

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

PR 2,30,40,50,52,60,63,70,71,72,73,76 & 150
(71FR64003)



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DOCKETED
USNRC

January 4, 2007 (8:40am)

OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

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January 2, 2007

Sent electronically to http://ruleforum.llnl.gov/cgi-bin/utlnader/sgi_drl_plain?st=

Secretary,
U.S. Nuclear Regulatory Commission,
Washington, DC 20555-00001
Attn: Rulemaking and Adjudications Staff

re: State of Utah's Comments on NRC's Proposed Rules for the Protection of Safeguards Information as it Relates to Adjudications (RIN 3150-AH57)

The State of Utah submits these comments on NRC's proposed rules for protection of safeguards information (SGI), as the rules relate to adjudications. The State's comments, presented in detail below, note the potential for creating a biased forum and unfairly prejudicing an intervenor, such as:

1. The "need to know determination" may be made by an adversary and the rules may require the divulgence of the names of non-testifying witness without any of the qualifying tests required by Federal Rules of Civil Procedure (F.R.C.P.) Rule 26(b).
 2. It is manifest (because of the civil and criminal penalties that may attach) that intervenors will be driven to over-classify adjudicatory material as SGI if they are required to self-identify what information is SGI.
 3. Neither the proposed rules in general, nor the handling procedures or the specific exceptions to criminal background checks, appears to gives a party to an NRC proceeding any protection against disclosure (even under seal) of SGI in a judicial appeal of issues that may contain SGI.
- A. Access to SGI and Protection of Attorney Work Product

NRC's proposed rules for the protection of SGI center, in part, around a "need to know" determination. Based on the definition of "need to know" for adjudicatory purposes, the person making a "need to know" determination appears to be a party adverse to an intervenor. Rule 73.1 proposes that the originator of the information makes the determination whether "the information is necessary to enable the proposed recipient to proffer and/or adjudicate a specific contention."

In some instances this could be the applicant,¹ whose self-interest in non-disclosure will likely cause it to be unable to render an impartial judgment. Where there is dual possession of SGI, the NRC staff makes the determination, who again will be a party adverse to an intervenor.

A determination of "need to know" in an adjudicatory setting, and appeal from an adverse determination, ignores the protections of F.R.C.P. Rule 26(b). As proposed by rule 2.336(f)(1)(iv), when "[p]articipants [in an NRC adjudicatory proceeding], potential witnesses, and attorneys" are denied access to SGI, they may seek to have the Chairman of the Atomic Safety and Licensing Board appoint an officer, other than the presiding officer, to review that adverse "need to know" determination. However, the party with the adverse ruling has no protection from disclosing privileged information, such as confidential details about a non-testifying witness, from an adversary in the adjudicatory proceeding, *i.e.*, the NRC staff.

An appeal of an adverse SGI ruling must be served, along with any additional information, on the NRC staff. In addition, rule 2.336(f)(1)(iv) states: "the NRC staff will file a response indicating whether the request and additional information has caused the NRC Office of Administration to reverse its adverse determination." In such instances, NRC's Office of General Counsel would presumably be responsible for filing the response and providing legal advice to the Office of Administration. There is no prohibition on the same NRC counsel representing the NRC Office of Administration staff and at the same time representing NRC staff (*e.g.*, from the Spent Fuel Projects Office) in the adjudicatory proceeding. This is clearly a conflict of interest.

Even more troubling is the likelihood that it will be NRC staff who are reviewing the license application (a party adverse to an intervenor), who will have custody of the SGI (*e.g.*, applicant's response to requests for additional information). There is no constraint under the rules on those same NRC reviewing staff or its counsel from assisting the Office of the Administrator in making a determination whether SGI is or is not necessary for an intervenor to proffer or adjudicate a contention. Such situations bias the SGI determination and unfairly open up intervenor's privileged information to an adverse party without any consideration of the F.R.C.P. Rule 26(b) protections.

In order to obtain access to SGI, an intervenor's litigation strategy and work product should not be subject to disclosure to an adverse party. Given NRC's stringent contention filing requirements, it will often be necessary for an intervenor to have an expert, under the direction of an attorney, review SGI documents to determine whether or not to file a contention, whether other experts should be retained, and for a variety of other reasons. Under the federal rules of civil procedure, such non-testifying persons and the attorney's thoughts and mental processes are shielded from disclosure unless a party seeking disclosure (*e.g.*, NRC staff) makes the showing required by Rule 26(b). The proposed rules may well deprive an intervenor of those customary protections.

