 3
1. Special nuclear material:			
A. (1) Licenses for possession and use of U-235 or plutonium for fuel fabrication activities.			
High enriched fuel			
Babcock and Wilcox.....	SNM-42	70-27	\$2,170,000
Nuclear Fuel Services.....	SNM-124	70-143	2,170,000
Low Enriched Fuel:			
B&W Fuel Company.....	SNM-1168	70-1201	683,000
Combustion Engineering (Hematite).....	SNM-33	70-36	683,000
Combustion Engineering (Windsor).....	SNM-1067	70-1100	683,000
General Electric Company.....	SNM-1097	70-1113	683,000
Siemens Nuclear Power.....	SNM-1227	70-1257	683,000
Westinghouse Electric Co.....	SNM-1107	70-1151	683,000
Category of materials licenses			Annual Fees 1, 2, 3
Surcharge.....			\$155,250
A. (2) All other special nuclear materials licenses not included in 1.A.(1) above for possession and use of 200 grams or more of plutonium in unsealed form or 350 grams or more of contained U-235 in unsealed form or 200 grams or more of U-233 in unsealed form.....			72,000
Surcharge.....			38,950
B. Licenses for receipt and storage of spent fuel at an independent spent fuel storage installation (ISFSI).....			43,000
Surcharge.....			1,750
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers.....			1,700
Surcharge.....			150
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those for Category 1.A.(2).....			2,300
Surcharge.....			1,750
E. Licenses for the operation of a uranium enrichment facility.....			N/A 11
2. Source material:			
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride.....			381,000
Surcharge.....			155,250
(2) Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, ore buying stations, ion exchange facilities and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode:			
Class I facilities *.....			167,500
Class II facilities *.....			73,200
Other facilities.....			58,800
Surcharge.....			150
B. Licenses which authorize only the possession, use and installation of source material for shielding.....			430
Surcharge.....			150
C. All other source material licenses.....			3,000
Surcharge.....			1,750
3. Byproduct material:			
A. Licenses of broad scope for possession and use of byproduct material issued pursuant to parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.....			9,400
Surcharge.....			1,750
B. Other licenses for possession and use of byproduct material issued pursuant to part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.....			4,600
Surcharge.....			1,750
C. Licenses issued pursuant to §§ 32.72, 32.73, and/or 32.74 of this chapter authorizing the processing or manufacturing and distribution or redistribution of radio pharmaceuticals, generators, reagent kits and/or sources and devices containing byproduct material. This category also includes the possession and use of source material for shielding authorized pursuant to part 40 of this chapter when included on the same license.....			10,900
Surcharge.....			1,750
D. Licenses and approvals issued pursuant to §§ 32.72, 32.73, and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material. This category also includes the possession and use of source material for shielding authorized pursuant to part 40 of this chapter when included on the same license.....			3,800
Surcharge.....			150
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units).....			2,500
Surcharge.....			150
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes.....			4,600
Surcharge.....			150
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes.....			16,400
Surcharge.....			150

