

RESPONSE TO FREEDOM OF  
INFORMATION ACT (FOIA) REQUEST

2016-0737

1

RESPONSE  
TYPE☐

INTERIM

☒

FINAL

## REQUESTER:

Julian Tarver

## DATE:

MAR 15 2017

## DESCRIPTION OF REQUESTED RECORDS:

SECY 15-0165

## PART I. -- INFORMATION RELEASED

- ☐ Agency records subject to the request are already available in public ADAMS or on microfiche in the NRC Public Document Room.
- ☒ Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☒ See Comments.

## PART I.A -- FEES

AMOUNT\*

\$

\*See Comments for details

☐

You will be billed by NRC for the amount listed.

☒

None. Minimum fee threshold not met.

☐

You will receive a refund for the amount listed.

☐

Fees waived.

## PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- ☐ We did not locate any agency records responsive to your request. *Note:* Agencies may treat three discrete categories of law enforcement and national security records as not subject to the FOIA ("exclusions"). 5 U.S.C. 552(c). This is a standard notification given to all requesters; it should not be taken to mean that any excluded records do, or do not, exist.
- ☒ We have withheld certain information pursuant to the FOIA exemptions described, and for the reasons stated, in Part II.
- ☐ Because this is an interim response to your request, you may not appeal at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination.
- ☒ You may appeal this final determination within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

## PART I.C COMMENTS ( Use attached Comments continuation page if required)

In conformance with the FOIA Improvement Act of 2016, the NRC is informing you that: (1) you have the right to seek assistance from the NRC's FOIA Public Liaison; (2) you have the right to seek dispute resolution services from the NRC's FOIA Public Liaison or the Office of Government Information Services; and (3) notwithstanding the language in Parts I.B and II.B of this form, you may appeal this final determination within 90 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

SIGNATURE - FREEDOM OF INFORMATION ACT OFFICER

Stephanie Blaney

**RESPONSE TO FREEDOM OF  
INFORMATION ACT (FOIA) REQUEST**

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**PART II.A – APPLICABLE EXEMPTIONS**

Records subject to the request are being withheld in their entirety or in part under the FOIA exemption(s) as indicated below (5 U.S.C. 552(b)).

- ☐ Exemption 1: The withheld information is properly classified pursuant to an Executive Order protecting national security information.
- ☐ Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.
- ☐ Exemption 3: The withheld information is specifically exempted from public disclosure by the statute indicated.
- ☐ Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
- ☐ Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
- ☐ 41 U.S.C. 4702(b), which prohibits the disclosure of contractor proposals, except when incorporated into the contract between the agency and the submitter of the proposal.
- ☐ Exemption 4: The withheld information is a trade secret or confidential commercial or financial information that is being withheld for the reason(s) indicated.
- ☐ The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
- ☐ The information is considered to be another type of confidential business (proprietary) information.
- ☐ The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- ☒ Exemption 5: The withheld information consists of interagency or intraagency records that are normally privileged in civil litigation.
- ☒ Deliberative process privilege.
- ☐ Attorney work product privilege.
- ☐ Attorney-client privilege.
- ☐ Exemption 6: The withheld information from a personnel, medical, or similar file, is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- ☐ Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
- ☐ (A) Disclosure could reasonably be expected to interfere with an open enforcement proceeding.
- ☐ (C) Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.
- ☐ (D) The information consists of names and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
- ☐ (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
- ☐ (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- ☐ Other

**PART II.B – DENYING OFFICIALS**

In accordance with 10 CFR 9.25(g) and 9.25(h) of the U.S. Nuclear Regulatory Commission regulations, the official(s) listed below have made the determination to withhold certain information responsive to your request.

