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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150-AC07

Availability of Official Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations pertaining to the availability of official records to conform the regulations to existing case law and agency practice. The proposed amendments would have three aspects: (1) it would inform the public of three additional exceptions to a submitter's right to withdraw submitted information; (2) it would provide more specific guidance for marking proprietary information; and (3) it would inform the public of agency practice regarding reproduction and distribution of submitted copyrighted material.

3/8/93

DATES: The comment period expires (75 days from date of publication in the Federal Register). Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for those comments received on or before this date.

ADDRESSES: Comments may be mailed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attn: Docketing and Service Branch. Comments may be hand-delivered to Docketing and Service

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Branch, One White Flint North, 11555 Rockville Pike, Rockville, MD between 7:45 am and 4:15 pm Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Patricia Siemien, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-504-1565.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission is proposing to amend 10 CFR 2.790 to conform its regulations pertaining to the availability of official records to existing case law and agency practice.

Document Withdrawal

10 CFR 2.790(c) currently provides that if the Commission (or an NRC official with delegated authority) denies a request to withhold information from public disclosure which an applicant seeks to have withheld under 10 CFR 2.790(a)(4), the applicant has a right to withdraw the information unless the information has been submitted in a rulemaking proceeding and subsequently forms the basis for a final rule. In this case, the information will not be withheld from public disclosure and will not be returned to the applicant. The NRC is proposing to amend 10 CFR 2.790(c) to add three additional circumstances where information submitted to the NRC will not be returned to the applicant.

The first exception would provide that a document submitted to NRC will

not be returned nor may it be withdrawn if it has been made available to or prepared for a Federal Advisory Committee. Section 10 (b) of the Federal Advisory Committee Act (FACA) requires that, subject to the FOIA, these records be available for public inspection and copying until the Committee is abolished. Although the Federal Advisory Committee Act permits the closing of Federal Advisory Committee meetings (FACA, sec.10(d)), all reports received by the committee must be contained in the minutes of the meeting to which they pertain (FACA, sec. 10(c)). The FACA has no provision for withdrawal of a document that has been provided to an advisory committee. In this connection it is important to note that a copy of many of the documents submitted to NRC is provided routinely to the Commission's Advisory Committee on Reactor Safeguards (ACRS) and the Commission's Advisory Committee on Nuclear Waste (ACNW).

The second exception would provide that when information contained in a record submitted to the NRC has been requested pursuant to the Freedom of Information Act (5 U.S.C. 552(b)), the record will not be returned to the submitter. When the NRC receives a FOIA request for a record, that record is "captured" as an agency record. The NRC is then obligated under the FOIA to determine whether to disclose the record or to withhold it, in part or in its entirety, under one of nine exemptions specified in the Act. If the agency discloses the information in a record which a submitter seeks to have withheld from public disclosure, the return of the submitted document provides no protection. Therefore, there generally is no reason for its return. If the record is withheld from public disclosure in response to a FOIA request, the agency is obligated to retain the record for six years under the record retention provisions of its Records Retention and Disposal Schedule, which has

been approved by the National Archives and Records Administration. This schedule reflects a decision of the District of Columbia Circuit Court that the statute of limitations for appealing the denial of information requested under the FOIA is six years and ten days from the agency's receipt of the request. (Spannaus v. Department of Justice, 824 F. 2d 52 (D.C. Cir. 1987)).

The third exception would relate to documents considered in connection with an open Commission meeting held in accordance with the Commission's Sunshine Act regulations, 10 CFR Part 9, Subpart C. Information discussed at a Sunshine Act meeting is generally subject to the same openness requirements as the meetings themselves. To the extent that proprietary information may be involved in matters discussed by the Commission, 10 CFR 9.104 provides that the meeting may be closed. However, after balancing the interests, if the Commission determines to release the information, there is no reason to provide for its return to the submitter, except for any material that may have been extraneous to the submittal officially before the Commission and that may easily be segregated from the remainder.

Document Marking

The Commission is proposing to amend 10 CFR 2.790(b)(1)(i) to require that any document that contains information which a submitter seeks to have withheld from public disclosure because it contains "Trade secrets and commercial or financial information obtained from a person and privileged or confidential" (10 CFR 2.790(a)(4)), be clearly marked, on the first page and on every other page that contains this information, to indicate that this type of information is contained within the document. The Commission has a centralized operation for receiving incoming mail relating to its licensing

activities. When mail is opened, a determination is made as to whether the information is to be made public. To ensure that information which a submitter seeks to be withheld from public disclosure under 10 CFR 2.790(a)(4) is not placed in the NRC Public Document Room, any document containing this type of information must be clearly marked to indicate that it contains information that the submitter considers company confidential (proprietary) information. The Commission will not be accountable for the public release of a document that is not marked in accordance with the Commission's regulations. Further, to avoid unnecessary delay and wasted effort, if withholding from public disclosure is not intended, any markings that could be misinterpreted as indicating a desire for withholding from public disclosure must be removed before submitting the document to NRC.

