



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 20, 2009

Via Electronic Mail (FOIA.Resource@nrc.gov)

FOIA/PA Officer
U.S. Nuclear Regulatory Commission
FOIA Officer Mail Stop T5-F11
Washington, DC 20555-0001

Dear FOIA/PA Officer:

Pursuant to the Freedom of Information Act (FOIA) and related regulations, I respectfully request that the Nuclear Regulatory Commission (NRC) provide copies of any and all versions of the following documents:

All communications that took place between January 1, 2004 and October 31, 2008 involving the U.S. Nuclear Regulatory Commission ("NRC"), its staff, or contractors and the U.S. Geological Survey ("USGS"), its staff, or contractors concerning sea level rising or tidal surges.

This request includes any documents or information, including, but not limited to, any memoranda, attachments, enclosures, evaluations, reports, appendices, charts, diagrams, CDs, DVDs, and/or transmittal letters that accompany/accompanied such communications.

This information is requested by the Office of the New York State Attorney General in the course of its official governmental duties on behalf of the People of the State of New York. This request is not based on a commercial interest of the requester.

Request for Waiver of Fees

New York State hereby requests that the NRC waive all fees associated with this request. The public disclosure of the requested information will promote the public interest and public understanding of the NRC's activities. Accordingly, the NRC should waive any fees associated

FOIA/PA REQUEST

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Specialist Dennis
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with this request. Indeed, given that the requested information is in the public interest (as opposed to a commercial interest, an individual, private interest, or an academic research project), Congress has mandated that the NRC waive fees for copies of the above-requested reports and documents. *See* 5 U.S.C. § 552 (a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”). Because this request satisfies the operative statutory standard, NRC must waive any fees associated with this request. Consistent with this Congressional directive, New York State hereby requests that the NRC waive all fees associated with this request.

Plainly, the information sought by this request will contribute to the public’s understanding of the operations of the federal government. *See* 10 C.F.R. § 9.41(c). New York’s FOIA request seeks information on sea level rising or tidal surges relating to power reactors. This information will further the public’s understanding of sea level rising or tidal surges, their impact on existing nuclear plants, and the operations or activities of the federal government. *See* 10 C.F.R. § 9.41(d)(1). Release of the information will allow New York State to understand the operations of NRC and, possibly, the NRC’s interactions with, and the operations of, other federal agencies (e.g., CEQ, EPA, USGS) or private entities or trade associations (e.g., NEI, EPRI). *See* 10 C.F.R. § 9.41(d)(2). Public interest exists in sea level rising or tidal surges. For example, in 2007 the New York State Legislature created a sea level rise task force. *See* NYS L. 2007, ch. 613. Release of the information will increase the ability of New York State residents and Americans across the Nation to better understand the interaction of sea level rising or tidal surges and the NRC’s exercise of its authority. Finally, as noted above, the Attorney General’s Office submits this request, not as a commercial competitor, but in the exercise of its sovereign governmental functions and on behalf of the People of the State of New York. *See* 10 C.F.R. § 9.41(d)(3). If the NRC wishes, the requested information may be placed on the public portion of the ADAMS document management system.

New York State provides the following additional information that you may also wish to consider as part of the fee waiver request. The Office of the Attorney General intends to use the information obtained in the furtherance of its official governmental functions on behalf of the People of the State of New York. By way of example, such functions include participating in Atomic Safety and Licensing Board proceedings, generic issue proceedings, and other NRC activities. The Office of the Attorney General will extract and analyze the information contained in the documents to further its understanding about sea level rising or tidal surges at various nuclear facilities and evaluate various NRC activities relating to sea level rising or tidal surges. The Office may use or reference information contained in the requested documents in various New York State administrative proceedings or NRC administrative proceedings (e.g., PSC # E-08-0077, ASLBP # 07-858-03-LR-BD01) and/or to evaluate NRC staff work product (e.g., Safety Evaluation Reports, Supplemental Environmental Impact Statements). The Office has expert scientists and engineers on staff and consults with additional state employees who have