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL	
			EDO	SECY
Stephanie Blaney	FOIA Officer		<input checked="" type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>

Appeals must be made in writing within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

POLICY ISSUE  
Notation Vote

December 15, 2015

SECY-15-0165

FOR: The Commissioners  
FROM: Maureen E. Wylie  
Chief Financial Officer  
SUBJECT: FISCAL YEAR 2016 PROPOSED FEE RULE

PURPOSE:

This paper provides the recommended policy and administrative changes for the fiscal year (FY) 2016 Proposed Fee Rule. The staff requests Commission approval for two proposed policy changes: 1) charging Touhy fees, and 2) (b)(5) [redacted] (b)(5) [redacted] The paper also provides additional information about the FY 2016 Proposed Fee Rule including the proposed schedule.

BACKGROUND:

The Omnibus Budget Reconciliation Act of 1990 (OBRA-90), as amended, requires that the NRC recover approximately 90 percent of its budget authority each year.<sup>1</sup> To meet the requirements of OBRA-90, the U.S. Nuclear Regulatory Commission (NRC) publishes a rule each year that establishes two types of fees: (1) fees for specific services under part 170 of title 10 of the *Code of Federal Regulations* (10 CFR), "Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services under the Atomic Energy Act of 1954, as Amended," to recover the cost of special benefits to identifiable applicants and licensees; and (2) annual fees under 10 CFR part 171, "Annual Fees for Reactor Licenses and Fuel Cycle Licenses and Materials Licenses, including Holders of Certificates of Compliance, Registrations

CONTACT: Arlette Howard, OCFO/DPB/LFPT  
(301) 415-1481

<sup>1</sup> The 90-percent requirement is applied to the NRC's budget authority, not including any amounts appropriated for activities related to high-level waste, waste incidental to reprocessing, generic homeland security, and the Defense Nuclear Facilities Safety Board.

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and Quality Assurance Program Approvals and Government Agencies Licensed by the NRC," to recover generic and other regulatory costs not otherwise recovered under 10 CFR part 170.

In accordance with the staff requirements memorandum dated October 11, 2005, on SECY-05-0164,<sup>2</sup> the staff will use the rebaselining method of calculating fees for FY 2016. The staff will continue to keep the Commission fully informed of proposed changes and resource allocations associated with the fee rule. Each year, before issuing the proposed fee rule, the staff sends a paper to the Commission with recommended policy changes and/or administrative changes.

DISCUSSION:

I. Policy

a) *Touhy Fees*

The staff proposes to begin assessing fees to recover the agency's costs in responding to significant Touhy requests. This proposal is discussed in detail in Enclosure 1. Touhy requests involve third-party subpoenas or demands for official information that are served on agency employees. These requests ask NRC employees to produce documents, to testify, or do both, in outside litigation in which neither the NRC nor the United States is a named party. Significant Touhy requests can require the staff to expend considerable amounts of agency time—time that currently cannot be billed to that specific Touhy requester, and as such is recovered generically through annual fees under 10 CFR Part 171.

Two options exist for charging fees to Touhy requesters. First, the staff could charge 10 CFR Part 170 user fees to recover its costs for the work spent on responding to Touhy requests. This option would impose user fees for requests for both documents and oral testimony. A second option entails charging Freedom of Information Act fees for document requests, and then Part 170 fees for oral testimony requests. The staff proposes a 30 hour *de minimis* exception apply to both options to ensure that the NRC does not assess fees for insignificant Touhy requests. As discussed in greater detail in the enclosure, the staff recommends using Part 170 to collect fees for both document requests and oral testimony requests because Part 170 provides the best means of ensuring that the NRC recoups its full costs for this work. If the recommendation to begin assessing fees to recover the agency's costs in recovering Touhy requests is approved, in the proposed FY 2016 fee rulemaking, the staff will identify both options, provide its recommended approach, and solicit public feedback on the two options.

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<sup>2</sup> "Annual Fee Calculation Method" (Agencywide Documents Access and Management System (ADAMS) Accession No.: ML052840249).

