

Nuclear Information and Resource Service

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Ms. Annette Vietti-Cook, Secretary
United States Nuclear Regulatory Commission
Washington, DC 20555
Attention: Rulemakings and Adjudications Staff

By email: SECY@nrc.gov

Comments of Nuclear Information and Resource Service (NIRS) on Nuclear Regulatory Commission Proposed Rule for the “Protection of Safeguards Information” (RIN-3150-AH57)

Dear Ms. Vietti-Cook:

On behalf of Nuclear Information and Resource Service (NIRS), I am submitting comments in response to the notice in the Federal Register, February 11, 2005 [Volume 70, Number 28] regarding the proposed rule on “Protection of Safeguards Information” (SGI).

The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations for “the protection of Safeguards Information (SGI) to protect SGI from inadvertent release and unauthorized disclosure which might compromise the security of nuclear facilities and materials.”

Under its misinterpretation of “broad authority and flexibility” granted NRC in Section 147 of the Atomic Energy Act, the agency has stepped over a bright line into an arbitrary and capricious policy to expand the scope of “sensitive information” withheld from the public as new safeguards information under revised federal regulation (10 CFR Part 73).

NIRS is increasingly alarmed by the agency’s already apparent abuse of withholding unclassified or non-safeguards information from public disclosure that is outside of the current definition and scope of “safeguards information.” This includes the agency current policy to indefinitely withhold broad categories of NRC documents such as NUREGS under the dubious umbrella of “security review.” NIRS is equally alarmed by NRC efforts to hold nuclear licensing proceedings in secret and institute “gag orders” on public health and safety advocates during such proceedings. NIRS is further disturbed by NRC efforts to block the disclosure of redacted documents authored by other government agencies for the purpose of shielding from public view the disclosure of NRC regulatory failures and industry safety and security non-compliances.

NIRS contends that the current NRC effort through the proposed rule now seeks to codify this arbitrary and capricious abuse of the public's right-to-know on matters of health, safety, security and environmental protection. The NRC effort to broaden categories of "sensitive information" to be withheld from public disclosure as new "safeguards information" threatens to further marginalize and even eliminate the vital role of the public's right-to-know and hold the agency accountability to effectively address and enforce regulations on matters of nuclear safety and security. Moreover, NRC efforts to suppress wider categories of currently non-classified and non-safeguards information can not now be distinguished from the agency's identified promotional agenda over health, safety, security and environmental concerns in order to protect and expand the financial agenda and interests of the nuclear industry.

NRC's not-so-secret agenda to promote and shield industry financial interests over public health, safety and security may now become "safeguards" information

NRC continues to face mounting credibility challenges regarding its willingness and ability to effectively oversee and enforce public health, safety and security in the nuclear industry. The exposure of long term NRC failures leading up to the significant reactor vessel head corrosion at Ohio's Davis-Besse nuclear generating station is documented by both the United States Government Accountability Office (GAO) ¹ and the United States Nuclear Regulatory Commission Office of Inspector General (OIG).² Both reports concluded that NRC management prioritized FirstEnergy Nuclear Company's financial interests by protecting its production agenda from early shutdown due to severe reactor vessel head corrosion and reactor coolant leakage over its own staff's studied judgment to issue an Order necessary to assure the public's health and safety. In so doing, NRC significantly damaged public confidence in the agency's safety oversight and its willingness to enforce US Code of Federal Regulation. Moreover, Davis-Besse is not an isolated example.

More recently, as conveyed in the transcript of the Commission Briefing on Materials Issues, March 07, 2005 in the opening remarks of Commissioner Edward McGaffigan quotes from a National Academy of Sciences report published the week prior, NRC "faced a significant disadvantage in regard to public credibility because it was viewed by its critics as a captured agency serving the interest of the nuclear industry".³

NIRS contends that NRC now plans to codify its abuse through a broader non-disclosure policy for the purpose of obfuscating systemic regulatory failures of safety/security oversight and enforcement. As such, NIRS views the proposed rule as an effort to further

¹ "NRC Needs To More Aggressively and Comprehensively Resolve Issues Related To The Davis-Besse Nuclear Power Plant's Shutdown," US Government Accountability Office, May 2004, <http://www.nirs.org/reactorwatch/aging/agedbgao2004nrcneeds.pdf>

² "NRC's Regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head," US NRC Office of Inspector General, December 30, 2002 <http://www.nirs.org/reactorwatch/aging/oigdavisbesse120302.pdf>

³ [http://video.nrc.gov:8383/nrc_webcast/archive.jsp]

protect and expand the ambitious financial interests of the nuclear industry. NIRS is therefore opposed to the vague and overly broad expansion of “safeguards information” as proposed that would fall under the agency’s non-disclosure policy.