engineering experience. The likely impact of the release of the requested information will be a substantial increase in the public understanding of the implications of sea level rising or tidal surges and the NRC's exercise of its responsibilities when compared to the public's understanding before the release of such documents. At present, the public does not have access to a number of the documents and its understanding of sea level rising or tidal surges is impeded. The public does not have a complete understanding of the interactions between NRC and USGS on this issue. The release of the information could increase the understanding of numerous citizens. For example, and as you may be aware, each day upwards of 20 million American citizens live, work, attend school, or travel within 50 miles of the Indian Point facilities. The NRC has acknowledged that the Indian Point facilities have the highest surrounding population density of any power reactor in the Nation.¹

Without seeing the quality and quantity of the information, it is difficult to guarantee the exact title, date, or length of a document that would contain the requested information. Nevertheless, the Office of the Attorney General anticipates that the information gleaned from the request would be incorporated in, for example and without limitation, the State's (1) public petitions and other submissions to the NRC as well as other related regulatory matters and generic safety issue and rulemaking processes and (2) public filings with the New York State Public Service Commission (*e.g.*, PSC # E-08-0077).

The Office of the Attorney General disseminates its filings in a variety of ways, including but not limited to the State's participation in NRC and PSC proceedings, the posting of the State's filings in those proceedings on various web sites, OAG-facilitated public meetings, OAG participation in NRC public meetings, OAG press releases, and various media reports on the OAG's activities with respect to NRC regulatory issues. Such participation, activities, and demonstrated capacity confirm that the State has satisfied the dissemination factor used in 10 C.F.R. §9.41(b)(6). Additionally, federal agencies typically post such filings in a publicly available docket (*e.g.*, NRC Rulemaking Docket; NRC Electronic Hearing Docket, ASLBP # 07-858-03-LR-BD01). Such documents would also be available on various public web sites, including, for example, those maintained by the New York Public Service Commission and the Nuclear Regulatory Commission (*e.g.*, NRC Agencywide Documents Access and Management System (ADAMS)). Further, as noted, if the NRC wishes, it may post the requested information at one or more locations on its web site so that the public may view it. None of these methods would entail a charge to a citizen who wished to review the information.

Separate and apart from such postings, such documents would be available directly from the Office of the Attorney General. In addition, the Office of the Attorney General has publicized various filings it has made with respect to the development of NRC regulations and/or

¹ NRC may take official notice of the fact that the three Indian Point reactors and associated facilities have the highest surrounding population density of any power reactor in the United States. *See, e.g.*, Atomic Energy Commission, Population Distribution Around Nuclear Power Plant Sites, April 17, 1973, Figure 2: Typical Site Population Distribution (5-50 Miles), hereby incorporated by reference.

the Indian Point facilities, which has increased the public awareness of such filings and their content.² Various media (internet, print, radio, television) have reported on such filings over the past two years.³ And from time to time, NRC officials, such as the Chairman or staff in the Office of Public Affairs, have responded to or commented on the State's filings -- thereby further increasing the public's awareness of the State's filings.⁴ Assuming that the NRC actually possesses information and documents that are responsive to the State's FOIA request, such response would also be available from the Office of the Attorney General and, presumably, also from the NRC's public ADAMS site.

Furthermore, over the past two years, the Office of the Attorney General has organized public forums around the State during which citizens and staff may discuss issues of interest to a particular community. By way of example, forums have been held in White Plains, Westchester County (approximately 17 miles from the Indian Point facilities), in Manhattan (approximately 35 miles from Indian Point), and Middletown, Orange County (approximately 29 miles from Indian Point). Various forums have included discussions about Indian Point and NRC regulatory issues. The Office plans to organize additional public forums in the future. At the same time, representatives of the Office of the Attorney General have attended public meetings convened by the Nuclear Regulatory Commission and have submitted public comments about issues of concern during such meetings. Such comments have been based, in part, on public information from the NRC. The Office plans to attend future meetings scheduled by the NRC.