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(b)(5)

(b)(5)

## II. Budget

### *FY 2016 Fee Calculations*

Currently, the agency does not have a full-year appropriation for FY 2016. The agency is operating under a continuing resolution, Pub. L. 114-53, which expires December 16, 2015. Because the budget allocation and fee calculation process takes several months to complete, the staff must begin preparing the Fee Rule now to ensure adequate time to propose the Rule and publish the Final Rule in the *Federal Register*. In the absence of an appropriation, the NRC staff proposes to base the FY 2016 Proposed Fee Rule on \$1,002 million of budget authority based on scenario planning estimates, which includes \$12 million for the Office of Inspector General. The remaining \$990 million reflects the funds necessary for the Commission to fund the agency's operations.

Upon receipt of the FY 2016 appropriation, the NRC staff will propose an FY 2016 Implementation Plan that reflects NRC's actual FY 2016 budget authority, including appropriate reductions and budget adjustments. The FY 2016 Final Fee Rule will be based on the Commission approved FY 2016 Implementation Plan.

## III. Related Rulemaking

### *Small Modular Reactors Rule*

On November 4, 2015 (80 FR 68268), the NRC published a proposed rule, "Variable Annual Fee Structure for Small Modular Reactors (SMR)," (ADAMS Accession No.: ML15230A424) that would establish a variable fee structure for light-water small modular reactors in a new paragraph (e) under 10 CFR 171.15 and redesignate the current paragraph (e) as paragraph (f). The FY 2016 Proposed Fee Rule would also modify current 10 CFR 171.15(e), but should be published after the SMR Final Rule is effective. Because both rules are expected to be in varying stages of development

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at the same time, the Proposed Fee Rule will be drafted with the assumption that the proposed revisions of the SMR Rule have been already adopted as final. Should the rulemaking process conclude differently, the regulatory text will be adjusted accordingly.

IV. Pilot Project

The Office of the General Counsel (OGC) and the Office of the Chief Financial Officer (OCFO) have agreed to pilot a new approach for the FY 2016 Fee Rule. This will entail OGC revising the language in the Statements of Consideration accompanying the proposed fee rule to streamline it for increased transparency and understandability. OGC will also have the lead in drafting the statements of consideration and responding to public comments (with input from OCFO and staff offices). OCFO will remain the project manager for this rule.

V. Public Meeting

The staff will hold a public meeting in March 2016 to discuss the highlights of the FY 2016 Proposed Fee Rule.

VI. Administrative Changes

Enclosure 2 contains administrative changes for the Proposed Fee Rule. Additional administrative and conforming changes may be necessary as the Proposed Rule is developed.

VII. Schedule

Enclosure 3 contains the estimated schedule for the FY 2016 Fee Rule.

RECOMMENDATION:

The staff recommends that the Commission approve:

1. The staff proposal to begin assessing fees to recover the staff's costs in responding to significant Touhy request;

2. (b)(5)

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The Commissioners

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COORDINATION:

OGC has reviewed this paper and has no legal objection. The Executive Director for Operations has concurred on this paper.

This document is marked "Official Use Only" because it contains predecisional information about the NRC's FY 2016 fee rulemaking. The NRC will release it upon the publication of the FY 2016 Proposed Fee Rule.

*/RA/*

Maureen E. Wylie  
Chief Financial Officer

Enclosures:

1. Charging User Fees for NRC Work Spent  
on Responding to Touhy Requests
2. Administrative Changes in the FY 2016  
Proposed Fee Rule
3. Estimated Schedule - FY 2016 Fee Rule

cc: SECY  
OGC  
EDO  
OCA  
OPA  
OIG

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The Commissioners

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/RA/

Maureen E. Wylie  
Chief Financial Officer

Enclosures:

1. Charging User Fees for NRC Work Spent on Responding to Touhy Requests
2. Administrative Changes in the FY 2016 Proposed Fee Rule
3. Estimated Schedule - FY 2016 Fee Rule

Adams: ☒ Yes ☐ No Initials: AH SUNSI Review: AH  
☐ Publicly Available ☒ Non-Publicly Available ☒ Sensitive ☐ Non-Sensitive  
ADAMS Accession No.: ML15337A376 \*see email

