

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150-AC07

Availability of Official Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations on availability of official records in three areas. The amendments require those who submit documents claimed to contain proprietary or other confidential information to specifically mark those portions of the document containing such information to decrease the chances of inadvertent public release of the information by the NRC, codify NRC's practices and delineate the circumstances under which the agency will not return confidential documents that have been submitted to the NRC, and codify NRC's practices of making as many copies of copyrighted material submitted to the agency as it needs to perform its regulatory and licensing functions. The amendments are necessary to conform the NRC's regulations regarding the availability of official records to case law and agency practice.

EFFECTIVE DATE: (Insert date 60 days after publication in the Federal Register).

ADDRESSES: The comments received in response to NRC's proposed rule for availability of official records are available electronically at the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. Copies of comments received also may be examined at the NRC Public Document Room (PDR), One White Flint North, First Floor, 11555 Rockville Pike, Rockville, Maryland or by contacting 1-800-397-4209 or 301-415-4737, or by email at pdr@nrc.gov. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR.

Comments received also may be viewed via the NRC's interactive rulemaking website (<http://ruleforum.inl.gov>). This site provides the ability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, 301-415-5905; email CAG@nrc.gov.

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I. Background

Procedures governing the submission of proprietary information to the NRC are found at 10 CFR 2.790. Under this regulation, absent extraordinary circumstances, material determined to be proprietary is protected by the NRC and not released to the public. The regulations set forth procedures that submitters may use to challenge an NRC determination that material is not proprietary, or a decision by the agency to release proprietary information to the public. The regulations also address the circumstances under which the agency would (or would not) return a document containing proprietary information to the submitter. In the past, the regulation had not addressed the right of the NRC to reproduce copyrighted material submitted to it.

On December 23, 1992 (57 FR 61013), the Commission published proposed amendments to § 2.790 explaining the need for standardized markings on proprietary documents submitted to the NRC, expanding the circumstances under which the NRC would not return proprietary information to the submitter, and clarifying that the agency would reproduce copyrighted material submitted to it, as necessary to carry out its regulatory and licensing functions. The proposed changes were not intended to modify agency policy or

practice regarding the public disclosure of proprietary information submitted to the NRC. However, public commenters on the proposed rule expressed concern over the potential for increased public disclosure of proprietary submittals, probably due to NRC's failure to make clear that NRC's refusal to return a proprietary document to its submitter did not mean that the NRC intended to release the document to the public. The earlier commenters also indicated that the established process worked fairly well, that overly-prescriptive document marking procedures would be cumbersome and unnecessary, but that the proposed copyright provisions seemed reasonable.

In response, the NRC issued a revised proposed rule for comment on October 17, 2001 (66 FR 52721). The revised proposal made the regulation easier to understand, and proposed additional changes and clarifications. Specifically, the proposed rule, as revised, differentiated between the discrete determinations of document withholding from the public and document return to the submitter, and incorporated additional "exceptions" to the document return rule. It did not propose any changes to the document withholding criteria nor to the previously proposed copyright provision.

In the revised proposed rule, the NRC also responded in detail to the comments it had received on the December 23, 1992 proposed rule. Some of the comments received on the October 17, 2001, proposed rule make arguments that the Commission rejected in that notice. After reviewing these arguments again, the Commission stands by its explanation set forth in the October 17th notice and will not address those same arguments again.

II. Responses to Comments

A. Overview

The Commission received six comments in response to its October 17, 2001, notice of proposed rulemaking. The comments were from an individual, two nuclear industry vendors, one electric generation company, and two nuclear industry trade organizations. The comment period ended on December 31, 2001, but the NRC gave full consideration to comments received after that date. The comments pertained to the proposed changes in all three categories: document return, including disclosure of proprietary information; document marking; and copyright handling. Most of the comments considered the proposed document return regulations as overly broad, particularly as they apply to the functions of the Office of Investigations. The proposed document marking provisions also were criticized and commonly viewed by commenters as unnecessary, unworkable, or burdensome, and the proposed copyright handling procedures were deemed either unnecessary or unauthorized. The specific comments are addressed below.