Category of materials licenses

Annual
Fees ^{1 2 3}

H. Licenses issued pursuant to subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter	6,300
Surcharge	150
I. Licenses issued pursuant to subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter	7,600
Surcharge	150
J. Licenses issued pursuant to subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter	7,500
Surcharge	150
K. Licenses issued pursuant to subpart B of part 31 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter	6,000
Surcharge	150
L. Licenses of broad scope for possession and use of byproduct material issued pursuant to part 30 and 33 of this chapter for research and development that do not authorize commercial distribution	7,400
Surcharge	1,750
M. Other licenses for possession and use of byproduct material issued pursuant to part 30 of this chapter for research and development that do not authorize commercial distribution	3,700
Surcharge	1,750
N. Licenses that authorize services for other licensees, except (1) licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3P, and (2) licenses that authorize waste disposal services are subject to the fees specified in fee Categories 4A, 4B, and 4C	4,400
Surcharge	1,750
O. Licenses for possession and use of byproduct material issued pursuant to part 34 of this chapter for industrial radiography operations. This category also includes the possession and use of source material for shielding authorized pursuant to part 40 of this chapter when authorized on the same license	12,800
Surcharge	150
P. All other specific byproduct material licenses, except those in Categories 4A through 9D	2,100
Surcharge	150
4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material	84,500
Surcharge	38,950
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material	13,800
Surcharge	1,750
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material	7,600
Surcharge	1,750
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies	10,300
Surcharge	150
B. Licenses for possession and use of byproduct material for field flooding tracer studies	15,000
Surcharge	1,750
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material	5,100
Surcharge	1,750
7. Human use of byproduct, source, or special nuclear material:	
A. Licenses issued pursuant to parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license	14,200
Surcharge	150
B. Licenses of broad scope issued to medical institutions or two or more physicians pursuant to parts 30, 33, 35, 40 and 70 of this chapter authorizing research and development, including human use of byproduct material except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license	12,200
Surcharge	1,750
C. Other licenses issued pursuant to parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material and/or special nuclear material except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license	4,600
Surcharge	150
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities	1,900
Surcharge	150
9. Device, product, or sealed source safety evaluation:	
A. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution	9,300
Surcharge	150
B. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices	4,500
Surcharge	150
C. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution	1,900
Surcharge	150

Category of materials licenses

Annual
Fees ^{1 2 3}

D. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel.....	990
Surcharge.....	150
10. Transportation of radioactive material:	
A. Certificates of Compliance or other package approvals issued for design of casks, packages, and shipping containers	
Spent Fuel, High Level Waste and plutonium air packages.....	N/A ⁴
Other Casks.....	N/A ⁴
B. Approvals issued of 10 CFR Part 71 quality assurance programs	
Users and Fabricators.....	62,800
Users.....	1,500
Surcharge.....	150
11. Standardized spent fuel facilities.....	N/A ⁴
12. Special Projects.....	N/A ⁴
13. A. Spent fuel storage cask Certificate of Compliance.....	N/A ⁴
B. General licenses for storage of spent fuel under 10 CFR 72.210.....	43,000
Surcharge.....	150
14. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation or site restoration activities pursuant to 10 CFR Parts 30, 40, 70, and 72.....	N/A ⁷
15. Import and Export licenses.....	N/A ⁴
16. Reciprocity.....	N/A ⁴
17. Master materials licenses of broad scope issued to Government agencies.....	300,000
Surcharge.....	36,150
18. DOE Certificates of Compliance.....	¹⁰ 1,200,000

¹ Amendments based on applications filed after October 1 of each fiscal year that change the scope of a licensee's program or that cancel a license will not result in any refund or increase in the annual fee for that fiscal year or any portion thereof for the fiscal year filed. The annual fee will be waived where the license is terminated prior to October 1 of each fiscal year, and the amount of the annual fee will be increased or reduced where an amendment or revision is issued to increase or decrease the scope prior to October 1 of each fiscal year.

If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration or approval held by that person. For those licenses that authorize more than one activity on a single license (e.g., human use and irradiation activities), annual fees will be assessed for each category applicable to the license. Licensees paying annual fees under Category 1.A.(1), are not subject to the annual fees of category 1.C and 1.D for sealed sources authorized in the license.

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

³ For FYs 1993 through 1995, fees for these materials licenses will be calculated and assessed in accordance with § 171.13 and will be published in the FEDERAL REGISTER for notice and comment.

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

⁵ Two licenses have been issued by NRC for land disposal of special nuclear material. Once NRC issues a LLW disposal license for byproduct and source material, the Commission will consider establishing an annual fee for this type of license.

⁶ Standardized spent fuel facilities, part 71 and 72 Certificates of Compliance and special reviews, such as topical reports, are not assessed an annual fee because the generic costs of regulating these activities are primarily attributable to the users of the designs, certificates and topical reports.