CFO-009

OFFICE	OCFO/DPB/LFPT	OCFO/DPB/LFPT	OCFO/DPB/LFPT	OCFO/D/DPB	OCFO/ADPB	OCFO/DOC
NAME	AHoward/lmv1	CGalster	MKaplan	JGreen	RCAIwein	BGusack
DATE	12/8/15	10/23/15	12/8/15	12/ /15	12/ /15	11/09/15
OFFICE	RES	ADM	NSIR	OIP	OGC	NRR
NAME	MWeber	CCarpenter	BHollan	NMamish	MDoane	BDean
DATE	11/09/15	11/10/15	11/09/15	11/19/15	12/09/15	11/16/15
OFFICE	NRO	NMSS	DCFO	EDO	CFO	QTE
NAME	JUHe	Chaney	MCMuessle	VMcCree	MEWylie	
DATE	11/10/15	11/10/15	12/09/15	12/15/15	12/15/15	

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### Charging user fees for NRC work spent on responding to Touhy requests<sup>3</sup>

The U.S. Nuclear Regulatory Commission (NRC) staff proposes to assess fees to recover the staff's costs in responding to significant Touhy requests. The NRC's Touhy regulations, found at 10 CFR §§ 9.200-9.204, govern the manner in which the NRC responds to third-party subpoenas or demands for official information served on agency employees. Those third-party subpoenas seek NRC employees to produce documents, to testify, or to do both, in outside litigation in which neither the NRC nor the United States is a named party.<sup>4</sup>

Currently, the NRC's Touhy regulations do not authorize the NRC to collect any fees for the work it performs either collecting and providing documents or providing oral testimony in depositions or before an administrative or judicial tribunal. Yet NRC work on some Touhy requests can be quite substantial—for the recent Touhy requests arising from the litigation between Georgia Power and Westinghouse over construction delays at the Vogtle facility, the Office of General Counsel (OGC) alone spent over 2,000 staff hours working on document production. The NRC staff expends a considerable amount of time on Touhy requests, and this work has to be recovered through annual fees under 10 CFR Part 171 because of the lack of a regulation authorizing the agency to charge fees for the Touhy requests.

OGC surveyed 17 other federal agencies to determine whether the NRC's practice of not assessing Touhy fees is consistent with how other agencies handle Touhy requests. Of these 17 agencies, 4 do not assess fees for Touhy requests and 13 do assess fees.<sup>5</sup> Of these 13 agencies, 7 require Touhy requesters to pay the same fees as those making the Freedom of Information Act (FOIA) requests.<sup>6</sup> Four agencies require Touhy requesters to pay FOIA fees for physical document duplication, but charge hourly-rate fees for search and review

<sup>3</sup> The name "Touhy" is derived from the leading Supreme Court case in this area. *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1951).

<sup>4</sup> After receiving a valid demand or subpoena, the regulations require NRC employees to provide the subpoena to the General Counsel (or the Inspector General, if appropriate) and authorize the General Counsel (or Inspector General) to require the person issuing the subpoena to explain the underlying basis for the request. An NRC employee may not produce NRC records, or disclose NRC information, without the authorization of the General Counsel (or Inspector General) and the regulations provide steps for persons seeking to issue a subpoena to obtain that authorization.

<sup>5</sup> The regulations for the agencies that assess fees can be found at: 10 CFR § 1707.301 (Defense Nuclear Facilities Safety Board); 11 CFR § 9409.14 (Election Assistance Commission); 12 CFR § 792.47 (National Credit Union Administration); 15 CFR § 15.14 (Department of Commerce); 18 CFR § 1301.55(e) (Tennessee Valley Authority); 22 CFR § 713.8 (Overseas Private Investment Corporation); 36 CFR § 1012.6 (Presidio Trust); 38 CFR § 14.810 (Department of Veterans' Affairs); 39 CFR § 265.12 (Postal Service); 43 CFR § 2.285 (Department of Interior); 45 CFR § 2.6 (Health and Human Services); 46 CFR § 503.42 (Federal Maritime Commission); 40 CFR §§ 1611.4, 1612.4 (Chemical Safety and Hazard Investigation Board).