B. Document Disclosure

1. Comment. Some commenters focused on the issue of disclosure of proprietary information over the submitter's objections, which was not the subject of this rulemaking, rather than the core issue regarding return to the submitter of documents claimed to contain proprietary information. Although, the Commission does not propose changes in its current document disclosure policy or practice, this issue warrants a response as it represents a fairly widespread concern among the comments received. Certain commenters objected to the

potential for disclosure of proprietary information pursuant to a balancing test, a long-standing provision of 10 CFR 2.790(b)(5), giving the Commission discretionary disclosure authority. The objection is based on a claim that balancing is not within the Commission's authority once a determination is made that the submitted information is proprietary and falls within exemption 4 of the Freedom of Information Act (FOIA).¹ Rather, the commenters asserted, the balance already has been struck by Congress in favor of the protection of proprietary information. Additionally, one commenter argued that the Trade Secrets Act, 18 U.S.C. 1905, prohibits disclosure of information falling within exemption 4 of FOIA.

Response. The Commission is not making any changes to § 2.790(b)(5). Current regulations, which are based on sound judicial case law,² recognize the NRC's authority to balance the public's interest in disclosure against the potential harm that such disclosure would cause the submitter. This authority has not been enhanced by the proposed changes and there is nothing in the FOIA, FOIA case law, or the Trade Secrets Act that prohibits a balancing of this type.

Courts have expressly acknowledged that, when determining whether to disclose information that falls within exemption 4 of the FOIA, agencies may balance the public's interest in disclosure against the harm that would be caused by disclosure to the provider of

¹ This exemption protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (2000).

² Indeed, this very regulatory authority of the NRC was tested in court nearly twenty years ago and remains good law today. General Electric Co. v. NRC, No. 80-2244 (C.D. Ill. Nov. 30, 1983), motion to vacate denied (C.D. Ill. June 26, 1984), aff'd in part, rev'd in part and remanded, 750 F. 2d 1394 (7th Cir. 1984). That same case also provides fundamental legal authority for the proposition that a rule permitting withdrawal of documents before public release would be inapplicable once the agency was in receipt of a FOIA request for the information.

the information. See Public Citizen Health Research Group v. FDA, 185 F. 3d 898 (D.C. Cir. 1999); see also Chrysler Corp. v. Brown, 441 U.S. 281, 293-94 (1979) (holding that Congress did not intend FOIA exemptions to be mandatory bars to disclosure). The public interest to be weighed in this balance has been narrowly defined as an interest in determining the bases for and effects of agency action (i.e., determining “what the government is up to”), and does not include incidental benefits from disclosure that may be enjoyed by members of the public. Public Citizen, 185 F. 3d at 904, 905. Section 2.790(b)(5), which weighs the public’s interest in being “fully apprised as to the bases for and effects of the proposed action,” currently reflects this understanding of the interests that the Commission may properly consider when deciding whether to disclose proprietary information. There is no need to alter the balancing test the Commission has long used.

One commenter argued that the Trade Secrets Act, 18 U.S.C. 1905, prohibits the use of a balancing test to determine whether to disclose information considered proprietary under FOIA exemption 4. According to the Supreme Court, in order for an agency to disclose information considered proprietary and otherwise prohibited from disclosure under the Trade Secrets Act, the agency must act pursuant to properly promulgated rules based on a federal statute other than FOIA itself. See Chrysler Corp., 441 U.S. at 301-05, 308. Section 2.790(b)(5) of the Commission’s regulations, which permits the use of a balancing test to determine whether to disclose proprietary information, was enacted pursuant to the Commission’s rulemaking authority under the Atomic Energy Act of 1954, as amended (AEA). See 42 U.S.C. 2201(p). This rulemaking authority enables the Commission to make such rules as may be necessary to carry out the purposes of the AEA, one of which is the dissemination of unclassified scientific and technical data. See 42 U.S.C. 2013(b), 2201(p). Because § 2.790(b)(5) was properly promulgated under the authority of the AEA, using

rulemaking procedure required by the Administrative Procedure Act, 5 U.S.C. 551 et seq., it authorizes the Commission to disclose information that would otherwise be prohibited from disclosure under the Trade Secrets Act. See Chrysler Corp., 441 U.S. at 301-05, 308.

Finally, the proprietary determination decisionmaking process provides several opportunities for the submitter to make a case for withholding information from public disclosure. As a practical matter, the final determination may be the outcome of a series of exchanges between the agency and the submitter, almost always resulting in the protection of truly confidential and privileged portions of the material, while making available enough of the rest to inform the public adequately of the vital details that the public needs to understand and inquire into the Commission's actions. The Commission stresses that it rarely, if ever, has released proprietary information over the objection of a submitter. The Commission emphasizes that there is nothing in the final rule that will result in a more liberal release of information deemed to be proprietary.