⁷ Licensees in this category are not assessed an annual fee because they are charged an annual fee in other categories while they are operating.

⁸ No annual fee is charged because it is not practical to administer due to the relatively short life or temporary nature of the license.

⁹ Separate annual fees will not be assessed for pacemaker licenses issued to medical institutions who also hold nuclear medicine licenses under Categories 7B or 7C.

¹⁰ This includes all Certificates of Compliance issued to DOE.

¹¹ No annual fee has been established because there are currently no licensees in this particular fee category.

(e) A surcharge is proposed for each category, except Category 18, for which a base annual fee is required. The surcharge consists of the following:

(1) To recover costs relating to LLW disposal generic activities, an additional charge of \$155,100 has been added to fee Categories 1.A.(1) and 2.A.(1); an additional charge of \$38,800 has been added to fee Categories 1.A.(2) and 4.A.; an additional charge of \$1,600 has been added to fee Categories 1.B., 1.D., 2.C., 3.A., 3.B., 3.C., 3.L., 3.M., 3.N., 4.B., 4.C., 5.B., 6.A., and 7.B.; and an additional charge of \$36,000 has been added to fee Category 17.

(2) To recoup those costs not recovered from small entities, an additional charge of \$150 has been added to each fee Category, except Categories 1E, 10.A., 11., 12., 13.A., 14., 15., 16., and 18. Licensees who qualify as small entities under the provisions of § 171.16(c) and who submit a completed NRC Form 526 are not subject to the \$150 additional charge.

11. In § 171.19, paragraph (b) and (c) are revised to read as follows:

§ 171.19 Payment.

(b) For FY 1992 through FY 1995, the Commission will adjust the fourth quarterly bill for operating power reactors and certain materials licensees to recover the full amount of the revised annual fee. All other licensees, or holders of a certificate, registration, or approval of a QA program will be sent a bill for the full amount of the annual fee upon publication of the final rule. Payment is due on the effective date of the final rule and interest shall accrue from the effective date of the final rule. However, interest will be waived if payment is received within 30 days from the effective date of the final rule.

(c) For FYs 1992 through 1995, annual fees in the amount of \$100,000 or more and described in the Federal Register Notice pursuant to § 171.13, 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 fiscal year. Annual fees of less than \$100,000 shall be paid once a year.

Dated at Rockville, Maryland this 8th day of July, 1992.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

Editorial Note: This appendix will not appear in the Code of Federal Regulations.

Appendix A to This Final Rule— Regulatory Flexibility Analysis for the Amendments to 10 CFR Part 170 (License Fees) and 10 CFR Part 171 (Annual Fees)

I. Background

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) establishes as a principle of regulatory practice that agencies endeavor to fit regulatory and informational requirements, consistent with applicable statutes, to a scale commensurate with the businesses, organizations, and government

jurisdictions to which they apply. To achieve this principle, the Act requires that agencies consider the impact of their actions on small entities. If the agency cannot certify that a rule will not significantly impact a substantial number of small entities, then a regulatory flexibility analysis is required to examine the impacts on small entities and the alternatives to minimize these impacts.

To assist in considering these impacts under the Regulatory Flexibility Act, the NRC adopted size standards for determining which NRC licensees qualify as small entities (50 FR 50241; December 9, 1985). These size standards were clarified November 6, 1991 (56 FR 56672). The NRC size standards are as follows:

(1) A small business is a business with annual receipts of \$3.5 million or less except private practice physicians for which the standard is annual receipts of \$1 million or less.

(2) A small organization is a not-for-profit organization which is independently owned and operated and has annual receipts of \$3.5 million or less.

(3) Small governmental jurisdictions are governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

(4) A small educational institution is one that is (1) supported by a qualifying small governmental jurisdiction, or (2) one that is not state or publicly supported and has 500 employees or less.

Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990 (OBRA-90), requires that the NRC recover approximately 100 percent of its budget authority, less appropriations from the Nuclear Waste Fund, for Fiscal Years (FY) 1991 through 1995 by assessing license and annual fees. For FY 1991, the amount to be collected was approximately \$445 million, and for FY 1992, the amount to be collected is approximately \$492.5 million.

