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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

16

Subject: Comments on Proposed Rule on Protection of Safeguards Information (RIN 3150-AH57)

Madame Secretary:

I am writing to comment on the NRC's proposed rule on Protection of Safeguards Information (RIN 3150-AH57). I support the NRC's efforts to strengthen and expand the information security protection requirements associated with Safeguards Information. I am also providing the attached comments on the proposed rule and recommend these changes be accepted by the NRC.

Sincerely,



S. Hardin

Attachment: As stated

Template = SECY-067

SECY-02

1. The NRC's proposed rule language on degree of information security required for facilities possessing or transporting formula quantities of strategic special nuclear material (CAT I SSNM) affords an insufficient degree of protection to National Security and is inconsistent with both long standing NRC classification guidance and recent Commission and staff actions. This incorrect language will cause regulatory confusion and could lead to inadequate protection of national security information or inadequate enforcement authority. Specifically the proposed language in § 70.22, 70.32, 73.2, and 73.22 refers to physical security, safeguards contingency, and guard qualification and training plans associated with a licensee's possession, use, or transport, or delivery to a carrier for transport of CAT I quantities of SSNM being controlled as Safeguards Information (SGI).

However, the NRC's classification guide for Nuclear Material and Facilities (CG-NMF-2), dated December 1991, clearly indicates that such plans for CAT I facilities are to be classified as national security information. Additionally, the Commission's 2003 DBT Order to CAT I licensees, the licensees's revised security plans provided to the NRC, and the NRC's security evaluation of the licensee's revised plans were all controlled as classified information. I believe this problem has its roots many years ago when the NRC referred to classified safeguards information and sensitive unclassified safeguards information. However, today the NRC uses the term Safeguards Information to solely refer to unclassified information controlled in accordance with § 147 of the AEA, not to classified information.

Recommendations:

- A) The NRC revise the final rule to specify that security information or plans associated with a licensee possessing, using, transporting, or offering for transport greater than or equal to CAT I quantities of SSNM must control such information as classified information in accordance with the provisions of 10 CFR Parts 25 and 95.
- B) In addition, the NRC should also revise the final rule with respect to protection of information associated with security information and plans for a licensee possessing, using, transporting, or offering for transport CAT II and III quantities of SNM to utilize a risk-informed and graded approach consistent with the change to CAT I SSNM, specifically:

- Security information and plans for licensees possessing, using, transporting, or offering for transport less than a formula quantity of SSNM but greater than or equal to a CAT II quantity of SNM consisting of U-233, Pu, or high-enriched U-235 ($\geq 20\%$ enrichment) should be controlled as Safeguards Information per the requirements of §§ 73.21 and 73.22 of the proposed rule.
- Security information and plans for licensees possessing, using, transporting, or offering for transport less than a CAT II quantity of SNM consisting of U-233, Pu, or high-enriched U-235 ($\geq 20\%$ enrichment) or a CAT II quantity of low-enriched U-235 but greater than 10 kg of special nuclear material of low strategic significance (CAT III SNM) should be controlled as Safeguards Information-Modified Handling per the requirements of §§ 73.21 and 73.23 of the proposed rule.
- The risks associated with security information and plans for licensees possessing, using, transporting, or offering for transport less than a CAT III quantity of SNM do not require protection under Part 73.

This approach will provide greater regulatory clarity than the NRC's proposed rule language of "fuel cycle facilities required to implement security measures" and "fuel cycle facilities" in §§ 73.21(a)(1)(i) and 73.22 introductory text, respectively, by clearly identifying *de minimis* levels of SNM requiring protection.

2. Similar to comment 1 above, the NRC's proposed rule language on degree of information security required for facilities licensed under Parts 60 or 63 affords an insufficient degree of protection to National Security and is inconsistent with the joint NRC/DOE classification guide for a proposed repository at Yucca Mountain issued in 2004 (CG-OCRWM-1). This incorrect language will cause regulatory confusion and could lead to inadequate protection of national security information or inadequate enforcement authority. Specifically the proposed language in §§ 60.21, 60.42, 63.21, and 63.42 refers to design for physical protection, the safeguards contingency plan, and the guard qualification and training plan being controlled as SGI per §§ 73.21 and 73.22.

However, CG-OCRWM-1 clearly indicates that certain information associated with a repository at Yucca Mt. will be considered classified national security information.

The NRC's proposed rule language in §§ 60.21, 60.42, 63.21, and 63.42 refers to the "design for physical security" being protected as SGI; however, no mention is made of a "physical security plan." In the license application and license condition sections found in Parts 30, 50, and 70 of this proposed rule the NRC refers to a "physical security plan" being protected as safeguards information. I believe the NRC should explicitly require the physical security plan for a repository licensed under Parts 60 or 63 be protected as SGI or classified information, as appropriate. This will ensure that both the plan itself is properly protected and that greater regulatory consistency is maintained.