C. Document Return

2. Comment. Some commenters urged that, to protect proprietary information adequately, the NRC should implement presubmission review procedures during which a document would not be considered an "agency record" under the FOIA. The purpose of the procedure would be to allow submitters an absolute right to withdraw documents for which proprietary protection is denied during the "presubmission" period. One commenter requested clarification of the return provision to indicate that information would not be returned automatically if a withholding request is denied, but may be returned upon request. This

commenter also wished to see the procedures for supplementing information pursuant to a potential denial of proprietary treatment and for the negotiation process on the matter.

Response. These comments seek a period of delay before a submitted document would have legal status as an agency record. The scheme suggested by the comments would allow documents to be tendered to the Commission on an informal basis along with a withholding request, pending a Commission determination on whether to grant or deny the withholding request. Then, should the Commission decide that the submitted information would not be withheld, the submitter could exercise an absolute right to withdraw the information, thereby avoiding any possibility of document capture (and possible release) under the FOIA.

The Commission finds this suggested approach to be legally flawed. A document becomes an “agency record” subject to capture under the FOIA if: (1) it is created or obtained by the agency; and (2) it is under the control of the agency at the time of an FOIA request. United States Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). According to the Supreme Court, “[b]y control we mean that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” Id., 492 U.S. at 145. In this context, “control” is a broad concept, and exists at the moment the agency gains possession of documents submitted in the normal course of agency business. Therefore, the Commission does not believe that establishing presubmission review procedures would produce the commenter’s desired legal effect of forestalling a document’s becoming an agency record subject to capture under the FOIA.

Moreover, if presubmission procedures were seen as an attempt to evade or circumvent FOIA, the Commission would not expect them to survive judicial scrutiny. At least one court has held that an agency may not exclude documents from the legal ambit of the FOIA through presubmission procedures. See Teich v. FDA, 751 F. Supp. 243 (D.D.C. 1990). In fact, the court discredited procedures similar to those proposed by the commenter, stating that "presubmission review is nothing more than an attempt to get around the FOIA." Id. at 248.

While the Commission is not prepared to institute document presubmission procedures, commenter's concerns are mitigated by case law, which in recent years, has broadened the definition of what constitutes proprietary information. Additionally, the Commission historically has worked closely with submitters to negotiate a version acceptable for public release for information initially claimed to be proprietary but upon which there is ultimate mutual agreement that proprietary treatment is not appropriate. Indeed, we reiterate that the NRC has rarely, if ever, publicly released purportedly proprietary information over the objection of a submitter, and such a release only would be undertaken after considerable thought and discourse between the parties. Thus, the Commission is not revising its regulations to provide for presubmission procedures.

The commenter is correct in that the proposed rule does not call for automatic return of documents denied proprietary status. Commission policy is to return a document only upon request, subject to the document return exceptions. The rule neither addresses the negotiation process for obtaining the grant of a withholding request, nor how submittal of supplemental supporting documentation in support of the proprietary claim fits into the scheme. It is unclear that singling out this aspect of the administrative process for elaboration

would be helpful. It would entail a fuller description than the other parts of the rule. This is viewed as unnecessary and potentially too limiting to be useful, and our regulations customarily do not go into that level of administrative detail.

3. Comment. One commenter asserted that the provisions for determining what constitutes proprietary information make no distinction between documents containing proprietary information that the Commission requires applicants, licensees, or others to submit, which are subject to the disclosure criteria set forth in National Parks & Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974), and those that are voluntarily submitted, which are subject to the disclosure criteria set forth in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992). A commenter suggested that the rule be revised to distinguish between voluntary and mandatory submittals to reflect the dichotomy in standards applied to the proprietary determination for these documents.

Response. FOIA exemption 4 authorizes agencies to withhold from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Until the Critical Mass case, the test for whether information could be withheld as confidential under exemption 4 was two-pronged: disclosure had to be likely either to impair the Government's ability to obtain information in the future or to cause substantial harm to the competitive position of the submitter. National Parks & Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974). In Critical Mass, the court established a new and broader standard of categorical protection for information *voluntarily* submitted to an agency. For such information, the court found that there is a governmental interest to be protected, namely that of maintaining the continued and full availability of the information to the agency. In addition, the court held that the exemption also

recognizes the submitter's interest in protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained'." Critical Mass, 975 F.2d at 878, citing Sterling Drug, Inc. v. FTC, 450 F. 2d 698, 709 (D.C. Cir. 1971). Thus, the court found that there was broad protection for voluntarily submitted information, provided it is not customarily disclosed to the public by the submitter.