To comply with OBRA-90, the Commission proposed amendments to its fee regulations in 10 CFR parts 170 and 171 on April 12, 1991 (56 FR 14870). On the basis of a careful evaluation of over 400 comments, the Commission issued a final rule on July 10, 1991 (56 FR 31472). This final rule established the methodology to be used in identifying the fees to be assessed and determined the fees that were assessed and collected in FY 1991. Consistent with the Conference Committee Report accompanying OBRA-90, the NRC fairly and equitably allocated its budget costs. This resulted in the assessment of

annual fees for all classes of licensees, including those classes of licensees with a substantial number of small entities. Using the same methodology established in the FY 1991 rulemaking, the NRC published a proposed rule on April 29, 1992 (57 FR 18095), that would establish the fees to be assessed for FY 1992.

II. Impact on Small Entities

The comments received on the proposed FY 1991 fee rule revisions and the small entity certifications received in response to the final FY 1991 fee rule indicate that NRC licensees qualifying as small entities under the NRC's size standards are primarily those licensed under the NRC's materials program. Therefore, this analysis will focus on the economic impact of the annual fees on materials licensees.

The Commission's fee regulations result in substantial fees being charged to those individuals, organizations, and companies that are licensed under the NRC materials program. Of these materials licensees, the NRC estimates that about 25 percent (approximately 2,000 licensees) qualify as small entities. Therefore, in recognition of this substantial number of small entities, the NRC requested comments from small entities on the proposed FY 1991 rule. Comments were specifically requested on (1) how the proposed regulations would affect each class of licensee and (2) how the regulations could be structured to further minimize the economic impact on the licensee but still meet the statutory mandate of OBRA-90.

For materials licensees, the increase in fees assessed in FY 1991 consisted of (1) an increase of 25 percent in the license and inspection fees assessed under 10 CFR part 170 and (2) a new annual fee assessed under 10 CFR part 171 that ranged from \$290 to over \$10,000. A number of small entities indicated that the 25 percent increase in license and inspection fees, although not desirable, would not have a significant economic impact on them. However, many other materials licensees commented that the new annual fee would have a negative economic impact on them. Therefore, the regulatory flexibility analysis prepared for the July 10, 1991, final rule, as well as this regulatory flexibility analysis, concentrates on the annual fee.

The commenters on the FY 1991 proposed fee rule indicated the following results if the proposed annual fees were not modified:

—Large firms would gain an unfair competitive advantage over small entities. One commenter noted that a

small well-logging company (a "Mom and Pop" type of operation) would find it difficult to absorb the annual fee, while a large corporation would find it easier. Another commenter noted that the fee increase could be more easily absorbed by a high-volume nuclear medicine clinic. A gauge licensee noted that, in the very competitive soils testing market, the annual fees would put it at an extreme disadvantage with its much larger competitors because the proposed fees would be the same for a two-person licensee as for a large firm with thousands of employees.

—Some firms would be forced to cancel their licenses. One commenter, with receipts of less than \$500,000 per year, stated that the proposed rule would, in effect, force it to relinquish its soil density gauge and license, thereby reducing its ability to do its work effectively. Another commenter noted that the rule would force the company and many other small businesses to get rid of the materials license altogether. Commenters stated that the proposed rule would result in about 10 percent of the well logging licensees terminating their licenses immediately and approximately 25 percent terminating their licenses before the next annual assessment.

—Some companies would go out of business. One commenter noted that the proposal would put it, and several other small companies, out of business or, at the very least, make it hard to survive.

—Some companies would have budget problems. Many medical licensees commented that, in these times of slashed reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Another noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship and some facilities would experience a great deal of difficulty in meeting this additional burden.