¹ An applicant may have sole custody of information it has classified as SGI (*e.g.*, an engineering analysis) that, apart from being SGI, would otherwise need to be divulged in discovery.

If an attorney in the proceeding requires access for SGI, based on the same concerns as described above, his or her rationale for "need to know" may divulge an attorney's work product or litigation strategy to the NRC staff and its counsel involved in the adjudicatory proceeding, again in derogation of Rule 26(b).

NRC case law clearly recognizes the attorney work product doctrine and has held that, in the normal course of litigation, it is not easily overridden. Texas Utility Co. (Commanche Peak Steam Electric Generating Units 1 & 2), LBP-84-50, 20 NRC 1464, 1473 (1984). Moreover,

Attorney work product is ordinarily given substantial deference in shielding from discovery an attorney's inner thought processes to enable the attorney to best prepare a client's case. It provides a "zone of privacy" within which attorneys may weigh the merits of their case and determine a litigation plan from which to proceed.

Id. However, in an NRC adjudicatory proceeding, where an intervenor must rely on SGI to develop its case, those Rule 26(b) protections are summarily overridden.

Intervenors should not be required to forego well-established Rule 26(b) protections in order to have access to SGI. If the Commission proceeds with the structure of the rules as proposed, it must ensure that an SGI determination is made by an unbiased NRC entity and that intervenors are accorded the full protection of Rule 26(b), including non-disclosure of attorney work product to other parties in the adjudicatory proceeding. The information submitted to the NRC Office of Administration should not be accessible to staff or its counsel who may be involved in the adjudicatory proceeding. At a minimum, the Commission should require such information, and NRC Office of Administration staff and its counsel (*i.e.*, NRC lawyers who are in any way involved in advising on any SGI decisions or review), be screened from staff and its counsel who are involved in the related NRC adjudicatory proceeding. Only then will intervenors be able to participate on a level playing field in an NRC adjudicatory proceeding.

B. Classification and De-classification of SGI

NRC's proposed rules expand the scope of material that could be classified as SGI. Moreover, NRC has not thought through the ramifications its rules will have on records generated during NRC adjudicatory proceedings. The Commission must make it less cumbersome for persons swept up by these rules to discern what should be treated as SGI and, more importantly, create a process for de-classifying material that is broadly labeled SGI in NRC adjudicatory proceedings.

Proposed rule § 73.22(d) requires the cover page of each document determined to be SGI contain the "name, title, and organization of the individual authorized to make a Safeguards Information determination," the date the determination was made, and a notation that unauthorized disclosure will be subject to civil and criminal sanctions. Under threat of sanctions, intervenors will be driven to over-classify adjudicatory material they generate as SGI.

Proposed rule § 73.22(a) generally requires engineering and safety analyses to be treated as SGI if unauthorized disclosure could “reasonably be expected to have significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of . . . sabotage” of nuclear materials. Frequently, the basis of a contention will rely on an engineering and safety analysis prepared by intervenor’s expert. In such cases, the standards for determining whether information is SGI may be similar to determining whether a contention is admissible (adverse effect on public health, safety or common defense). Therefore, requiring an intervenor to determine whether its engineering and safety analyses (or other documents) are SGI when submitting a contention or other litigation material to the NRC, is an undue burden to place on an intervenor, especially when there is the threat of civil and criminal sanctions.

It is self-evident that some documents are SGI (e.g. physical security plans). Sometimes, however, it is difficult to discern whether the information is SGI. For example, in the *Private Fuel Storage LLC* proceeding (Docket No. 72-22 ISFSI) (“PFS”), the applicant decided to make certain modifications to a generic storage cask. Utah submitted a late-filed contention labeled “may contain safeguard information” and later the staff (Office of Nuclear Security and Incident Response) deemed only a couple of sentences in that document to be SGI. This willingness by NRC to classify documents in the PFS proceeding was somewhat of an aberration because the State requested other documents to be portion marked as SGI but was informed by staff counsel: “We will not be portion marking other people’s documents. It takes too much of our resources to do that and it’s not our policy to do that.” PFS Tr. 14851 (May 18, 2004).

In another rare instance when the staff evaluated whether a document was SGI, it lifted the SGI label from the State’s radiation dose analysis. However, as the document was later introduced into a closed hearing and the transcript denoted “contains safeguards information,” it is not obvious whether or not the document should be treated as SGI. Moreover, a hearing closed because some portion of it may divulge SGI, creates an incredible burden on record-keeping and document control because, although much of what takes place in the hearing is not SGI, all transcripts and associated hearing documents are treated and stored as SGI.