Currently, § 2.790 does not explicitly distinguish between voluntary and mandatory submittals. Instead, the Commission's rules provide that in determining whether a submittal is proprietary, a number of factors are considered. In the Commission's view, this approach allows for maximum flexibility in accommodating the continually evolving legal standards governing the classification of proprietary information. Explicitly defining specific standards for voluntary submittals and mandatory submittals in the text of the final rule would remove this flexibility and potentially require revisions to the rule as judicial case law changes. Therefore, the Commission has chosen to maintain its present approach to the classification of proprietary information in the text of the rule, with a slight modification intended to capture the precise standard for voluntarily submitted information set forth in Critical Mass. Under the current rule, one factor to be considered when determining whether a submittal is proprietary is "whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor." 10 CFR 2.790(b)(4)(ii). In response to this comment, and in order to align the Commission's rules with the holding of Critical Mass, the final rule eliminates any inquiry into whether there is a rational basis for withholding voluntarily submitted information if it is of a type customarily held in confidence by its owner. In cases of mandatory submittals, the rational basis factor may be weighed along with the others listed in § 2.790(b)(4) in order to determine proprietary status. In cases of voluntarily submitted information, the only factor to be considered in determining whether the information is

proprietary is the “customarily held in confidence” factor, in accordance with Critical Mass. Thus, the final rule will accurately reflect the standard of Critical Mass while retaining the flexibility to accommodate future changes to the legal criteria for determining when submitted information is considered to be proprietary.

4. Comment. A few of the commenters considered the proposed rule to sweep too broadly with respect to retention of documents obtained during investigations conducted by the NRC Office of Investigations (OI) and preferred to see the rule provision restricted to “evidence” obtained during an ongoing OI investigation. Some commenters were concerned about the additional release under FOIA of confidential information inadvertently revealed at Advisory Committee or at open Commission meetings. One of these commenters also objected to the proposed change from the 30-day period after denial of a withholding request to a “reasonable time” after which the information in question would be publicly released, assuming no other resolution was reached sooner.

Response. The Commission does not agree with the suggestion that only those documents that specifically form the basis of the OI’s decision, i.e., “evidence,” should be subject to the return exception, or for that matter, only those documents relied upon to make an official finding or to develop a report, decision, or policy by an advisory committee or the Commission in Sunshine Act meetings. Such an interpretation would add nothing to the provisions that provide for retention of documents that form the basis of a final decision or agency action. The Commission would not compound a mistake by deliberating making publicly available confidential information that had been inadvertently or erroneously released at an Advisory Committee or an open Commission meeting. The Commission takes pains to ensure that inappropriate disclosures do not occur. However, in the unusual circumstance

that it should happen, the NRC would not simply publish the information under the theory that “the horse is already out of the barn.”

As for the issue regarding a suitable period of time to provide the submitter after denial of a withholding request, the Commission has changed it from 30 days to a “reasonable time” to allow maximum flexibility, particularly in situations in which time may be of the essence and a 30-day period is simply untenable. The regulation merely substitutes the less definitive qualifier “reasonable time” for the specific but rigid quantifier 30 days. In no case would the submitter be afforded inadequate notice; notice is guaranteed and the amount of time to be provided is specified in the notice itself. This modification will permit an informed decision of the amount of time that may be afforded judiciously for the submitter to address the denial without jeopardizing any of the Commission’s competing responsibilities. Even where a brief period is deemed necessary, the submitter still will be provided adequate opportunity to address the matter.

D. Document Marking

5. Comment. The proposed rule used the term “confidential” to encompass all types of information that might be susceptible to protection under 10 CFR 2.790. One commenter was troubled by the potential for confusion because the same term is used in the context of classified national security information. The commenter suggested an alternative.