<sup>6</sup> These agencies are: National Credit Union Administration, Tennessee Valley Authority, Overseas Private Investment Corporation, Presidio Trust, Department of Veterans' Affairs, Department of Interior, and Health and Human Services. Note that the National Credit Union Administration and Overseas Private Investment Corporation also set forth a \$5 charge for certification of documents in their Touhy regulations in addition to requiring requesters to pay their FOIA fees.

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time.<sup>7</sup> One agency requires Touhy requesters to fully reimburse the agency for processing the Touhy request.<sup>8</sup> The last agency in this set of 13 requires a fee only for document certification.<sup>9</sup> In terms of Touhy's where oral testimony is sought, of the 17 agencies, 10 have regulations in place that authorize the agency to require fees for employee testimony or attendance as a witness pursuant to a Touhy request.<sup>10</sup> Generally, these regulations require the Touhy requester to pay for the cost incurred to the witness and the agency for providing testimony or acting as a witness in a legal proceeding.

In line with the multi-agency practice of collecting fees associated with Touhy requests, and in view of the potentially significant costs associated with responding to Touhy requests, the NRC staff proposes to start assessing Touhy fees in certain circumstances. The authority for assessing these fees would come from the same statute that provides the authority for the NRC's 10 CFR Part 170 fee schedule. That statute—the Independent Offices Appropriation Act (IOAA)—sets forth Congressional policy that "each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible."<sup>11</sup> Here, when the NRC complies with a third-party demand for information, the NRC is bestowing a benefit on a private litigant because the NRC is aiding that private litigant in its litigation by providing the information; and that benefit is not shared by other members of society.

The NRC staff therefore proposes amending its regulations to authorize the collection of fees for agency time spent processing Touhy requests. This can be achieved through one of two ways; although the NRC staff has a preferred option, we propose seeking public input on both options during the rulemaking process.

The first option entails amending 10 CFR Part 170 to authorize the full-cost recovery of all work spent processing Touhy requests above a certain threshold—this is Option 1. Under Option 1, the same full-cost recovery under Part 170 would apply to both requests for documents and requests for oral testimony.<sup>12</sup> When working on Touhy requests for documents, the primary agency costs are the costs associated with searching for and reviewing responsive documents. Under Option 1, all search and review costs would be recovered under Part 170 through the NRC's hourly rate (\$268 per hour in fiscal year 2015), no matter who is doing the

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<sup>7</sup> These agencies are: Defense Nuclear Facilities Safety Board, Elections Assistance Commission, Federal Maritime Commission, and perhaps the Department of Commerce.

<sup>8</sup> This agency is the Postal Service.

<sup>9</sup> This agency is the Chemical Safety and Hazard Investigation Board.

<sup>10</sup> 10 CFR § 1707.301(c) (Defense Nuclear Facilities Safety Board); 11 CFR § 9409.14(c) (Elections Assistance Commission); 12 CFR § 792.47(c) (National Credit Union Administration); 22 CFR § 713.8(c) (Overseas Private Investment Corporation); 36 CFR § 1012.6 (Presidio Trust); 38 CFR § 14.810 (Department of Veterans' Affairs); 39 CFR § 265.12 (Postal Service); 40 CFR § 1611.4(e) (Chemical Safety and Hazard Investigation Board.); 43 CFR § 2.285 (Department of the Interior); 46 CFR § 503.42(c) (Federal Maritime Commission).

<sup>11</sup> 31 U.S.C. § 9701.

<sup>12</sup> "Oral testimony" includes requests for both testimony during administrative and judicial proceedings, as well as depositions.

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searching or reviewing.<sup>13</sup> Option 1 also recovers the hourly rate for all the time that the employee spent preparing for and delivering oral testimony.

