



CHIEF FINANCIAL
OFFICER

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 14, 2019

Ms. Susan Perkins
Senior Director
Security and Incident Preparedness
Nuclear Energy Institute
1201 F Street, NW, Suite 1100
Washington, DC 20004

Dear Ms. Perkins:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter dated May 3, 2019 (Agencywide Documents Access and Management System [ADAMS] Accession No. ML19126A037), requesting a fee waiver under Title 10 of the *Code of Federal Regulations* (10 CFR) 170.11(a)(1)(ii) for all future NRC activities related to the Nuclear Energy Institute (NEI) Composite Adversary Force (CAF). Furthermore, your letter requests a fee waiver for past fees of \$55,895.39, which were assessed within invoice LFB-18-5202.

The NRC has an established regulation for the granting of fee exemptions at 10 CFR 170.11, "Exemptions." An exemption may be requested in accordance with 10 CFR 170.5, "Communications." The NRC staff has reviewed your request based on the provisions in 10 CFR 170.11(a)(1)(ii) and 10 CFR 170.11(a)(13):

10 CFR 170.11(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— . . . (ii) When the NRC, at the time the request/report is submitted, plans to use the information in response to an NRC request from the Office Director level or above to resolve an identified safety, safeguards, or environmental issue, or to assist the NRC in generic regulatory improvements or efforts (e.g., rules, regulatory guides, regulations, policy statements, generic letters, or bulletins).

10 CFR 170.11(a)(13) All fee exemption requests must be submitted in writing to the Chief Financial Officer in accordance with § 170.5,¹ and the Chief Financial Officer will grant or deny such requests in writing.

In your letter, you state that NEI should be granted a fee waiver under 10 CFR 170.11(a)(1)(ii) because (1) the CAF program resolves a safety, safeguards, or environmental issue in response to a Commission directive; and (2) the CAF program assists the NRC in generic regulatory improvements or efforts.

¹ 10 CFR 170.5 provides that, "All communications concerning the regulations in this part should be addressed to the NRC's Chief Financial Officer, either by mail to the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; by hand delivery to the NRC's offices at 11555 Rockville Pike, Rockville, Maryland; or, where practicable, by electronic submission, for example, via Electronic Information Exchange, or CD-ROM."

I note that pursuant to 10 CFR 170.11(a)(1)(ii), this fee exemption applies only to special project fees. Section 170.2(m) authorizes the NRC to assess fees to anyone who applies for review of a “special project.” A “special project,” in turn, is defined broadly in § 170.3 to mean “specific services provided by the Commission for which fees are not otherwise specified [.]” NEI’s CAF program is intended to provide a means through which the NRC’s force-on-force exercises can simulate security threats in accordance with the design basis threat. Section 170D(b)(3) of the Atomic Energy Act, states that “the Commission shall mitigate any potential conflict of interest that could influence the results of a force-on-force exercise.” NRC staff oversight of the selection and training of the industry’s CAF is a key element in fulfilling this Commission obligation. This oversight activity is consistent with the broad definition of “special project.”

First, you state that the CAF program is entitled to a fee exemption pursuant to 10 CFR 170.11(a)(1)(ii) because it was developed “in response to an NRC request from the Office Director level or above to resolve an identified safety, safeguards, or environmental issue.” In SECY-03-0208,² the staff recommended, and the Commission approved, the alternative that provided the underpinning for NEI’s CAF program. As noted in the SECY, the five alternatives presented to the Commission, including the recommended alternative to establish standards for an industry-provided adversary force, were discussed with the industry security working group and NEI as the staff developed the proposed options. In a 2004 letter to the NRC, NEI stated that it competitively bid a contract for the creation of the CAF after the Commissioners “expressed concern about the quality of the adversary teams.” NEI did not state that creation of the CAF was based on a *request* from the Commission, and the NRC has found no documentation indicating that such a request was made. I, therefore, cannot determine that the NEI CAF program was developed “in response to an NRC request from the Office Director level or above to resolve an identified safety, safeguards, or environmental issue.”