The Commission’s proposed rule also would require submitters of documents containing proprietary or other confidential information to mark those portions of the documents claimed to be withholdable from the public and would provide direction on how this

is to be done. The comments on the proposed document marking provisions were largely oriented toward pragmatic concerns over the potential burdens of performing “adjacent” marking and top-of-page marking, calling them duplicative, time-consuming, impractical, and unnecessary. Some commenters viewed the marking provisions as too prescriptive and suggested that a general requirement, combined with submitters’ self-interest, would accomplish the Commission’s goal of reducing the risk of inadvertent disclosure of proprietary or otherwise confidential material. Two commenters generally supported the proposed marking requirement, one requesting clarification to determine whether the “first page” to which the proposed regulation referred was the cover letter or a substantive page, and if the cover letter, whether it also must bear an indication of confidential content. The commenter suggested a “decontrolling” provision for the cover letter when separated from the remaining material. This commenter believes that identification in the affidavit of the location of confidential material by page number should be adequate. One commenter requested guidance on how portion marking might be done (e.g., would bracketing of material to be withheld be appropriate?), and on identification in the affidavit of the location of information to be withheld.

Response. The proposed rule used the term “confidential” because it was already employed in the existing version of the rule and because exemption 4 of the FOIA, the primary statutory provision for withholding information from public disclosure that serves as the model for this section, as well as the judicial case law, utilize that term. Thus, there is value in employing it. Changing the term now might produce confusion, particularly since it will be at variance with both the statutory language and the interpretive case law. Thus, the Commission has decided to retain the term “confidential” in accordance with established

usage and case law, with the understanding that the intent is to interpret the term consistently with that usage and not as a reference to classified national security information.

In response to the comments regarding the marking requirements for documents containing confidential information, e.g., proprietary or personal privacy information, the Commission's final rule provides submitters of confidential information greater leeway. As to the need for adjacent marking, it is noted that, while some parties may submit one type of confidential information (e.g., proprietary information), others may submit documents or packages with mixed, or more than one, type of confidential information (e.g., both proprietary and personal privacy information). This was the primary reason for the "adjacent" marking requirement. While this identification still could be confined to any required affidavit, the benefit to the Commission of adjacent marking is in obviating the need for NRC personnel to cross-reference the document to the affidavit to determine which particular portions should be protected and under what basis.

It will be acceptable to employ a bracketing approach akin to that commonly used in the FOIA process, in which portions of documents subject to particular exemptions are enclosed with brackets and marked with the statutory (exemption) basis for withholding. This is a reasonable way to handle the adjacent marking requirement, where less than an entire page is affected by the marking, and without marking each paragraph. However, the Commission's intention is not to be overly-prescriptive in the particulars of either the marking language or the mechanics, in order for submitters to have broad latitude for whatever is most sensible in each case.

The Commission does not agree that the reference to “first page” of the document is ambiguous; the provision refers to “document, or a portion of it,” sought to be withheld. The reference does not encompass a “cover letter,” unless the cover letter itself reveals confidential material, in which case it should be marked accordingly. Obviously, submitters are free to place any legend they choose on cover correspondence to indicate public availability where only the attachments are to be withheld from the public.

There seemed to be a consensus among commenters that a less prescriptive form of document marking would work as well as the proposed marking language and that a general requirement, coupled with the submitter’s self-interest, would produce the same results. The Commission agrees with this observation and has decided to relax this requirement to reflect a less rigid standard, relying on the submitter to identify proprietary or other confidential material appropriately. The Commission will accept any marking that clearly indicates the material to be withheld from public disclosure, or the affected portion thereof, such as by the following legends: “withhold from public disclosure under 10 CFR 2.790,” “proprietary,” or “confidential.” Any cover letter, likewise, should provide notice of confidential content in the enclosure, although there would be no reason to withhold from public disclosure a cover letter that itself contained no confidential material. As for the affidavit, identification of confidential material by page number should be adequate, as suggested by one of the commenters. Ultimately, the Commission will honor any legend that signifies the same sense of restriction intended to be conveyed by the prescribed marking, as described more fully in response to the following comment.

6. Comment. Another commenter expressed concern that confidential documents not be vulnerable to disclosure for inadvertent or immaterial failure to follow the prescribed

marking requirements and sought clarification of handling procedures in such situations, as well as a reasonable opportunity for the submitter to rectify the situation upon discovery of the error. This commenter also objected to the redaction and affidavit requirement for personal privacy information, indicating that imposing the document marking requirement for this type of information presented an administrative burden without a corresponding benefit. The commenter suggested a categorical exemption to withhold in the entirety medical, personnel, and operator examination records, and possibly other documents containing personal privacy information, arguing that it usually is clear when a document contains privacy information and the need to protect it normally requires no further justification. Finally, the commenter sought clarification of the affidavit requirement for privacy information to state that a licensee official might sign the affidavit, rather than the subject of the personal information.