While the agency’s proposed rule has defined some existing elements of “safeguards information” in more detail, NIRS contends that the level of new detail is not lost in the interpretation of the current definition. More important and of great concern is the overly broad and vague language lacking in specificity where NIRS sees NRC’s effort as a “Trojan Horse” to codify its mistakes and abuses of withholding more information from the affected public.

The proposed rule seeks to codify an arbitrary and capricious nondisclosure policy by reclassifying non-classified and non-safeguards information for withholding from public access while expediting licensing proceedings that seek to financially benefit the nuclear industry

Since October 1999, the NRC Agencywide Document Access and Management System (ADAMS) has become essentially the only public source of information on nuclear licensing and safety oversight. The agency immediately suspended updating its local public document rooms of microfiche and paper documentation and has since closed all local public document rooms.

Over the past decade NRC has significantly streamlined its licensing process particularly in the area of license extensions for operating reactors and new reactor licensing including the Early Site Permit Application and Combined Operating Licenses processes under 10 CFR 52. The agency and its Atomic Safety Licensing Boards (ASLB) have established an expedited licensing process and sought to maintain a rigorous licensing schedule.

Immediately following the September 11, 2001 terrorist attacks, NRC shutdown public access to ADAMS for a “top-to-bottom” security review of documents. Over 1000 documents according to NRC were removed from public access including a 1982 report by Argonne National Laboratories that concluded that nuclear power stations had not been adequately analyzed and evaluated for reactor safety impacts of an explosion and fire resulting from an aircraft crash and penetration of a nuclear power station containment building.⁴ At the same time NRC was removing this document and others from its publicly accessible files, its Office of Public Affairs was answering media calls to the effect that nuclear power stations are impregnable to terrorist attack by aircraft. NIRS contends withholding this document as an obfuscation of the real public safety/security risks associated with nuclear power station operation and the clear and present danger from terrorism. Additionally, the Commission ruled against public intervenors on security contentions raised by the September 11th aircraft attacks in all of

⁴ “Nuclear Plants’ Vulnerability Raised Attack Concerns 1982 Report on Danger of Jet Crashes Into Reactors Was Open to Public, Despite Terrorism Fears,” Washington Post, October 25, 2001; p. A04

its licensing proceedings including licensee extensions for questionably vulnerable reactor containment buildings.⁵

Again, on October 25, 2004, ADAMS was closed to public access, partially restored December 07, 2004 and again on February 07, 2005. To date, public access has not been fully restored to non-safeguards but safety-related documents. This includes the denial of access to a significant percentage of non-safeguard related NUREGs, which to date are held back under NRC's vague and indefinite security review.

In the meantime, NRC has not suspended nor extended any non-essential licensing proceedings including license extensions where licensee applications were in some cases placed more than a decade in advance of expiration and include three Early Site Permits applications or "site banking" for expanded nuclear generating capacity with new reactors.

NRC is now also attempting to drive its licensing hearings further behind close doors. On December 20, 2004, NRC staff asked an adjudicatory licensing board to conduct a licensing hearing for a proposed nuclear fuel refinery under a "protective order" which, if approved, would effectively make the entire proceeding secret and closed to the public. NIRS and Public Citizen have contested the application of Louisiana Energy Services (LES), a multinational consortium led by the European firm Urenco, which is seeking a permit to construct and operate a uranium enrichment plant in southeastern New Mexico. The groups charge that the company's plans fail to meet regulatory standards in the areas of radioactive waste disposal and need for the plant, among other things. The NRC stated that its motion is a remedy to a situation that has made it impossible for parties in this case to meaningfully participate created by the NRC's unilaterally blocking of public access to virtually all of the electronic documents posted on its Web site pending a security review "to ensure that documents which might provide assistance to terrorists will be inaccessible." Most of these licensing documents remain unavailable to the public.

There is growing public criticism of NRC's arbitrary and capricious expansion of its non-disclosure policy in health and safety standards development and licensing proceedings as further evidenced in the following Las Vegas Sun Times editorial:

"Officials from the EPA, the Energy Department and the Nuclear Regulatory Commission, which ultimately would have to rule on the Energy Department's application to build a dump, have been meeting secretly regarding the Yucca Mountain project. Officials from these federal agencies have sought to downplay what's been occurring, but it's clear what is going on. These agencies are collaborating to see if there is a way to create a new radiation standard that isn't too strict and, most importantly, will allow Yucca Mountain to proceed."

⁵ Commission Memorandum and Order, Private Fuel Storage, U.S. Nuclear Regulatory Commission, December 18, 2002 and three companion cases, including NIRS intervention on Duke Power license renewal application for Catawba and McGuire units.