A second option entails amending 10 CFR Part 9 to authorize the collection of Touhy fees through the NRC's existing FOIA fee schedule—this is "Option 2." With respect to Touhy requests for documents, Option 2 would impose the following search/review fees:

- (a) Clerical search and review at a salary rate that is equivalent to a GG-7/step 6, plus 16 percent fringe benefits;
- (b) Professional/managerial search and review at a salary rate that is equivalent to a GG-13/step 6, plus 16 percent fringe benefits; and
- (c) Senior executive or Commissioner search and review at a salary rate that is equivalent to an ES-Maximum, plus 16 percent fringe benefits.<sup>14</sup>

Consistent with FOIA charges, Option 2 would also impose duplication costs and other special service costs as appropriate.<sup>15</sup> In addition, because the FOIA fee schedule is designed for document requests only, the NRC would require a mechanism for billing for non-document components of Touhy requests, such as depositions and testimony. The NRC staff proposes assessing Part 170 user fees for these items; as a result, fees for oral testimony will be recovered through Part 170 under both options.

For both Options 1 and 2, the NRC staff proposes creating a *de minimis* carve-out to ensure fees are only assessed for significant Touhy requests. In the staff's view, non-corporate Touhy requests for a limited set of documents should not be subject to fees. The staff therefore proposes that all work spent processing Touhy requests under 30 hours not be billed under either option.<sup>16</sup> Once NRC work on a Touhy exceeds 30 hours, however, the Touhy requester will be billed for the full amount of work. In addition to recouping the agency's costs for performing the work associated with the Touhy request, this also will provide a strong incentive for Touhy requesters to keep their requests from becoming overly burdensome. This 30 hour *de minimis* would apply to Option 2 as well, even though under NRC's FOIA fee schedule, at 9 CFR § 9.33, a 2 hour *de minimis* for search time already exists. The justification for applying

<sup>13</sup> In addition to search/review costs, the agency could also incur some costs if it needs to duplicate responsive records. Those costs could not be recovered under Part 170 because Part 170 does not authorize the agency to collect fees for the physical reproduction of documents. Like those four agencies referenced above, the NRC could propose a variant of Option 1 that would—in addition to Part 170 fees require Touhy requesters to pay FOIA duplication fees as-needed. But as the NRC moves towards electronic document production, recovering the costs of document duplication become less important. Therefore, this variant of Option 1 is not necessary, and Option 1 entails only Part 170 fees.

<sup>14</sup> 10 CFR § 9.37.

<sup>15</sup> See 10 CFR § 9.33 (authorizing fee recovery for certain "special services" such as express mailings); 10 CFR § 9.35 (authorizing fee recovery for document duplication).

<sup>16</sup> The staff chose 30 hours because past experience shows that 30 hours provides a demarcation point between significant and insignificant Touhys. As an illustrative example, a common type of Touhy request involves a request for documents in a divorce proceeding, where one of the ex-spouses works at the NRC, and the other ex-spouse needs access to certain personnel files (such as that NRC employee's work schedule) for purposes of addressing custody, etc. These cases involve simple requests for discrete and non-deliberative documents and require limited processing time.

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the 30 hour *de minimis* to Option 2 rather than using the existing 2 hour, 100 page, FOIA-based *de minimis* threshold is to ensure that Touhy requesters asking for minimal numbers of easily found documents do not have to pay any fees for receiving their documents.

The NRC staff recommends using Option 1. (b)(5)

(b)(5)

(b)(5)

The public may have views on the desirability and practicability of the two options. Therefore, in the proposed fiscal year 2016 annual fee rule, the NRC staff will identify both potential options for collecting fees to recoup the costs associated with Touhy requests. The staff will further explain that Option 1 (along with a thirty hour *de minimis* exception) is the staff's recommended approach, for the reasons discussed above. The staff will keep the Commission fully informed if any changes to its preferred fee-recovery methodology become necessary based on public comments.