Although it was not clear to what extent these impacts would materialize at the time the July 10, 1991, final rule was promulgated, it was clear that the assessed annual fees would be a relatively high portion of the gross revenues of some licensees and far less of a portion for other larger material licensees. After the final rule was published, approximately 2,000 license, approval, and registration terminations were requested. Although some of these terminations were requested because the license was no longer needed or licenses or registrations could be

combined, indications are that other termination requests were due to the economic impact of the fees.

The NRC continues to receive written and oral comments from small materials licensees. These comments indicate that the \$3.5 million threshold for small entities is not representative of small businesses with gross receipts in the thousands of dollars. These commenters believe that the \$1,800 maximum annual fee represents a relatively high percentage of gross annual receipts for these "Mom and Pop" type businesses. Therefore, even the reduced annual fee could have a significant impact on the ability of these types of businesses to continue to operate.

Members of Congress, in many of the more than 100 Congressional letters the NRC has received since the July 10, 1991, final rule was published, have expressed concern about the size of the NRC annual fees and their economic impact on small entities. Some of these letters have suggested that the Commission should act to further reduce the economic impact on those licensees who conduct limited operations. The Small Business Administration (SBA), while commending the Commission for complying with and using the RFA in the final rulemaking, suggested that the Commission should act to further alleviate the impact of the fees on small businesses. The American Nuclear Society (ANS) also expressed concern about the impact of the annual fees on small entities and suggested that the Commission examine alternatives to further reduce the impacts.

Therefore, the NRC considered additional alternatives, in accordance with the RFA, to alleviate the continuing significant impact of the annual fees on a substantial number of small entities.

III. Alternatives

Commenters on the proposed rule published April 12, 1991, and comments received subsequent to publication of the final rule on July 10, 1991, and comments received on the limited amendments to the fee schedules published as a final rule on April 17, 1992 (57 FR 13625) suggested alternatives to reduce the impact on small entities. These comments are categorized as follows:

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

The first alternative would result in the annual fee being in direct proportion to the amount of radioactivity (e.g., number of radioactive sources) possessed by the licensee, independent of whether the licensee meets the size standard for a small business. Thus, a large diversified firm that owns one source would get a reduced fee, while a small entity, whose business may depend solely on the use of radioactive materials, would pay a larger fee because it has more than one source. Thus, this alternative does not necessarily achieve the goal of the RFA to minimize the impact on small entities. The NRC also believes that this approach would not result in a fair and equitable allocation of its generic and other costs not recovered under 10 CFR part 170. Therefore, the NRC rejected this approach.

For similar reasons, the second suggested alternative, basing the fee on the frequency of use of the licensed radioactive source, would not necessarily reduce the cost for small entities that meet the size standards discussed earlier. Therefore, the NRC also rejected this approach.

The last alternative would base fees on the size standards that the NRC has used to define small entities. This alternative would ensure that any benefits from modifying the proposed fees would apply only to small entities. Three basic options, each using the NRC size standards, were considered for modifying the annual fees imposed on small entities:

- (1) Exempt all small entities which meet the size standards from annual fees.
 - (2) Require small entities to pay a fixed percent of the amount of the fee in each of the specific material license fee categories.
 - (3) Establish a maximum fee for small entities.
- Under Option 1, all small entities would be exempted from fees. However, because small entities would not pay any of the generic costs attributable to their class of licensees, this option could be viewed as inconsistent with the objectives of OBRA-90. Under this option, all the annual fees attributable to small entities would be paid by other NRC licensees.

Under Option 2, small entities would pay a percentage (e.g., 50 percent) of the proposed fee for each specific category of materials license, regardless of how small or large the fee is. This option could result in a reduction in annual fees that are already relatively small and that do not have a significant impact on a substantial number of small entities. However, for those fee categories

assessed large annual fees, the percentage of reduction may result in assessing small entities licensed under those fee categories relatively large annual fees.