The NRC should allow a party in an adjudicatory proceeding to submit documents marked “may contain safeguard information” whereby the material would be transmitted, controlled and stored as SGI pending the staff’s unbiased determination (*see* Part A above) whether any, all, or part of the document was indeed SGI. To require otherwise would chill public participation and an open litigation forum.

When a document no longer meets the SGI criteria in Part 73, it must be declassified. Proposed rule 73.22(h) states: “The authority to determine that a document may be decontrolled shall be exercised only by the NRC or with NRC approval, or if possible, in consultation with the individual or organization that made the original determination.”

Declassification of SGI is a positive attribute. However, there are no established mechanisms for an intervenor to request the staff to decontrol documents, or part of documents.

For example, hearings closed because a small portion of it may reveal some safeguards information creates a mass of documents that must be controlled and stored as SGI (*e.g.*, testimony, exhibits, transcripts, etc.). Furthermore, destruction of all documents may not be an option because of a party's internal document retention procedures.

Participating in an SGI proceeding is cumbersome, costly and a restraint on open communications with the Board, other parties and between lawyers and their experts. Devising a workable system within NRC to label documents "SGI" only when they are "truly" SGI would go a long way towards creating an open litigation forum that welcomes public participation, while at the same time protecting national security.

C. Appellate Review

The Atomic Energy Act (AEA) provides that "[a]ny final order entered in any proceeding of the kind specified in subsection [189(a) (*e.g.*, licensing a nuclear facility)] . . . shall be subject to judicial review." AEA § 189(b)(1), 42 U.S.C. 2239(b)(1). The AEA also provides that when the Commission is exercising authority over safeguards information, it shall "apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security." AEA § 147, 42 U.S.C. § 2167. However, the proposed changes to Part 73, in derogation of the Act, may impinge on a party's ability to independently prosecute a judicial appeal of NRC licensing decisions involving SGI.

Neither the proposed rules in general, nor the handling procedures or the specific exceptions to criminal background checks, appears to give a party to an NRC proceeding any protection against disclosure (even under seal) of SGI in a judicial appeal of issues that may contain SGI.

Courts are well equipped to protect sensitive information, such as SGI, from public disclosure. For example, the United States Court of Appeal for the District of Columbia has a local rule that specifically deals with such matters: "Any portion of the record that was placed under seal . . . before an agency remains under seal in this court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed." D.C. Cir. Rule 47.1. A party, therefore, should not be constrained by NRC's proposed changes to Part 73 from filing (under seal) petitions or briefs in a judicial proceeding that may contain SGI.

The proposed rules are unclear whether, to avoid the threat of sanctions, a party should obtain pre-authorization from the NRC prior to filing SGI with a court. Such a situation would interfere with a party's unfettered right to seek judicial review, the jurisdiction of the court of appeals over NRC final orders, and comity between the agency and the court. *See* 42 U.S.C. § 2239, 28 U.S.C. § 2342, Public Service Co. of New Hampshire, (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365 (1976). Perhaps there are other rules that address this issue but if there are not, the Commission should revise Part 73 to ensure that NRC rules defer to established court procedures so that a party may independently file SGI under seal with the court.

Secretary, U.S. Nuclear Regulatory Commission,
Attn: Rulemaking and Adjudications Staff
State of Utah Comments, page 6

The State of Utah thanks you for your consideration of its comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor
Assistant Attorney General

cc: Dr. Dianne R. Nielson,
Executive Director
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From: Carol Gallagher
To: Evangeline Ngbea
Date: 01/03/2007 5:28:33 PM
Subject: Comment letter on Protection of Safeguards Information Proposed Rule

Attached for docketing is a comment letter on the above noted proposed rule that I received via the rulemaking website on 1/02/07.

Carol

Mail Envelope Properties (459C2E0C.A12 : 5 : 35764)

Subject: Comment letter on Protection of Safeguards Information Proposed Rule
Creation Date 01/03/2007 5:28:28 PM
From: Carol Gallagher
Created By: CAG@nrc.gov

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MESSAGE	545	01/03/2007 5:28:25 PM
TEXT.htm	414	
1485-0003.pdf	1312923	01/03/2007 5:26:36 PM

Options

Expiration Date: None
Priority: Standard
ReplyRequested: No
Return Notification: None

Concealed Subject: No
Security: Standard

Junk Mail Handling Evaluation Results

Message is not eligible for Junk Mail handling
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