That Nevada officials have been excluded from these closed-door meetings, despite the fact that our state would be the nation's permanent dumping ground for 77,000 tons of high-level nuclear waste, confirms that something nefarious is happening. If ever there were an issue that demanded openness, it certainly would involve meetings involving high-level nuclear waste. Instead, we get secrecy by federal agencies hell-bent on burying man's deadliest waste near the nation's fastest-growing city. It's not just a disgrace -- it's a scandal.”⁶

NRC abuses to suppress non-classified information potentially damaging to the agency's credibility as an effective oversight and enforcement agency have also included direct threats made by the agency against the public interest groups. According to the Project On Government Oversight (POGO), the public interest community *“has faced such chilling attempts when raising concerns about nuclear power plant security. After POGO published a letter revealing how the Nuclear Regulatory Commission was failing to adequately test security at the plants, the Commission threatened us with civil and criminal prosecution. There was nothing in the letter that was classified or even sensitive and, in the end, the NRC was forced to back down. Of course, this was only after we had to secure an attorney to defend us from the government.”⁷*

There is also growing public criticism of NRC abuses to suppress non-classified, non-sensitive or non-safeguards information as reported by other government agencies on matters vital to the public health and safety as described in a front page story in The Washington Post *“Storage of Nuclear Spent Fuel Criticized, March 28, 2005. The story describes the agency's efforts to date to suppress a National Academy of Sciences (NAS) redacted summary for public release of a report to Congress critical of the vulnerability of the nation's current irradiated fuel storage system at reactor sites. “Even a stripped-down, declassified version has remained under wraps since November because the commission says it contains sensitive information,” said the Post article.⁸ Furthermore, NRC has publicly misstated the conclusions of the NAS study. “There are substantive disagreements between our committee's views and the NRC,” he said in an interview. “If someone only reads the NRC report, they would not get a full picture of what we had to say,” stated E. William Colglazier of NAS for the record. The national news article goes on to state, “Although the commission said it is keeping the report under wraps for security reasons, some officials who have seen the document suggest that the NRC is merely suppressing embarrassing criticism. “At the same time that the NRC is saying that the National Academy's study is classified and not releasable to the public, it has somehow managed to send a detailed rebuttal of the report's conclusions to Congress in unclassified form,” said Rep. Edward J. Markey (D-Mass.), who has seen the report. “I am concerned that the totality of the Commission's actions reflect a systemic effort to withhold important information from . . . the public, rather than a genuine effort to be*

⁶ “Editorial: Secrecy on nuke dump,” Las Vegas Sun, March 14, 2005

⁷ “Secrecy Won't Make You Safe,” Danielle Brian, POGO, Sunshine Week, March 11, 2005, <http://www.pogo.org/p/x/2004governmentsecrecy.html>

⁸ “Storage of Spent Fuel Criticized,” The Washington Post, March 28, 2005, p. 1.

protective of national security," said Markey in a March 21 letter to the Commission's inspector general." The news article further reveals the existing dispute between the NAS and NRC which regards NRC unprecedented efforts to suppress unclassified and non-safeguards information, "The academy's Colglazier said the science organization had produced many classified reports but had never encountered such hurdles in creating a public version. "We don't want to provide information in our report that could be used by terrorists to exploit vulnerabilities," he said. "But we also want the public and decision makers to know what things need to be addressed."⁹

NIRS contends that NRC's arbitrary and capricious suppression of the redacted NAS report summary is part and parcel of the agency's overt cost containment strategy that seeks to protect and benefit the financial interests of the nuclear industry to the detriment of the public's right to know on the clear and present danger. The proposed rule would codify this abusive treatment of the public's right-to-know.

NRC abuses to suppress non-classified and non-safeguards information have already greatly benefited the nuclear power industry. Power reactor license extension applications are being filed, processed and approved at accelerating speed at the same time opening opportunities for public safety and environmental review potentially through legal interventions. While expedited calendar dates are rigorously observed by agency staff, applicant schedules and licensing boards, the public's ability to review scores of relevant reports and studies on related issues such as the aging of various components published by the NRC Office of Research are being arbitrarily denied. Thirty reactor units have already been re-licensed by the NRC, the majority since September 11, 2001, with eighteen units currently under review. Meanwhile, many of the official agency records potentially affecting license renewal issues and their resolution, available only in ADAMS, are still held back or deleted from public search functions under the agency's vague and indefinite security review. It is our concern that the proposed rule would codify the broader and further suppression of many reports and studies relevant to the public review of health, safety, security and environmental issues in the context of nuclear energy policy development and licensing proceedings.

Similarly, NRC continues to run out the clock on numerous public comment periods on rulemakings, license amendments and exemptions when the public cannot access the majority or a complete record of relevant agency records.