Option 3 would establish a maximum fee for all small entities. Under this option, a small entity would pay either the smaller of the annual fee for the category or the maximum small entity fee. This alternative strikes a balance between the requirements of OBRA-90 and the RFA, which are to consider and reduce, as appropriate, the impact of an agency's regulatory actions on small entities. Therefore, the NRC has adopted Option 3 as the most appropriate to reduce the impact on small entities. Commenters on the proposed fee rule for FY 1992 did not present alternatives that have not been considered previously.

IV. Maximum Fee

To implement Option 3, the NRC established a maximum annual fee for small entities. The RFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity. Therefore, the NRC has no benchmark to assist in determining the amount or the percent of gross receipts that should be charged to a small entity. To determine a maximum annual fee for a small entity, the NRC examined the NRC 10 CFR part 170 license and inspection fees established in 1991 and the 1991 Agreement State fees for those fee categories that are expected to have a substantial number of small entities. Because these fees have been charged to small entities, the NRC believes that these fees do not have a significant impact on them. In fact, the NRC concluded, in issuing the July 10, 1991, final rule, that the existing materials license and inspection fees do not have a significant impact on small entities. This conclusion remains valid for the FY 1992 fee rule.

The maximum fees per year charged in 1991 by several Agreement States and by the NRC for materials license fee categories with a significant number of small entities are shown below.

	1991 Maximum average total fee per year
Washington	\$3,760
Texas	2,100
Illinois	2,000
NRC	1,590
Nebraska	1,460
New York	1,030
Utah	440

Table 1 presents the estimated total fees (part 170 plus part 171) for materials licensees, assuming maximum annual fees for small entities of \$2,000 or \$1,500 and an average number of licensing actions and inspections per year. If the maximum annual fee for small entities is established at \$2,000, the average fee per year for all of the categories would be below the approximately \$3,800 maximum fee charged by Agreement States, except for radiography, waste receipt and packaging, and broad-scope medical licensees. The broad-scope medical, and waste receipt and packaging licensees are primarily large entities. Therefore, with a \$2,000 maximum small entity annual fee and the average license and inspection fees, only small entities who are radiographers would pay slightly more than the current maximum Agreement State fee of approximately \$3,800. If the maximum fee is reduced by \$200 (from \$2,000 to \$1,800), then all categories of materials licensees, including radiographers, would pay no more for each category than the 1991 maximum Agreement State fee of about \$3,800 if the licensee qualifies as a small entity.

By establishing the maximum annual fee for small entities at \$1,800, the annual fee for many small entities will be reduced while at the same time materials licensees, including small entities, pay for most of the FY 1991 costs (\$22.3 million of the total \$27.2 million) attributable to them. Therefore, the NRC has established and will continue, for FY 1992, the maximum annual fee (base annual fee plus surcharge) for certain small entities at \$1,800 for each fee category covered by each license issued to a small entity. Note that the costs not recovered from small entities are allocated to other materials licensees and to operating power reactors.

While reducing the impact on many small entities, the Commission agrees that the current maximum annual fee of \$1,800 for small entities, when added to the Part 170 license and inspection fees, may continue to have a significant impact on materials licensees with annual gross receipts in the thousands of dollars. Therefore, the Commission has further reduced the impact on small entities with relatively low gross annual receipts.

Commenters have suggested that the NRC could reduce the impact of the fees for materials licensees by basing them on the licensee's nuclear capacity (e.g., the number of sources possessed, the number of hospital beds, or the amount of radioactive material possessed), or

the frequency of use of the radioactive material. In adopting the July 10, 1991, final rule, the Commission recognized that inherent differences exist in the nuclear capacity and the frequency of source use for many of the classes of materials licensees. However, as indicated in Section III of this analysis, the Commission concludes that basing the fee on the number of sources, frequency of use, or amount of radioactive material possessed does not necessarily reduce the impact of the fees on small entities, which is the goal of the RFA. The Commission continues to believe that uniformly allocating the generic and other regulatory costs to the specific license to determine the amount of the annual fee is a fair and equitable way to recover its costs and that establishing reduced annual fees based on gross receipts (size) is the most appropriate approach to minimize the impact on small entities. Consistent with this approach, the Commission will continue the \$1,800 maximum annual fee for small entities. In addition, the Commission has created a lower tier annual fee for small entities with relatively small gross annual receipts or with a relatively small population (57 FR 13625; April 17, 1992).

