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PROPOSED RULE **PR 2**
(66FR 52721)

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF
Robert W. Bishop
VICE PRESIDENT &
GENERAL COUNSEL

December 21, 2001

Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

ATTN: Rulemakings and Adjudications Staff

SUBJECT: Proposed Rule: *Availability of Official Records* (66 Fed. Reg. 52,721;
October 17, 2001)

Dear Sir:

On October 17, 2001, the NRC published a notice in the Federal Register (cited above) stating that the agency is proposing to amend its regulations concerning the availability of official records. The Nuclear Energy Institute (NEI)¹ hereby submits the following comments on the NRC's proposed rule.

The proposed rule would modify regulations addressing the availability of official records in three areas. First, the proposed rule would require those submitting documents claimed to contain proprietary or other confidential information to mark the material in a specified manner in order to decrease the possibility of inadvertent public release. Second, the proposed rule would codify certain NRC practices delineating the circumstances under which the agency would retain confidential documents that have been submitted to it, and the process for releasing them. Third, the regulations would address certain matters relevant to copyright law as they pertain to reproducing copyrighted material. We have suggested specific modifications to certain provisions of the proposed rule as detailed below.

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.



1. Marking of Documents Containing Proprietary or Other Confidential Information

It is reasonable to require that each page be marked with a special legend indicating that it is confidential information submitted under 10 C.F.R. 2.790. However, also requiring an indication on each page adjacent to the information, or at the top if the entire page is affected, of the basis for proposing that the information be withheld from public disclosure is impractical and unnecessary. In many instances the margins may be small, or there might be multiple bases for requesting nondisclosure, and this could simply require that too much information be put onto each page of the document. All that should be necessary is that the basis for proposing that information be withheld from public disclosure be adequately specified. This is assured by proposed section 2.790(b)(1)(ii) requiring an affidavit which, among other things, "[i]dentifies the document or part sought to be withheld," together with "the basis for proposing the information be withheld," and the "location(s) in the document of all information sought to be withheld." Accordingly, proposed section 2.790(b)(1)(i)(B) should be eliminated.

2. Return and Processing of Confidential Documents

As proposed, 10 CFR 2.790(c)(3) provides:

Whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document, and the document will be returned unless the information –

- (i) Forms part of the basis of an official agency decision, including but not limited to, a rulemaking proceeding or licensing activity;
- (ii) Is contained in a document that was made available to or prepared for an NRC advisory committee;
- (iii) Was revealed, or relied upon, in an open Commission meeting held in accordance with 10 CFR part 9, subpart C;
- (iv) Has been requested in a Freedom of Information Act request; or
- (v) Has been obtained during the course of an investigation conducted by the NRC Office of Investigations.

The exception specified in item (iii) should be modified to exclude information that was inadvertently disclosed. Accordingly, the word "intentionally" should be inserted between the words "was" and "revealed," so that the exception would read: "Was intentionally revealed, or relied upon, in an open Commission meeting held in accordance with 10 CFR part 9, subpart C."

In addition, the exception specified in item (v) lacks a rational legal basis. It also exceeds the scope of the discussion in the Supplementary Information, which refers to “documentary evidence, submitted voluntarily or through compelled process, for consideration by NRC and Department of Justice decision makers”²

Accordingly, item (v) should either be eliminated or revised to read as follows: “Has been obtained as evidence during the course of an ongoing investigation by the NRC Office of Investigations.”

The proposed rule would change, in a revised section 2.790(c), the time period for release of documents whose request for withholding was denied from a period not less than thirty (30) days from notification of denial of withholding, to simply a “reasonable time.” According to the Supplementary Information, the NRC has found “through past experience that more flexibility in this area is needed.” The Supplementary Information further states that, “[t]he Commission expects that it will continue to provide a thirty-day waiting period for most documents, but altering the rule will allow the Commission the flexibility to release documents more expeditiously should, for example, the submitter consent to an earlier release date or the Commission determine that an earlier release date is needed to fulfill the Commission’s public health and safety mandate.”³

The thirty-day period in the current rule, however, provides certainty which has proven useful in the past for planning purposes. Further, the goals of the Commission to address circumstances involving submitter consent and protection of public health and safety can be addressed through appropriate wording of the regulation. Accordingly, section 2.790(c)(2) of the proposed rule should be reworded as follows:

If the Commission denies a request for withholding under this section, it will provide the submitter with a notice, including a statement of reasons for that determination. This decision will specify the date when the document will be available at the NRC Website, <http://www.nrc.gov>. Absent special circumstances, of which the submitter will be informed, or the consent of the submitter, this date will not be less than thirty (30) days after the date of the notice.

3. Matters Relevant to Copyright Law

The proposed rule would address NRC reproduction of copyrighted material by requiring, in essence, that: (a) any person submitting information provide the

² 66 Fed. Reg. at 52,722 (emphasis added).

³ 66 Fed. Reg. at 52,728.

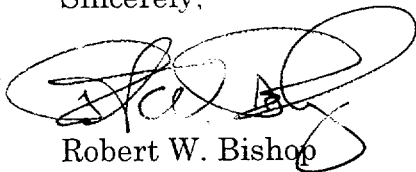
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Commission with legal authority to reproduce and distribute the document, regardless of whether or not the submitter was the copyright holder; and (b) hold the Commission harmless from damages resulting from the agency's reproduction or distribution of documents.

The applicability of copyright law to the Federal Government is governed by statute and relevant case law. The "fair use" doctrine provides the NRC with adequate authority to carry out its responsibilities. *See generally Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975). Requiring, in effect, that members of the public provide the Commission with the right to make a virtually unlimited number of copies of copyrighted material as a condition of filing a document with the agency is improper. Further, requiring that a person hold the Commission harmless for damages resulting from the NRC's reproduction or distribution of documents would remove accountability of the agency for wrongful acts. Accordingly, proposed section 2.790(e) should not be adopted.

The industry appreciates the opportunity to comment on the proposed rule concerning the availability of official documents. We recommend that the Commission revise the rule to comport with the comments provided herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Bishop", written in a cursive style with a large loop at the end.

Robert W. Bishop