Recommendation: The NRC should revise the final rule in Parts 60 and 63 to require that the design for physical security and the physical security, safeguards contingency, and the guard qualification and training plans must be controlled as Safeguards Information per §§ 73.21 and 73.22 or as classified information per Parts 25 and 95, as appropriate.

3. The proposed rule language in §§ 73.21 and 73.22 refers to transportation of more than 100 grams of irradiated reactor fuel. The term "spent nuclear fuel" (SNF) is defined in the *Nuclear Waste Policy Act of 1982*, as amended (NWSA). The term "irradiated reactor fuel" is not defined in § 73.2; however, it is effectively characterized in § 73.37(a)(1) as being "in excess of 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 100 Rem per hour at a distance of 3 feet from any accessible surface without intervening shielding..." The proposed rule does not address transportation of less than 100 grams of spent nuclear fuel or spent fuel with an unshielded dose rate of less than 100 Rem/hr.

Furthermore, the NRC indicated in stakeholder meetings held in 2004 on draft security measures for the transportation of radioactive byproduct materials that information on shipments of SNF less than 100 grams should be protected as SGI-M and thus should be included in § 73.23. However, information on shipments of this type of radioactive material was not included in § 73.22 under the proposed rule. The Commission created the term "irradiated reactor fuel" in physical security regulations to identify special nuclear material (SNM) — in the form of SNF — that warranted a decreased degree of protection from that of Category I SSNM, because of the lower attractiveness of this material to theft and diversion due to its high radiation levels. However, with the NRC indicating that information security measures will be applied to shipments of SNF less than 100 grams, I believe it is time to sever the nexus between information security and physical security for SNF shipments.

Therefore, I would urge the NRC to require information associated with the shipment of greater than 15 grams of SNF (e.g., security plans or advance notifications) to be controlled as SGI. For 15 grams or less, the material should not be considered "SNF," rather any information security measures should be based upon security measures for the radionuclides that are present. I would recommend using 15 grams as a reasonable *de minimis* value that would be consistent with the NRC's fissile exemption limit of 15 grams for transportation purposes under § 71.15(b). Therefore, in the final rule §§ 73.21, 73.22, and 73.72 should refer to the transportation of spent nuclear fuel or SNF rather than irradiated reactor fuel (§ 73.72 should also be revised as a conforming change). Thus, no mention of SNF would be required in the final rule in § 73.23. I would also urge the NRC to consider updating the physical security regulations for the transportation of SNF in a future rulemaking to clarify the necessary physical security for SNF shipments, irrespective of the radiation field of the SNF (i.e., differentiation between measures for the protection against theft and diversion versus radiological sabotage).

Separately, the proposed rule and the existing § 73.72 do not provide information security requirements for the transportation of high-level radioactive waste (HLW), as compared to SNF. Under § 180(b) of the NWSA, the NRC is responsible for regulating advance notifications of shipments of SNF and HLW that would be made to State and local officials by the Department of Energy (DOE) under proposed shipments to a geologic repository at Yucca Mountain. I believe that advance notifications of both SNF and HLW shipments made by DOE warrant protection as SGI under the NRC's regulations.

Recommendations:

A) §§ 73.21 and 73.22 should be revised in the final rule to require protection as SGI for information associated with the transportation of greater than 15 grams of SNF and HLW.

B) If the NRC believes information associated with the transportation of 15 grams or less of SNF and HLW should be protected, then it should be protected as SGI-M under § 73.23 in the final rule. However, I am not in favor of this approach, but would recommend treating such material in a manner consistent with radionuclides present in such a shipment.

C) As a conforming change, § 73.2 should be revised in the final rule by including definitions for “spent nuclear fuel or SNF,” “high level radioactive waste or HLW,” and “irradiated reactor fuel.” The NRC should use the existing definitions of HLW and SNF found in § 72.3, minus the 1 year decay time. [Note: the 1 year decay time is not included in the definition of SNF found in the NWPA and is not inherently required for the transportation of SNF.]

D) As a conforming change, § 73.72 should be revised in the final rule to refer to advance notifications of shipments of greater than 15 grams of SNF or HLW.

4. The proposed rule in §§ 73.1, 73.21, 73.22, and 73.23 does not specifically include “certificate holders” as covered persons, even though the NRC has specifically proposed conforming changes to Parts 71 and 72 to bring these persons under the SGI umbrella. I would urge the NRC to explicitly include certificate holders in §§ 73.1, 73.21, 73.22, and 73.23 of the final rule; notwithstanding the “any person” language in the proposed rule. This will ensure regulatory clarity and consistency within this rulemaking.

Additionally, in the “Discussion of the Proposed Amendments by Section” in the proposed rule the NRC indicated for Part 71 that “[t]he proposed revision does not address the protection of design-related information with respect to transportation packages.” In reviewing the proposed changes to Parts 71 and 72 in conjunction with the proposed changes to §§ 73.21, 73.22, and 73.23 it is not clear what information related to the design, safety analysis, or security analysis of transportation packages under Part 71 or spent fuel storage casks under Part 72 the NRC intends to require control as SGI or SGI-M. Is some, all, or none of this information to be controlled as SGI or SGI-M?