To implement this action, relatively small annual receipts were defined. Based on data from an NRC survey of materials licensees and the Department of Commerce industry census, the following data shows the distribution of businesses with annual gross receipts of less than \$3.5 million.

Annual gross receipts	NRC Survey (%)	Department of Commerce
Less than \$250K	45	55
\$250-\$499K	14	22
\$500-\$749K	8	6
\$750-\$999K	9	6
\$1,000-\$3,500K	24	11

As shown, 45 to 55 percent (or about 50%) of small businesses with gross annual receipts of less than \$3.5 million have gross annual receipts that are less than \$250,000. Thus, by defining relatively small gross annual receipts as less than \$250,000, a significant number of small entities would be eligible for a further reduction of the impact of the annual fees. This level would also help ensure that those small businesses which probably would be impacted the most would pay the lower fee.

A similar approach was used to define a relatively small governmental jurisdiction. Using 1990 data from the National Association of Counties, the

distribution for counties located in non-Agreement States with a population of less than 50,000 shows that a population level of less than 20,000 would ensure that at least 50 percent of the small counties would be eligible for reduced fees (See the data presented below). This would also ensure that at least 50 percent of other governmental jurisdictions (cities, towns, villages, school districts, etc.) could also receive the benefits because these other jurisdictions are typically smaller than counties.

Population	Percent of total
Less than 5,000	10
5,000-9,999	18
10,000-14,999	16
15,000-19,999	14
20,000-24,999	9
25,000-50,000	33

The NRC also determined the amount of the annual fee that should be assessed to lower tier small entities (less than \$250,000 for small businesses and small non-profit organizations, or less than 20,000 population for small governmental jurisdictions). In establishing the annual fee for lower tier small entities, the Commission retained a balance between the objectives of the RFA and OBRA-90. This balance can be measured by (1) the amount of costs attributable to small entities that is transferred to larger entities (the small entity subsidy); (2) the total annual fee small entities pay, relative to this subsidy; and (3) how much the annual fee is for a lower tier small entity. Nuclear gauge users were used to measure the reduction in fees because they represent about 40 percent of the materials licensees and most likely would include a larger percentage of lower tier small entities than would other classes of materials licensees.

Before presenting alternative fees, the NRC notes that the number of licensees filing small entity certifications for the FY 1991 annual fees is lower than originally estimated. The NRC estimated 3,000 certifications in the July 10, 1991, rule, which would have resulted in an estimated cost of about \$5 million in the small entity subsidy. On the basis of the response to the FY 1991 billings, the NRC's estimate is now that there are about 2,000 small entities.

The following data shows four different lower tier small entity fees, their impact on the licensees, and their impact on the balance between OBRA-90 and RFA.

Alternative lower tier small entity annual fee	Reduction in fee for gauge users (%)	Estimated FY 1992 small entity subsidy (\$ M)	Estimated FY 1992 annual fees paid by small entities (\$ M)
\$1,200.....	30	\$5.0	\$4.5
900.....	50	5.3	4.2
700.....	60	5.5	4.0
400.....	75	6.0	3.5

Each of the alternative lower tier annual fees reduces the annual fee for qualifying nuclear gauge licensees. However, the Commission established an annual fee of \$400 for the lower tier small entities because this amount should ensure that the lower tier small entities receive a reduction (75 percent for small gauge users) substantial enough to mitigate any severe impact. The amount of the small entity subsidy resulting from this fee is equivalent to the amount estimated in the July 10, 1991, final rule, increased by 20 percent to account for the FY 1992 budget increase and the reduced number of materials licensees resulting from license terminations after the FY 1991 rule became effective. Although the other reduced fees would result in lower subsidies, the Commission believes that the amount of the associated annual fees, when added to the license and inspection fees, would still be considerable for small businesses and organizations with gross receipts that are less than \$250,000 or for governmental entities in jurisdictions with a population of less than 20,000.

