



NUCLEAR ENERGY INSTITUTE

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USNRC

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July 12, 2004

July 12, 2004 (4:50PM)

Ms. Annette Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-00001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Proposed Amendment of Freedom of Information Act Regulations and
Privacy Act Regulations; 69 Fed. Reg. 22737 (April 27, 2004)

Dear Ms. Vietti-Cook:

The Nuclear Energy Institute¹ hereby submits the following comments in response to the above cited Federal Register notice. As stated therein, the NRC proposes to amend and add a section to its regulations implementing the Freedom of Information Act (FOIA) and the Privacy Act.

As explained below, some the changes to 10 C.F.R. Part 9 proposed in the instant rulemaking present issues of potentially significant consequence for the commercial nuclear energy industry. These issues compound those previously identified by members of the industry with respect to the NRC's proprietary information rule, previously numbered 10 C.F.R. 2.790 and now designated 10 C.F.R. 2.390. See Comments by Westinghouse Electric Company, submitted January 21, 2002. Consistent with the concerns expressed in that rulemaking, (See 66 Fed. Reg. 52721 (October 17, 2001)), we are concerned that the modifications to 10 CFR 2.390 work to the detriment of companies that voluntarily submit information appropriately identified as "proprietary" to the NRC.

In this regard, the industry wishes to stress the importance of the need to offer an opportunity for an owner of information submitted as proprietary to withdraw it if the NRC decides either that the information is not proprietary or it would not be exempt from disclosure under FOIA. A provision permitting such withdrawal upon notification in advance of disclosure is critical to protecting vital proprietary information developed by the U.S. nuclear industry and U.S. companies in general.

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.

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More particularly, the proposed rule would add section 9.28 to provide a submitter of proprietary information notice and an opportunity to object to an NRC initial determination to disclose the proprietary information. Although a predisclosure notice provision is appropriate,² the proposed change inadequately addresses the compelling needs of submitters. The notice to be given does not provide the basis on which the NRC has decided to disclose the information. Because there is no provision for identifying to a submitter the reason(s) for the NRC's determination regarding disclosure, there is no way for a submitter to know from the notice whether the initial determination to disclose the information is based on the agency's conclusion that the information is not proprietary in the first place, or whether the initial determination is based on results of the balancing test (to which the industry objects).

Therefore, the notice from the NRC should specify the grounds upon which the agency based its initial determination. Otherwise, while a submitter may be able to specify the bases for its claims that the information is proprietary, it may be impossible to respond to the particular reasons relied upon by the NRC if it determines that the information should not have been designated as proprietary in the first place. Further, and most important in light of the balancing test that the NRC is to perform pursuant to section 2.390(b)(1)(iii)(2), it will be virtually impossible for a submitter to respond to the emphasis the NRC has given any particular factor in its balancing effort if the agency does not specify the bases for its determination.

The industry also suggests that the NRC modify section 9.28(b) to provide a more reasonable period in which to respond to the NRC notice. Fifteen days is not sufficient. The period is actually less than 15 days because the clock begins to run on the date of the notice, and not on the date of receipt. The notice published in the Federal Register does not explain the basis for such a short response period. It is particularly problematic in light of the fact that the proprietary information which the NRC has deemed disclosable is likely to have great economic and/or competitive value to the submitter. Therefore, the industry requests that the NRC provide at least 30 days for a submitter to respond, as well as to require that a full explanation of the bases for the agency's determination be provided.

Proposed section 9.28(b) also provides that, if the submitter's response is not received within the time specified in the notice, "the submitter will be considered to have no objection to disclosure of the information," and that information received

² See Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information" (June 23, 1987).

after the date specified "will not be considered" unless the NRC's FOIA and Privacy Act Officer grants an extension. This provision is unnecessarily harsh and the NRC has offered no rationale to justify this approach. No statute requires the NRC to so limit its consideration, and the potential consequences of the NRC mistakenly disclosing proprietary information are likely to be both immediate and harmful to a submitter. This is highly inconsistent with the approach the NRC takes in considering matters of importance subject to rulemaking. Even in that context, comments will be "considered if it is practical to do so." See, e.g., 69 Fed. Reg. at 22737. Therefore, the NRC should consider information furnished by a submitter after the NRC-imposed deadline but before it makes a final determination if such consideration is practicable.

No provision is made in the proposed notification rule for a submitter to request withdrawal of the information from the NRC, either at the time of submittal of a response to the notice or after the NRC makes a decision to disclose the proprietary information. The proprietary rule, 10 C.F.R. 2.390(c)(3), provides for such a right of withdrawal. The right of withdrawal should be specifically mentioned in the proposed notification rule. The NRC should modify section 9.28 to provide the opportunity to request withdrawal of the information either in response to a notice or upon a final determination on disclosure.

We note that, although the NRC has not included a provision for the submitter to request withdrawal of the information from the NRC, several other federal agencies – Federal Communications Commission, Department Of Interior and Department of Labor – have procedures under which the agency will return voluntarily-submitted documents if the agency denies a request for proprietary information protection. Permitting the withdrawal of voluntarily submitted documents is likely to "encourage increased business participation in agency rulemaking by assuring that their [confidential business information] will not be released upon an adverse confidentiality assessment." See *Agency Handling of Confidential Information*, 56 *Administrative Law Review*, p. 530 (footnote omitted) Spring 2004. The NRC should adopt this policy as well, as its implementation will allow the agency to more effectively carry out its regulatory and other responsibilities.

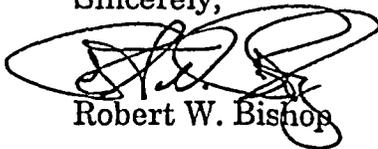
Finally, proposed section 9.29 provides an internal NRC appeal process if the NRC denies a request for access to proprietary information. However, an internal appeal process is not, but should be, provided if the NRC staff decides that proprietary information should be released to the public. We recommend that the rule be modified to contain such a provision.

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The NRC should bring the instant regulations and section 2.390 into compliance with case law by, among other things, eliminating the balancing test for release of proprietary information and providing the proper standard for determining when voluntarily submitted information is proprietary. See Comments by Westinghouse Electric Company, submitted January 21, 2002, at pp. 6-8.

NEI appreciates the opportunity to submit these comments. Protection of proprietary information is required as a matter of sound public policy and is of great importance to the U.S. nuclear industry.

Sincerely,

A handwritten signature in black ink, appearing to read "R. W. Bishop", is written over a printed name. The signature is stylized and somewhat illegible due to overlapping loops and lines.

Robert W. Bishop