The various means for dissemination identified by the State easily satisfy the applicable standard for fee waivers. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003). Thus, there is no basis to deny this Office's application that the NRC waive all fees associated with this FOIA request. The Office of the Attorney General notes that Congress intended that § 552(a)(4)(A)(iii) be liberally construed in favor of granting fee waivers. *See* 132 Cong. Record at S14,298 (Sept. 30, 1986) (Sen. Leahy); *id.* at H9464 (Oct. 8, 1986) (Rep. English). In enacting the provision, Congress sought to ensure that noncommercial requesters would be granted fee waivers on a routine basis. *See id.* at S16496 (Oct. 15, 1986) (colloquy between Sens. Kerry and Leahy); *id.* at S14,299 (Sept. 30, 1986) (Sen. Leahy). While the applicable statutory framework authorizes an agency to charge fees in cases in which FOIA requests are made for a "commercial" purpose, the State of New York's underlying request plainly is not for a commercial purpose. New York respectfully submits that the State's underlying request, which

² *See, e.g.*, Press Release, Attorney General Cuomo & 5 Other States Demand NRC Consider Terrorism And Earthquakes When Relicensing Nuclear Plants (November 15, 2007) attached to NRC ML073511837; Press Statement From Attorney General Andrew Cuomo (regarding the July 16, 2007 earthquake in Japan's Niigata Province and its impact on Tokyo Electric Power Company's Kashiwazaki-Kariwa nuclear power reactors), available at http://www.oag.state.ny.us/media_center/2007/jul/jul16c_07.html.

³ *See, e.g.*, *Nuclear Plants Subject to Terrorism, Earthquakes, States Warn* (November 16, 2007), available at <http://www.ens-newswire.com/ens/nov2007/2007-11-16-091.asp>; WNBC Broadcast *Earthquake Zone Intersection Threatens Indian Point Nuclear Plant* (August 22, 2008), available at <http://www.wnbc.com/news/17261669/detail.html>.

⁴ *See, e.g.*, December 30, 2007 letter from NRC Chairman Dale E. Klein to New York State Attorney General Andrew M. Cuomo (responding to seismic and security concerns) NRC ML073400603.

seeks information about the operations or activities of the federal government, will contribute to the public understanding of the government's operations and activities and will further the public interest. Accordingly, the NRC should waive any fees associated with the request. *Judicial Watch*, 326 F.3d 1309 (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters.’”). The State further notes that the recent decision in *Manley v. Department of the Navy*, Civil Action No. 1:07-cv-721, slip op., 2008 WL 4326448 (S.D. Ohio Sept. 22, 2008) (overturning federal administrative decision denying a FOIA fee waiver application), further supports the State's request for a waiver of all fees associated with this request.

To reiterate, the Attorney General's Office submits this request, not as a commercial competitor, but in the exercise of its sovereign governmental functions and on behalf of the People of the State of New York.

Thus, there is no basis to deny this Office's application that the NRC waive all fees associated with this FOIA request.

Conclusion

Please produce all responsive documents within 10 days of the receipt of this letter.

If you have any questions concerning this FOIA request, please contact me directly at (518) 474-1978 or Teresa.Fountain@oag.state.ny.us. Thank you for your attention to this matter.

Sincerely,

/s/

Teresa Fountain
Legal Assistant Trainee

FOIA Resource

From: Teresa Fountain [Teresa.Fountain@oag.state.ny.us]
Sent: Friday, February 20, 2009 8:10 AM
To: FOIA Resource
Subject: Request for Information
Attachments: 2009 02 20 OAG Initial Request to NRC.pdf

Dear FOIA Officer:

Attached is the State of New York's request for information under FOIA. If you have any questions, please contact me. No hard copy to follow.

Thank you,

Teresa Fountain
Legal Assistant Trainee II
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224
(518) 474-1978
(518) 473-2534 fax