Recommendations:

A) §§ 73.1, 73.21, 73.22, and 73.23 should be revised in the final rule to specifically include a certificate holder or an applicant for a certificate of compliance as a covered person to promote regulatory clarity.

B) The NRC should explicitly clarify in the Statement of Considerations accompanying the final rule and in §§ 73.21, 73.22, and 73.23 final rule text what information related to the design, safety analysis, or security analysis of transportation packages under Part 71 or spent fuel storage casks under Part 72 is required to be controlled as SGI or SGI-M.

5. Similar to comment 1 above, the NRC’s proposed rule language on degree of information security required for facilities regulated under Part 76 affords an insufficient degree of protection to National Security and is inconsistent with NRC classification guide CG-NMF-2. Specifically, in § 76.113(c) of the proposed rule, the NRC indicate that the requirements for protection of security information for formula quantities of SNM (i.e., CAT I SSNM) should be controlled as SGI, for NRC purposes. However, as discussed in Comment 1 above on Part 70, information on the security of CAT I SSNM should be protected under NRC regulations as classified information. Therefore, in the final rule this paragraph should be revised to refer to Parts 25 and 95.

I believe that requirements for protection of CAT I, II, or III SNM under Parts 70 and 76 should be the same. Therefore, the graded approach I recommended in Comment 1 above [for CAT II and III SNM] should also be applied to certificate holders regulated under Part 76.

With respect to the language in the proposed rule referring to protecting DOE’s UNCI information to a level equivalent to SGI, I support such an approach. However, I believe the NRC should clarify whether UNCI information should be protected to SGI or SGI-M.

Recommendations:

A) § 76.113 should be revised in the final rule to protect information on CAT I SSNM in a manner consistent with Part 70 (i.e., as classified information).

B) §§ 76.115 and 76.117 should be revised in the final rule to protect information on CAT II and III SNM in a manner consistent with Part 70 (i.e., utilizing the graded approach recommended in Comment 1 above).

C) § 76.113 should be revised in the final rule to specify more clearly to what equivalent NRC requirement certificate holders should protect UNCI.

6. In § 150.15 of the proposed rule a new paragraph (a)(9) would be added to indicate that persons in agreement states remain under the jurisdiction of the NRC's regulations for control of SGI-M, rather than the Agreement State the person is located in. For example, in the current § 150.15(a)(1) indicates that persons in Agreement States are not exempt from the Commission's jurisdiction with respect to construction and operation of a production or utilization facility (i.e., jurisdiction over such facilities is reserved to the NRC). However, the proposed rule only reserved regulation of SGI-M under §§ 73.21 and 73.23 to the NRC, but not SGI under § 73.22. I believe that the NRC should retain full authority over all SGI regulations. Persons in Agreement States may receive SGI information from persons outside that state, e.g., advance notification of SNF and HLW shipments; however, they should remain subject to the NRC regulations under the provisions of § 73.22 for this information. Without this language, jurisdictional and regulatory clarity cannot be assured.

Recommendation: § 150.15(a)(9) should be revised in the final rule to include § 73.22.

7. The proposed rule did not include within its scope imposing increased safeguards information requirements on Part 110 license application, license conditions, and advance notifications, including schedules and itineraries. However, the proposed rule set forth changes to the regulations in Parts 30, 40, 50, 63, 70, 72, etc. to require licensees and applicants for licenses to protect safeguards information under the provisions of Part 73 for domestic transportation activities that are effectively identical, especially in the domestic portion of the international shipment. Exports and imports of SNM, SNF, byproduct material, and source material should require information security requirements equivalent to that required for domestic transportation of these materials under Parts 70, 30, and 40, respectively. For example, I believe that the international shipment of plutonium-239 to France in 2004, should have had greater information security requirements on the license application and supporting information. I note that the Commission published a proposed rule on Part 110 (69 FR 55785; 07/16/2004) that significantly increased the security measures for export or import of certain byproduct material shipments. However, no information security provisions were also included in that proposed rule either.

Accordingly, changes should be made to §§ 110.31, 110.32, and 110.50 consistent with the changes set forth in the proposed rule, as modified by the above comments, e.g., use of a graded approach for SNM. I recognize that such changes are beyond the scope of the proposed rule published by the NRC for notice and comment (70 FR 7196); however, I believe the Commission needs to take prompt action to improve the information security associated with export and import shipments. This could be accomplished by renouncing the proposed rule to include part 110 and these sections. Alternatively, the NRC could issue a new proposed rule concurrent with issuance of the final rule that addresses Part 110. I believe that given urgency the Commission attaches to this rulemaking, this second approach is preferable and the issuance of a final rule should not be unnecessarily delayed.

Recommendation: The NRC issue a new proposed rule concurrent with the issuance of this final rule, or as expeditiously as possible. The new proposed rule should address information security requirements for appropriate export and import shipments in a manner that is consistent with this final rule.