Response. As noted in this comment, the proposed rule attempted to provide reassurance that submitters would not be penalized for inadvertent failure to follow prescribed marking procedures. The Commission reiterates its position that it prefers use of the standardized language set forth in the final rule because it does not believe that requiring standardized language will result in a serious hardship on submitters, especially since the NRC intends to use standardized marking language as a processing tool and not as a means of limiting access to the withholding request procedure. The NRC will not impose a penalty, however, for failure to use the precise wording prescribed. Language substantially similar to that prescribed will be equally acceptable.³

³ “The point is not to enforce a standard rigidly for its own sake, but to afford appropriate protection to submitter’s confidential information, as economically and efficiently as possible. The NRC would work with submitters, as it always has, to resolve any discrepancies of which it was aware within a particular request.” NRC Proposed Rule on Availability of Official Records (October 17, 2001; 66 FR 52721, 52723).

The Commission continues to have concerns when submitters intend that the NRC treat information as proprietary or confidential, yet do not request this treatment or request this treatment without identifying those portions warranting such treatment. A major purpose of the rule is to put the public on notice that the NRC will not place itself in the position of having to comb through documents searching for confidential information that had not been identified by the submitter and for which there was no reasonable designation. There is, however, ample opportunity to resolve situations cooperatively where the submitter inadvertently neglects to mark confidential information and subsequently seeks to have it so designated. There is no need to codify such a process, and in response to admonishments not to be overly-prescriptive, the final rule does not address every type of situation that may be encountered, nor the manner in which each would be handled. Moreover, preserving the flexibility for treating each circumstance in the most appropriate fashion would seem to counsel against such codification.

As to the objection regarding the affidavit requirement for personal information, the Commission agrees with the comment that an affidavit need not accompany a request to withhold personal privacy information. The affidavit requirement is better suited to submittals containing proprietary information. The final rule thus does not require that an affidavit accompany submittals containing personal privacy information. Nonetheless, the submitter needs to identify personal privacy information in accordance with the marking requirements, to assist in the avoidance of inadvertent release.

Finally, although no comment was received on this point, the proposed rule contained a provision in § 2.790(e)(2) for the Commission to “waive the requirements of this paragraph on request, or on its own initiative, in circumstances the Commission deems appropriate.”

The waiver was intended to apply to the affidavit requirement. Therefore, the language has been moved to paragraph (b)(1)(ii), which pertains to affidavits, and revised to reflect that correction.

E. Copyright Handling

7. Comment. The Commission proposed to codify its practices regarding the copying of copyrighted material submitted to it. Two commenters suggested that, under the “fair use” doctrine of copyright law, the Commission already is authorized to make copies of submittals as necessary to perform its official responsibilities, and that § 2.790(e) is unnecessary. One commenter was concerned that proposed § 2.790(e) violates the Copyright Act (17 U.S.C. 101 et. seq.) by allowing the Commission an unrestricted right to make and distribute copies as a condition of providing the Commission with information. Two commenters objected to the “hold harmless” provision, which was intended to limit liability of NRC employees for inadvertent copyright infringement in making copies of documents when the submitter lacked the requisite authority to grant reproduction permission (proposed § 2.790(e)(1)(ii)). These commenters considered this an improper attempt to shield the Commission from responsibility for wrongful acts arising out of potential copyright abuses. Finally, one commenter suggested that it is unfair for the Commission to require, as a condition of acceptance for any submittal, that the submitter grant a license to the Commission to make copies because the submitter may not in fact have the legal authority to do so.

Response. The Commission agrees with the comment that, under the “fair use” doctrine, the Commission is authorized to make such copies of information submitted to it as necessary to perform its official responsibilities. The purpose of § 2.790(e) is simply to codify

and give public notice of the Commission's intent to make copies of documents submitted to it as necessary to perform its mission, and to make explicit its view that such activity *per se* constitutes "fair use." Section 2.790(e) is intended to eliminate any confusion about how the Commission will make use of information submitted to it.

The Commission recognizes that § 2.790(e) is coextensive with the "fair use" doctrine, and does not grant the Commission an unrestricted right to copy material submitted to it. Rather, the Commission's right to copy submittals is linked directly to the need to perform its statutory mission of protecting the public health and safety and promoting the common defense and security. The Commission disagrees with the comment that § 2.790(e) would give it a virtually unlimited right to reproduce copyrighted material. The Commission does not intend to make or distribute copies of submittals in a manner inconsistent with traditional copyright protections. The Commission makes copies available pursuant to its responsibilities under the Federal Records Act and the Administrative Procedure Act. The NRC will continue its practice of placing copyrighted documents into the electronic record-keeping system for inspection. This does not entitle non-NRC parties to copy documents not otherwise authorized by copyright laws, much as with volumes maintained by public libraries.