(b)(5)

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To implement this policy change, the CFO will propose amendments to 10 CFR § 170.2, 10 CFR § 170.3, and 10 CFR § 170.12. Also, as part of the proposed fee rule, the CFO will propose conforming amendments to the NRC's Touhy regulations in 10 CFR Part 9, Subpart D.

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### **Administrative Changes in the Fiscal Year 2016 Proposed Fee Rule**

#### **1. Increase Direct Hours per Full-Time Equivalent in the Hourly Rate Calculation**

The hourly rate in 10 CFR Part 170 is calculated by dividing the cost per direct full-time equivalent (FTE) by the number of direct hours per direct FTE in a year. "Direct hours" are hours charged to mission-direct activities in the Nuclear Reactor Safety Program and the Nuclear Reactor Materials and Waste Program. The U.S. Nuclear Regulatory Commission (NRC) staff analyzed time and labor data and projected that the number of direct hours would increase from 1,420 in FY 2015 to 1,440 in fiscal year (FY) 2016. The increase in the projected number of direct hours charged by direct employees is due to greater accuracy in recording time to direct activities.

#### **2. Redefine Corporate Support Business Line**

Based on Ernst & Young's report on "Overhead Assessment," (Agencywide Document Access and Management System (ADAMS) Accession No. ML15244B375) and recommendations to reduce overhead costs, the NRC has realigned overhead and support functions under the current budget structure similar to best practices of other Federal agencies. As a result, the following three changes were implemented in the FY 2016 budget to provide more consistency between the NRC budget and its annual fee rule:

- Realignment of office-specific mission support (Office Support) by assigning the associated resources to the specific programmatic business lines (Operating Reactors, New Reactors, Fuel Facilities, Nuclear Materials Users, Spent Fuel Storage and Transportation and Decommissioning and Low-Level Waste) they support;
- Removal of the International Activities Product Line from the Corporate Support Business Line; and
- Realignment of selected activities in corporate support to the appropriate programmatic business lines.

Previously, the NRC allocated office support resources to business lines in the budget and included them with the Corporate Support costs as overhead in the annual fee rule. In the FY 2016 Staff Proposed Current Estimate, the NRC budgeted Office Support resources directly in the mission areas they support. This realignment eliminates office support as a business line by aligning the associated resources to the specific programmatic business lines they support.

The majority of the International Activities Product Line activities (those activities that includes international cooperation, international assistance, export/import licensing, and supervisory staff), were reallocated to the appropriate programmatic business lines. Consistent with existing agency policy, a portion of these activities, however, will remain part of the ten percent of agency costs that are not recovered through fees.

#### **3. Amend Language under 10 CFR 170.11, "Exemptions," to Clarify Fee Exemption Requirements and Add a New Paragraph on Fee Exemption Communications**

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The NRC proposes to amend the language under 170.11(a)(1)(i), 170.11(a)(1)(ii) and 170.11(a)(1)(iii) to redefine the requirements for receiving a fee exemption for submitting a special project that is a request/report submitted to the NRC. The current language under 170.11(a)(1)(i) and 170.11(a)(1)(ii) is similar to 170.11(a)(1)(iii) regarding review of special projects supporting regulatory improvement efforts. Yet the current language in 170.11(a)(1)(iii) is ambiguous because it requires that the NRC be the "primary beneficiary" of the review and approval of the submitted documents; in practice, it can be difficult to precisely determine whether the NRC or the document-submitter is actually the "primary beneficiary" of the NRC's review. Therefore, this language has been a source of contention between the NRC and its stakeholders.

The staff proposes to eliminate the "primary beneficiary" criteria in 170.11(a)(1)(iii) and instead rely on the related exemptions in 170.11(a)(1)(i) and 170.11(a)(1)(ii) for this kind of work. For all three regulations pertaining to special projects. The staff expends a significant amount of hours explaining these regulations to internal and external stakeholders. Therefore, these proposed amendments would increase program efficiency by reducing the number of hours spent ensuring fee exemption requests comply with NRC regulations in order to obtain approval from the Chief Financial Officer (CFO).