Second, in your letter you state that the CAF program is entitled to a fee exemption pursuant to 10 CFR 170.11(a)(1)(ii) because it “assist[s] the NRC in generic regulatory improvements or efforts.” Specifically, your letter asserts that NEI members are the licensees for 81 of the 98 operating power reactors and 47 of the 59 reactor sites in the U.S., and that by having a common NEI CAF team for more than 80 percent of the operating reactors and 80 percent of reactor sites, the NRC does not have to perform oversight activities for separate adversary forces for each NEI member or alternatively, establish NRC’s own adversary force. In addition, you state that the use of a single CAF team for all NEI members also increases NRC regulatory efficiency as it provides a consistent approach for CAF team selection and implementation. But regardless of how many power reactors the CAF applies to, the NRC properly invoices its costs to NEI because the nature of the work is oversight (e.g., inspections) rather than generic regulatory improvement. The NRC provides oversight to verify that the CAF meets the appropriate performance requirements and mitigation of conflicts of interest—it does not oversee the CAF to make programmatic regulatory improvements for the NRC’s force-on-force inspection program. Therefore, I determine that NEI’s CAF program does not meet the criteria for an exemption pursuant to 10 CFR 170(a)(1)(ii) as a generic regulatory improvement or effort; however, I recognize that my December 10, 2018, letter³ and subsequent communications could have been clearer in this regard.

² SECY-03-0208, “Adversary for Force-on-Force Exercises at NRC-Licensed Facilities,” (December 03, 2003) (ADAMS Accession No. ML051020052).

³ Letter from M. Wylie, CFO, NRC to J. Pollock, Vice President, NEI (December 10, 2018) (ADAMS Accession No. ML18289A774).

In your letter, you express concern that the NRC's position as stated in my December 10, 2018, letter suggests that in order for such a request or report to "assist the NRC in generic regulatory improvements or efforts," such a request or report must apply to all operating power reactors. That is not how the NRC interprets this provision.

Section 170.11(a)(1)(ii) provides examples of what the term *generic* means in the context of 10 CFR Part 170. It means regulatory actions such as rulemaking, issuing regulatory guides, and issuing generic letters. These types of actions typically apply to a broad group of licensees. The key question, though, is not how many operating reactors an action applies to, but whether the NRC's associated review allows it to make programmatic regulatory improvements that apply to a generic and non-arbitrary class. Some reports, for instance, may be used by the NRC to generate a policy statement that applies to only pressurized water reactors. Such a report may be entitled to a fee waiver under § 170.11(a)(1)(ii), even though the policy statement would not apply to all operating reactors. Whether a report or request submitted to the NRC qualifies for a § 170.11(a)(1)(ii) fee exemption is fact-sensitive and will depend on the particular circumstances surrounding that request or report. Future NEI reports, therefore, may or may not satisfy the regulatory requirements for a fee exemption. To the extent that my December 10, 2018, letter suggested that no NEI reports could qualify for a fee exemption, this was not my intent.

Lastly, you request a fee waiver for past fees of \$55,895.39, which were assessed within invoice LFB-18-5202 for the CAF. You are correct that the NRC has not previously charged 10 CFR Part 170 fees to NEI for work related to the CAF selection process. Unfortunately, this was an error on the NRC's part that we only recently identified. After NextEra and Entergy cancelled their membership in NEI, the NRC reviewed the CAF program and determined that the NRC's work relates to oversight (e.g., inspections) of the CAF. NEI was initially notified of the fee recovery changes during a May 1, 2018, teleconference with the Deputy Director, Office of Nuclear Security and Incident Response. But I acknowledge that communications on this issue resulted in unclear expectations, and that NEI was not able to properly budget the finances for invoice LFB-18-5202. I, therefore, grant a one-time fee exemption for LFB-18-5202 under § 171.11(b), which states, "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 and are otherwise in the public interest."

If you have any technical questions regarding this matter, please contact Mr. Todd Keene at 301-415-4053. Please contact Ms. Jo Jacobs, 301-415-8388, or Mr. William Blaney, 301-415-5092, of my staff for any fee-related questions.

Sincerely,

/RA/

Maureen E. Wylie
Chief Financial Officer

SUBJECT: LETTER TO SUSAN PERKINS TO FEE WAIVER (NEI), DATED: June 14, 2019

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