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From: "Robert Rutkowski" <rutkowski@terraworld.net>
To: <SECY@nrc.gov>
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Subject: RIN 3150-AH57 - Proposed Rule for "Protection of Safeguards Information"

Via E-Mail: SECY@nrc.gov

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

RE: RIN 3150-AH57 - Proposed Rule for "Protection of Safeguards Information"

To whom it may concern:

This comment is in response to the Nuclear Regulatory Commission's (NRC's) Proposed Rule for "Protection of Safeguards Information" that was published in 70 Federal Register 7196 (February 11, 2005). I oppose the proposed rule's expansion of controls for unclassified "Safeguards Information" (SGI).

Specifically, the proposed rule is overreaching in scope and expanding the cloak of secrecy over the NRC and its licensees and applicants. The rules also inhibit the public's right to know how the federal government operates in the areas of byproduct material, source materials, nuclear power plants, and geologic repositories (including Yucca Mountain, Nevada) among others to "protect" SGI. All those categories are new SGI designated sections. Such a sweeping policy poses a significant threat to our nation's security as well as to the rights of American citizens.

William Leonard, Director of Information Security Oversight Office in the National Archives and Records Administration (the agency that governs classified information), stated at a recent congressional hearing: "In certain circumstances, even with respect to national security information, classification can run counter to our national interest." Secrecy conveniently conceals safety failings from journalists, concerned citizens, and nonprofit watchdogs who play a vital role in holding government accountable and making public policy stronger. Without sunshine and public debate, our homeland security vulnerabilities are festering behind closed doors. The end result is a more - not less - vulnerable nation.

The statutory definition of "safeguards information" is "information which specifically identifies a licensee's or applicant's detailed" plans for "the physical protection of special nuclear material," "the physical protection of source material or byproduct material," or "the physical protection of and the location of certain plant equipment vital to the safety of production or utilization facilities." 42 U.S.C. § 2167(a); see 10 C.F.R. § 73.2. In other words, information that "might compromise the security of nuclear facilities." NRC Regulatory Issue Summary 2003-08, Protection of Safeguards Information from Unauthorized Disclosure, April 30, 2003, at p. 1. The NRC claims that the release of SGI "could result in harm to the public health and safety and the Nation's common defense and security, as well as damage to the Nation's critical infrastructure, including nuclear power plants and other facilities licensed and regulated by the NRC." Id.

Access to SGI is on a "need-to-know" basis. 10 C.F.R. § 73.21(c); see also 10 C.F.R. § 73.2 (defining "need to know"). Based on that standard, in essence, NRC's message is nothing more than "err on the side of caution - NRC licensees and applicant must protect all information." That message, however, is too broad and overreaching, preventing genuine internal and external debate that may improve nuclear safety.

I am also troubled by the criminal and civil penalties that may result from release or unauthorized disclosure of SGI. Undoubtedly, those penalties will have an internal and external chilling effect that may impact the exchange of information resulting in a reduced level of safety. It is important to note that any willful attempts to hide non-protected information do not result in similar penalties.

The NRC's rule would "protect" additional types of security information held by an expanded group of

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licenses as SGI. I believe the use of any unclassified designation, including SGI, to "protect" information is an abuse of power, unless it is created with the intent that all information is public and that any exemptions to the public release of information, should be the exceptions rather than the rule. Furthermore, the NRC must have a genuine system for designating officials who may withhold SGI, provide oversight of that system, and allow for administrative agency appeals of any denial of SGI. The current law (42 U.S.C. § 2167(c)) permits judicial review pursuant to the Freedom of Information Act (FOIA at 5 U.S.C. § 552(a)(4)(B)), however, litigation is inappropriate for initial appeals. Unlike FOIA, the current statutes, regulations, and proposed rule do not permit someone holding SGI "to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552 (a)(6)(A)(I)).

Additionally, the NRC must not forget that the designation of SGI does not permit it to withhold all information. Even with classified national security or FOIA'able information, courts have repeatedly compelled agencies to carefully review withheld documents and release non-classified, segregable information. See, e.g., Donovan v. FBI, 806 F.2d 55, 60 (2d Cir. 1986).

Those rights and duties have been the cornerstone of FOIA and, to a limited extent, the government's process for classifying information. Creating a system without such rights, duties, and obligations would abuse the open government principals on which this country was founded - an open government that is for the people. In comparison, the NRC's rules on SGI makes the government's classification system and FOIA look like tremendous open government vehicles, which is far from their reality.

I recognize the need for secrecy of certain government activities and information. The NRC is making a leap in the wrong direction - a leap that could harm homeland security by silencing those who are trying to improve nuclear security for all Americans. The NRC's proposed rule could create, at the least, an environment fostering waste and fraud, and at worst, possibly endanger American lives. I urge the NRC to reconsider the proposed rule's expansion of SGI to ensure that it balances the government's need to legitimately protect some government information against the public's right to know.

Thank you for the opportunity to bring these remarks to your attention at this critical time.

Mindful of the enormous responsibilities which stand before you, I am,

Yours sincerely,
Robert E. Rutkowski

cc:
Nancy Pelosi
President George Bush

2527 Faxon Court
Topeka, Kansas 66605-2086
P/F: 1 785 379-9671
r_e_rutkowski@myrealbox.com

CC: "Nancy Pelosi" <sf.nancy@mail.house.gov>, "George W. Bush" <president@whitehouse.gov>

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