Material Subject to Copyright Protection

The rule proposes to redesignate the current 10 CFR 2.790(e) as 10 CFR 2.790(f). The rule proposes a new 10 CFR 2.790(e) that would provide notice to persons submitting copyrighted information to the NRC, that by submitting the material, the submitter authorizes NRC to reproduce sufficient copies of the copyrighted information to carry out its regulatory and public information responsibilities under the Atomic Energy Act of 1954, as amended, and other applicable Federal laws, including the Freedom of Information Act. This authorization includes NRC's reproduction contractor acting within the scope of the reproduction contract with NRC.

Current Commission regulations do not specify how copyrighted material submitted to the NRC in connection with licensing or regulatory activities is handled. Recent submissions of material bearing copyright notices led the

Commission's staff to consider this issue. This in turn led to a recognition of the recent changes in U.S. copyright law (Title 17 United States Code), which no longer require a copyright notice on a document in order for that document to be subject to copyright protection. Thus, a much larger quantity of documents may be affected and identifying documents entitled to protection against copying is no longer a matter that the NRC can determine simply by looking for a copyright notice. Because the NRC regularly reproduces and distributes copies of material submitted to the NRC in connection with its licensing and regulatory activities, it has become important to describe explicitly how the Commission will handle material submitted to it that may be subject to protection against copying under the copyright law. Although NRC's copying activities may well be encompassed by the "fair use" provisions of the copyright law, the Commission believes it is preferable to state clearly in its regulations the Commission's policy with respect to copying and distributing documents submitted to the agency.

Specifically, the proposed regulation provides notice that the submission of a document to the NRC in connection with NRC licensing and regulatory activities authorizes NRC to reproduce and distribute copies required for its regulatory and public information responsibilities. Another provision of the proposed rule provides that the submission of a document to the NRC in connection with its licensing or regulatory activities is deemed to be a representation to the NRC by the submitter that the submitter has the authority to submit the document and to authorize the NRC to make copies of the document, whether or not the document bears a copyright notice.

The proposed regulation is designed to assure that copyright restrictions do not limit public access to information submitted to the NRC in connection

with its licensing and regulatory activities. The Commission's practice has been to provide broad public access to this information and thus meet its responsibility to keep the public informed of its activities relating to licensing and regulation of nuclear facilities and materials. The Commission believes that making these documents available to the public is essential to satisfy its regulatory and public information responsibilities.

The proposed regulation authorizes only the NRC to copy and distribute the document and does not extend these rights to other persons receiving copies from NRC. The proposed rule provides that if the document bears a copyright notice or is accompanied by an explicit statement that the document is protected under the copyright law, a notice would be placed on the document indicating that the NRC has the authority to copy the document; however, all copyright markings contained on the submitted document would be retained.

The proposed rule states that the NRC would not accept documents submitted in connection with NRC licensing or regulatory activities which bear or are accompanied by a statement that purports to restrict the copying of these documents by the NRC or that indicates that the submitter lacks the authority to permit the NRC to copy and distribute the document. These documents would not be considered by the Commission and would be returned to the submitter unless the Commission has granted a waiver of the regulation. However, with respect to distribution of documents to the general public, only one copy per request will be made of documents bearing a copyright notice or documents accompanied by an explicit statement indicating that the document is protected under the copyright law. In the absence of such an explicit statement, the Commission will continue its customary reproduction practices.

In addition to the provisions included in this proposed rule, the NRC

intends to post near each copying machine on NRC premises a copyright notice. This notice will inform users and persons obtaining copies from the NRC that, although NRC has been authorized to copy the material pursuant to 10 CFR 2.790(e), this authorization does not extend to persons obtaining copies or access to documents from NRC and that these persons are responsible for any copyright infringement that may result from their activities.

Submitters of copyrighted information are on notice that, in order to meet its routine regulatory and public information responsibilities under the Atomic Energy Act of 1954, as amended, NRC reproduces sufficient paper and microfiche copies to meet its staff and contract needs, the needs of users of its headquarters Public Document Room (PDR) and Local Public Document Rooms (LPDRs), and to service subscribers of microfiche copies by the Department of Commerce National Technical Information Service (NTIS). As part of its normal practice, the NRC reproduces an average of 35 additional paper copies of written submittals made to the Commission. The copies are dispatched to the NRC staff; one copy is placed in the NRC Public Document Room, and, on occasion, a copy may be provided to an NRC contractor or an organization having an information exchange agreement with the NRC. In many instances, a copy of a document submitted to NRC is also routinely provided to the Advisory Committee on Reactor Safeguards (ACRS) and the Advisory Committee on Nuclear Waste (ACNW). The NRC films each record on 48X, (360-framed, packed) microfiche and currently duplicates 167 microfiche copies, which are made available to the staff, contractors and public users, if any, of the NRC's Nuclear Documents System (NUDOCS). Of these 167 microfiche copies, 71 copies are provided for agency staff use at locations in NRC headquarters and regional offices. Four microfiche copies are placed in the PDR, and one in

each of the NRC's 76 power-reactor LPDRs, which are maintained in facilities accessible to the public, such as local and university libraries. An additional microfiche copy is provided to the NTIS, which provides microfiche copies to 20 subscribers in the United States and various foreign countries. Three copies are provided to NRC contractors. One copy is provided to the Institute for Nuclear Power Operations. Ten microfiche copies are maintained for archival reserve and replacement purposes.