Also, the current language under 170.11(a)(1)(iii)(C) regarding CFO communications should apply to all fee exemptions requests under 10 CFR 170.11, not just special projects. Therefore, the NRC proposes to add a new paragraph on fee exemption communications which would apply all to fee exemption criteria.

The current language reads as follows:

(a) No application fees, license fees, renewal fees, inspection fees, or special project fees shall be required for:

(1) A special project that is a request/report submitted to the NRC:

(i) In response to a Generic Letter or NRC Bulletin that does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;

(ii) In response to an NRC request from the Associate Office Director level or above to resolve an identified safety, safeguards, or environmental issue, or to assist NRC in developing a rulemaking, regulatory guide, policy statement, generic letter, or bulletin; or

(iii) As a means of exchanging information between industry organizations and the NRC.

To receive this fee exemption:

(A) The report should be submitted for the specific purpose of supporting ongoing NRC generic regulatory improvements or efforts (e.g., rules, regulations, regulatory guides, and policy statements), and the agency, at the time the document is submitted, plans to use it for that purpose. The exemption applies even if ultimately the NRC does not use the document as planned;

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(B) The NRC must be the primary beneficiary of the NRC's review and approval of these documents. This exemption does not apply to a topical report submitted for the purpose of obtaining NRC approval for future use of the report by the industry to address licensing or safety issues, even though the NRC may realize some benefits from its review and approval of the document; and

(C) The fee exemption is requested in writing to the CFO in accordance with 10 CFR 170.5, and the CFO grants this request in writing.

(D) [Reserved].

The revised language would read as follows:

(a) No application fees, license fees, renewal fees, inspection fees, or special project fees shall be required for:

(1) A special project that is a request/report submitted to the NRC-

(i) In response to a Generic Letter or NRC Bulletin that does not result in an amendment to the license, does not result in the review of an alternate method or reanalysis to meet the requirements of the Generic Letter, or does not involve an unreviewed safety issue;

(ii) In response to an NRC request from the Director level or above to resolve an identified safety, safeguards, or environmental issue, or to assist NRC in generic regulatory improvements or efforts (e.g., rules, regulatory guide, regulations, policy statement, generic letter, or bulletin), and the agency at the time the document is submitted, plans to use it for that purpose.

*New Section*

13) All fee exemption requests must be submitted in writing to the Chief Financial Officer in accordance with 10 CFR 170.5, and the Chief Financial Officer will grant or deny such requests in writing.



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**Estimated Schedule - Fiscal Year 2016 Fee Rule**

<u>Action</u>	<u>Date</u>
SECY Policy paper sent to Program Offices for comment	Friday, October 30, 2015
Program Office comments provided to OCFO	Tuesday, November 10, 2015
SECY paper transmitted to the Commission Executive Director for Operations (EDO) concurrence on Proposed Rule	Tuesday, December 15, 2015
Proposed Rule to be sent to the Commission	Wednesday, February 17, 2016
Proposed Rule to <i>Federal Register</i>	Thursday, February 18, 2016
Publish Proposed Rule	Thursday, February 25, 2016
30-day public comment period ends	Thursday, March 3, 2016
EDO concurrence on Final Rule due	Monday, April 4, 2016
Final Rule to be sent to the Commission	Monday, June 6, 2016
Final Rule to the <i>Federal Register</i>	Wednesday, June 8, 2016
Publish Final Rule	Monday, June 15, 2016
Final Rule effective (60 days after publication)	Friday, June 24, 2016
	Tuesday, August 23, 2016

**NOTES:**

- (1) This is an estimated schedule and is subject to changes in the FY 2016 budget.
- (2) This schedule assumes that all proposed revisions to the FY 2016 Fee Rule will be finalized as proposed and no Commission paper seeking a notation vote will accompany the Final Fee Rule.

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Enclosure 3