Safeguards Information Defined and NRC Proposed Changes of Concern Identified

The term "safeguards information" is defined in 10 CFR 73.21(b) as information to be protected. The specific types of information, documents, and reports that shall be protected are defined in extensive detail. As stated, NIRS contends that NRC has already abused its interpretation and now proposes to expand upon those abuses through codification of the proposed rule.

⁹ Ibid., p. 1

Among the specific proposed changes that NIRS opposes:

NRC CHANGE: Section 73.21(b) would be renumbered to 73.22(a) with revisions to add specificity to the types of information and documents protected as SGI, including the more detailed elements and characteristics of the Design Basis Threat (DBT), interim compensatory measure, and additional security measures.

NIRS RESPONSE: With regard to the proposed changes renumbered 73.22(a), NRC has not specified all of the types of information and documents that are part of the proposed expansion. The proposed rule therefore lacks specificity by merely citing examples of information that “would include” more detailed elements and characteristics. The operative phrase “would include” does not provide the necessary and claimed specificity to satisfy public concerns about current NRC broad and sweeping abuses to date.

NRC CHANGE: Section 73.22(a)(1)(xii) would be added to specify to the protection of SGI engineering and safety analyses, emergency planning procedures or scenarios, and other similar information related to the physical protection of the facilities and materials.

NIRS RESPONSE: The suppression of faulty assumptions as the bases for engineering and safety analyses is a significant concern to public safety policy analysts and public interest intervenors. For example, the suppression of faulty nuclear fuel performance assumptions (failed fuel versus fuel with cladding integrity intact) would significantly and adversely affect public health and safety policy on continued reactor operations and safety, interim nuclear waste storage in both the fuel pool and dry cask, nuclear waste transportation and long-term nuclear waste management and repository performance while at the same time promoting a nuclear industry agenda through such non-disclosures. The issue of emergency planning and the questionable viability of federal, state and local response capabilities have been highly contentious and contested by public health and safety advocates. The fact that NRC and the industry could now suppress bogus and overly optimistic Evacuation Time Estimates from public review, or conceal the lack of quality and qualified radiological sheltering facilities, or a lack of first responders, hospital staff and other emergency response capabilities does not serve the public health, safety and security interest while readily lending to expedited licensing proceedings that financially benefit and promote the nuclear industry.

The proposed rule while stating that such information could be withheld “if unauthorized disclosure of that information could reasonable be expected to have a significant adverse impact” assumes that the agency retains the public trust and confidence to make such “reasonable” judgments. In fact, a growing portion of the public as identified that NRC has already abused its judgment and as such is “unreasonable.” Additionally, a growing sector of the public has recognized NRC as a “captured agency” that has prioritized the nuclear industry’s financial agenda over the public health and safety and the protection of the environment.

NRC CHANGE: Section 73.22(a)(3) would be broadened to cover specific requirements for Safeguards Information related to power reactors, licensees authorized to possess a formula quantity of strategic special nuclear material, transportation of or delivery to a carrier of a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel, and fuel cycle facilities required to implement security measures. Detailed information regarding defects, weaknesses or vulnerabilities is generally not released because identical circumstances may apply to a licensee or applicant employing similar security measures.

NIRS RESPONSE: The proposed change lacks specificity which could potentially conceal public health, safety, security and environmental concerns from disclosure. “Defects, weaknesses or vulnerabilities is generally not released because identical circumstances may apply to a licensee or applicant employing similar security measures” could be interpreted to include and suppress information with revealed NRC lack of oversight/enforcement that favored financial considerations of the nuclear industry to the detriment of public health, safety and security. For example, the National Academy of Sciences redacted public summary of inadequate irradiated fuel storage at reactors and the vulnerability of irradiated fuel pools to terrorism is in both in the mind of the public and NAS information about “defects, weaknesses and vulnerabilities” that rightfully should be brought to the public and policy makers’ attention. NRC efforts to codify such a policy of non-disclosure while benefiting the nuclear industry agenda would deprive the American people of their right-to-know about a clear and present danger existing at reactors and other nuclear facilities.

NRC CHANGE: Section 73.22(a)(5) would be new and would reflect the authority of the Commission under Section 147.a. of the AEA to designate as SGI such other information as the Commission may determine by order or regulation could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of material or a facility (within the scope of 73.22).

NIRS RESPONSE: Again, the proposed change lacks specificity to allay growing public concerns that the agency could arbitrarily and capriciously further conceal or subordinate significant public health, safety and security issues to economically shield and benefit the nuclear industry.

Conclusion

For the above stated reasons, NIRS is opposed to the proposed rule. NRC must first restore its own “trustworthiness and reliability” to prioritize the public health, safety, security and environmental protections over a promotional agenda of the nuclear industry.

Sincerely,

Paul Gunter, Director of the Reactor Watchdog Project