The Commission also contracts with a private reproduction company to reproduce copies of records in the PDR collection in response to requests by individuals and organizations, including the processing of standing orders for copies of certain types of public records. Reproduction fees for the contractor service and use of the onsite copying machines are published at 10 CFR 9.35. Billing is handled directly between the contractor and the person or organization ordering the copy and payment is made directly to the contractor. Reference librarians assist users in this interface as needed. In addition, the PDR maintains an electronic on-line system, the Bibliographic Retrieval System (BRS) which permits both retrieval of document citations and subject data and the ordering of desired copies. NRC also maintains an electronic document control system entitled NUDOCS which, for certain documents, has full-text search and retrieval capability. Written submittals to NRC, other than proprietary information, are accessible to the public through the NUDOCS system.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore,

neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The current regulations in §2.790 provide submitters of information the right to have the information returned to them upon their request. The amendment proposed in this rule would conform NRC's regulations concerning the availability of official records to existing case law and current agency practice. The proposed amendments would inform the public of three additional exceptions to an applicant's right to withdraw submitted information and of current agency practice concerning the reproduction and distribution of submitted copyright material.

The proposed amendments reflect current agency administrative and procedural practice and would have only minor impact on the benefits or costs associated with the Commission's regulations. Some submitters currently mark documents as specified in the proposed amendments. For others, the proposed amendments shift some responsibility to the submitter for ensuring that privileged material is protected. While actual benefits would accrue to the Commission, they are largely intangible and difficult to quantify. The foregoing constitutes the regulatory analysis for this proposed rule.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule clarifies the right of the submitter of information to have that information returned on request and informs the public of the additional exceptions to the right of withdrawal and of agency practice concerning the reproduction and distribution of copyrighted material. The proposed rule does not impose any obligation or have any financial impact on entities including any regulated entities that may be "small entities" as defined by the Regulatory Flexibility Act (5 U.S.C. 601(3)) or under the size standards adopted by the NRC (50 FR 50241; December 9, 1985).

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and, therefore, a backfit analysis is not required for the proposed rule because these amendments do not impose any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 2.

Part 2 - Rules of Practices for Domestic Licensing Proceedings

1. The authority citation for Part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)), sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under

secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In §2.790, paragraph (e) is redesignated as paragraph (f); the introductory text of paragraph (b)(1) and paragraph (c) are revised; and a new paragraph (e) is added to read as follows:

§2.790 Public inspections, exemptions, requests for withholding.

* * * * *

(b)(1) A person who proposes that a document or a part of a document be withheld in whole or part from public disclosure on the ground that it contains trade secrets, privileged or confidential commercial or financial information shall mark the first page of the document and every other page containing this information "Confidential Information Submitted Under 10 CFR 2.790" or "Proprietary Information Submitted under 10 CFR 2.790", to indicate that it contains information the submitter seeks to have withheld. The person shall also submit an application for withholding accompanied by an affidavit which:

* * * * *

(c)(1) If a request for withholding information under paragraph (b) of this section is denied, the Commission shall notify the applicant of the denial and state the reasons for the denial. The notice of denial will specify a time, not less than 30 days after the date of the notice, when the document will be placed in the Public Document Room. If the applicant requests withdrawal of the document within the time specified in the notice, the document will not be placed in the Public Document Room and will be returned to the applicant unless the information --

(i) Was submitted in a rulemaking proceeding and subsequently forms the basis for a final rule;

(ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;

(iii) Was discussed at an open Commission meeting held in accordance with 10 CFR Part 9, Subpart C; or

(iv) Is subject to a request submitted pursuant to the Freedom of Information Act.

(2) If a request for withholding information under paragraph (b) of this section is granted, the Commission shall notify the applicant of this determination.

* * * * *

(e) (1) Any person submitting information to NRC to be considered in connection with NRC licensing or regulatory activities, whether or not such information bears a copyright notice, shall be deemed to authorize the NRC, including NRC's reproduction contractor acting within the scope

of the reproduction contract with NRC, to reproduce and to distribute sufficient copies to carry out the Commission's regulatory and public information responsibilities. Any person submitting such information to NRC shall be deemed to represent to the NRC that such person has the authority to submit such document and the authority to authorize NRC to reproduce and distribute such document and shall hold the Commission harmless from damages that result from the Commission's reproduction or distribution of such documents.

(2) The Commission shall return to the submitter a document bearing or accompanied by a statement purporting to restrict the NRC from copying the document in accordance with this regulation or a document which bears or is accompanied by a statement representing that the submitter lacks the authority to permit NRC to copy and distribute the document. These documents will not be considered by the Commission in the absence of a waiver of this regulation. The Commission may waive the requirements of this paragraph when requested, or by its own initiative, in circumstances the Commission deems appropriate.

* * * * *

Dated at Rockville, MD, this 17th day of December, 1992.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,
Secretary of the Commission.