Commenters expressed further concern that the "hold harmless" provision, proposed § 2.790(e)(1)(ii), was an improper attempt to shield the Commission from liability for copyright infringement. This provision sought to limit liability resulting from unauthorized reproduction or distribution of documents submitted to the NRC. The Commission never intended to shield from liability for copyright infringement NRC employees who go beyond fair use. The intent of the "hold harmless" provision was simply to make clear that NRC personnel must not be held liable for making copies of materials utilized pursuant to the proper performance of their

official responsibilities. As proposed, the specific goal of § 2.790(e)(1)(ii) was the prevention of suits by third parties who might claim copyright infringement in the event their copyrighted material was submitted by another to the NRC and copied by the Commission without the copyright holder's knowledge or consent. However, under the fair use doctrine, no liability should attach to the copying and internal distribution of submittals as necessary to carry out the Commission's regulatory responsibilities. Thus, upon further reflection, because the fair use doctrine permits the copying necessary to carry out its official duties, the Commission has concluded that the proposed provision is unnecessary. It has been deleted from the final rule.

Because § 2.790(e) is based upon the fair use doctrine, and because the fair use doctrine provides that copies may be made without the consent of the copyright holder, the remaining provisions of §§ 2.790(e)(1) and 2.790(e)(2)⁴ also are unnecessary. These provisions would have required that, as a condition for the Commission's accepting any submittal, the submitter explicitly authorize the Commission to make and distribute copies of the submittal, and provided notice of the Commission's "hold harmless" position. However, in the Commission's view, any submittal may be copied as necessary to support the agency's mission, regardless of any stated copyright restrictions accompanying the submittal or any objections from copyright holders. Similarly, these copies may be distributed within the agency for use in carrying out the Commission's official responsibilities. The fair use doctrine requires no express grant of permission and thus, such a requirement is not needed in the regulation. Moreover, it may create problems for those submitters who are unable to make such a warranty over the objection of third-parties who may hold copyrights in some or all of

⁴ One portion of § 2.790(e)(2) addressed affidavit waivers and has been relocated in the regulation to clarify that point, as explained above.

the information being submitted. Finally, the “hold harmless” provision, likewise, is deemed unnecessary and has been removed.

In sum, in response to these comments, and in order to avoid confusion regarding the Commission’s intent in promulgating § 2.790(e), changes have been made in the final rule. Sections 2.790(e)(1) and 2.790(e)(2) have been deleted. Section 2.790(e) has been retained to give explicit notice of the Commission’s intent to copy and distribute submittals within the agency as necessary to carry out its official responsibilities, consistent with the fair use doctrine.

III. Final Action

The NRC is amending its regulations on availability of official records to provide specific guidance for marking information a submitter seeks to have withheld from public disclosure on the basis of proprietary content or other confidential information, to codify NRC practices concerning circumstances under which submitted documents will not be returned to the submitter, and to explain and clarify NRC’s practices regarding handling of copyrighted material submitted to it.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or otherwise impractical. In this final rule the Commission is codifying its

practices regarding the treatment of proprietary information and copyrighted material. This action does not constitute the establishment of a standard that establishes generally applicable requirements, and the use of a voluntary consensus standard is not applicable.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule 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 the final regulation.

VI. Paperwork Reduction Act Statement

This final rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

VII. Regulatory Analysis

This final rule brings NRC's regulations concerning the availability of official records into conformance with case law and current Commission practice. This rule informs the public of document marking requirements for submitted information, of four additional exceptions to a submitter's limited right to withdraw submitted information, and of Commission practice concerning the reproduction and distribution of submitted copyright material. The rule reflects Commission administrative and procedural practice and has only minor impact on the benefits or costs associated with the Commission's regulations. Some submitters already mark

documents consistent with the requirements in this rule. For others, the rule will shift some responsibility to the submitter for ensuring that its confidential material is identified and protected. It also codifies the Commission's practices regarding its dissemination of copyrighted material.

VIII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. The rule sets forth new document marking requirements for submitted information, clarifies the right of the submitter of information to have certain information returned on request, and provides notice of Commission practice concerning the reproduction and distribution of copyrighted material. The rule does not impose substantial obligations or have significant 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 in 10 CFR 2.810.