V. Summary

The NRC has determined the annual fee significantly impacts a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to collect 100 percent of the NRC budget and the requirement to consider means of reducing the impact of the proposed fee on small entities. On the basis of its regulatory flexibility analysis and the April 17, 1992, final rule the NRC concluded that a maximum annual fee of \$1,800 for small entities and a lower tier small entity annual fee of \$400 for small businesses and non-profit organizations with gross annual receipts of less than \$250,000, and small governmental entities with a population of less than 20,000, will reduce the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA-90. Thus, the revised fees for small entities maintain a balance between the objectives of OBRA-90 and the RFA. The NRC has

used the methodology and procedures developed for the FY 1991 fee rule in this rule establishing the FY 1992 fees. Therefore, the analysis and conclusions established in the FY 1991 rule remain valid for this final rule.

TABLE 1.—1991 AVERAGE TOTAL SMALL ENTITY FEES PER YEAR

License fee category	Total small entity fee ¹	
	Max annual fee = \$2K	Max annual fee = \$1.5K
Special Nuclear Material (SNM):		
1C. Industrial Gauges.....	\$1,672	\$1,672
1D. All other SNM.....	2,506	2,006
Source Material:		
2B. Shielding.....	463	463
2C. Other Source Materials.....	2,867	2,367
Byproduct Material:		
3A. Manufacturing—Broad.....	3,560	3,060
3B. Manufacturing—Other.....	3,343	2,843
3C. Radiopharmaceuticals.....	3,207	2,707
3D. Radiopharmaceuticals—Manufacturing.....	2,677	2,177
3E. Irradiators—Self-shield.....	1,699	1,699
3F. Irradiators—< 10,000 Ci.....	2,623	2,123
3G. Irradiators—> 10,000 Ci.....	3,840	3,340
3H. Exempt distribution—Device review.....	2,815	2,315
3I. Exempt distribution—No device review.....	2,682	2,182
3J. Gen. license—Device review.....	2,679	2,179
3K. Gen. license—No device review.....	2,708	2,208
3L. R&D—Broad.....	3,210	2,710
3M. R&D—Other.....	3,050	2,550
3N. Service license.....	2,733	2,233
3O. Radiography.....	4,050	3,550
3P. All other byproduct materials.....	2,120	2,120
Waste Disposal and Processing:		
4B. Waste receipt/packaging.....	4,680	4,180
4C. Waste receipt—prepackaged.....	3,216	2,716

TABLE 1.—1991 AVERAGE TOTAL SMALL ENTITY FEES PER YEAR—Continued

License fee category	Total small entity fee ¹	
	Max annual fee = \$2K	Max annual fee = \$1.5K
Well Logging:		
5A. Well logging.....	3,207	2,707
Nuclear Laundry:		
6A. Nuclear laundry.....	3,030	2,530
Human Use of Byproduct, Source, or SNM:		
7A. Teletherapy.....	3,788	3,288
7B. Medical—broad.....	4,360	3,860
7C. Medical other.....	3,130	2,630
Civil Defense:		
8A. Civil defense.....	1,789	1,789
Device, Product, or Sealed Source Safety Evaluation:		
9A. Device/product—Broad.....	3,200	2,700
9B. Device/product—Other.....	2,580	2,080
9C. Sealed sources—Broad.....	1,530	1,530
9D. Sealed sources—Other.....	770	770

¹ Based on average 10 CFR part 170 fees plus maximum annual fees.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 91-ASO-15]

Alteration of VOR Federal Airway V-157

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects the description of VOR Federal Airway V-157 located in the States of North Carolina and South Carolina. The final rule was published in the Federal Register on June 18, 1992 (57 FR 27158). During the time period prior to publication, the name of the VOR at Kenton, DE, was changed to Smyrna,