IX. Backfit Analysis

The NRC has determined that a backfit analysis is not required for this final rule because these amendments do not include any provisions that would impose backfits as defined in 10 CFR Chapter 1.

X. Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, the NRC has determined that this action is not a major rule.

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, Penalties, 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. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 2.

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

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, 183i, 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). Section 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note.) 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 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). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and 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).

2. Section 2.790 is amended by revising the introductory text of paragraph (a); adding introductory text to paragraph (b); revising paragraphs (b)(1), (b)(4)(ii); and (c); redesignating paragraph (e) as paragraph (f); and adding new paragraph (e), to read as follows:

§ 2.790 Public inspections, exemptions, requests for withholding.

(a) Subject to the provisions of paragraphs (b), (c), (d), (e), and (f) of this section, final NRC records and documents, including but not limited to correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, revocation, or violation of a license, permit, or order, or regarding a rulemaking proceeding subject to this part shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging

nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room, except for matters that are:

* * * * *

(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, or a portion of it, withheld from public disclosure because it contains trade secrets, privileged or confidential commercial or financial information.

(1) The submitter shall request withholding at the time the document is submitted and shall comply with the document marking and affidavit requirements set forth in this paragraph. The NRC has no obligation to review documents not so marked to determine whether they contain information eligible for withholding under paragraph (a) of this section. Any documents not so marked may be made available to the public at the NRC Website, <http://www.nrc.gov> or at the NRC Public Document Room.

(i) The submitter shall ensure that the document containing information sought to be withheld is marked as follows:

(A) The top of the first page of the document and the top of each page containing such information must be marked with language substantially similar to: "confidential information submitted under 10 CFR 2.790;" "withhold from public disclosure under 10 CFR

§ 2.790;” or “proprietary” to indicate it contains information the submitter seeks to have withheld.

(B) Each document, or page, as appropriate, containing information sought to be withheld from public disclosure must indicate, adjacent to the information, or at the top if the entire page is affected, the basis (i.e., trade secret, personal privacy, etc.) for proposing that the information be withheld from public disclosure under paragraph (a) of this section.

(ii) The Commission may waive the affidavit requirements on request, or on its own initiative, in circumstances the Commission, in its discretion, deems appropriate. Otherwise, except for personal privacy information, which is not subject to the affidavit requirement, the request for withholding must be accompanied by an affidavit that--

(A) Identifies the document or part sought to be withheld;

(B) Identifies the official position of the person making the affidavit;

(C) Declares the basis for proposing the information be withheld, encompassing considerations set forth in § 2.790(a);

(D) Includes a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public; and

(E) Indicates the location(s) in the document of all information sought to be withheld.

(iii) In addition, an affidavit accompanying a withholding request based on paragraph (a)(4) of this section must contain a full statement of the reason for claiming the information should be withheld from public disclosure. Such statement shall address with specificity the considerations listed in paragraph (b)(4) of this section. In the case of an affidavit submitted by a company, the affidavit shall be executed by an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. The affidavit shall be executed by the owner of the information, even though the information sought to be withheld is submitted to the Commission by another person. The application and affidavit shall be submitted at the time of filing the information sought to be withheld. The information sought to be withheld shall be incorporated, as far as possible, into a separate paper. The affiant must designate with appropriate markings information submitted in the affidavit as a trade secret, or confidential or privileged commercial or financial information within the meaning of § 9.17(a)(4) of this chapter, and such information shall be subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

* * * * *

(4) * * *

(ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;

* * * * *

(c) The Commission either may grant or deny a request for withholding under this section.

(1) If the request is granted, the Commission will notify the submitter of its determination to withhold the information from public disclosure.

(2) If the Commission denies a request for withholding under this section, it will provide the submitter with a statement of reasons for that determination. This decision will specify the date, which will be a reasonable time thereafter, when the document will be available at the NRC Website, <http://www.nrc.gov>. The document will not be returned to the submitter.

(3) 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.

* * * * *

(e) Submitting information to NRC for consideration in connection with NRC licensing or regulatory activities shall be deemed to constitute authority for the NRC to reproduce and to distribute sufficient copies to carry out the Commission's official responsibilities.

* * * * *

Dated at Rockville, Maryland, this 7th day of April, 2003.

For the Nuclear Regulatory Commission.

/ RA /

Annette Vietti-Cook,
Secretary of the Commission.