

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN: 3150 - AI08

Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive
Unclassified Non-Safeguards Information and Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC or Commission) is proposing to amend its regulations to provide for expedited (and in this case, “interlocutory”) review by the Commission of orders on requests by potential parties for access to certain sensitive unclassified non-safeguards information (SUNSI) and Safeguards Information (SGI).

DATES: The comment period expires on **[insert 30 days from date of publication]**.

Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number RIN 3150-AI08 in the subject line of your comments. Comments

on rulemakings submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including personal information such as social security numbers and birth dates in your submission.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via NRC's rulemaking web site at <http://ruleforum.llnl.gov>. Address questions about our rulemaking web site to Carol Gallagher (301) 415-5905; e-mail cag@nrc.gov. Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone (301) 415-1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415-1101.

Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking web site at <http://ruleforum.llnl.gov>.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into NRC's Agencywide Document Access and Management System (ADAMS), which provides

text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Patrick Moulding, Attorney, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-2549, e-mail pam3@nrc.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion
- III. Voluntary Consensus Standards
- IV. Environmental Impact: Categorical Exclusion
- V. Paperwork Reduction Act Statement
- VI. Regulatory Analysis
- VII. Backfit Analysis
- VIII. Plain Language

I. Background

Commission regulations in 10 CFR part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," govern the conduct of NRC adjudicatory proceedings. Potential parties who may request a hearing or petition to intervene in a hearing under 10 CFR part 2 may need access to sensitive unclassified non-safeguards information (SUNSI) (including, but not limited to, proprietary, confidential commercial, and security-related

information) and to Safeguards Information (SGI) as defined in 10 CFR 73.2 to meet Commission requirements for hearing requests or for intervention.

In order to facilitate access to the information described above, the NRC staff has developed, and the Commission has approved for public comment,¹ draft access procedures to address receipt of such information by potential parties. In addition, the Commission is completing a final rulemaking to update its regulations governing access to and protection of SGI.² Development of the draft procedures for access by potential parties and of the SGI rule is separate from, and not a part of, the proposed rulemaking to amend 10 CFR 2.311, which is the subject of this document. The proposed revisions to 10 CFR 2.311 would provide for interlocutory review by the Commission of access determinations made pursuant to those procedures, but § 2.311 would not control how the initial access determinations are made. However, a brief discussion of the purpose of those procedures is necessary to explain the Commission's intent in revising § 2.311.

Under the draft procedures for information access, a *Federal Register* notice of hearing, or a notice of opportunity for hearing on a licensing or other regulatory action, would instruct persons who claim a need for access to SUNSI or SGI in order to prepare a hearing request or intervention petition to submit a request by letter to specified Commission offices, within a specified time period from the issuance of the notice. The letter request for either SUNSI or SGI would have to contain certain elements, such as a description of the NRC licensing or enforcement action at issue (with citations to the relevant FRN); a description of the proposed party's particular interest that could be harmed by the potential NRC action; and

¹ The NRC staff intends to make those draft access procedures available for public comment as soon as practicable to coincide with the publication of this proposed rule.

² See "Protection of Safeguards Information," (71 FR 64004; Oct. 31, 2006). The comment period on that proposed rule expired January 2, 2007, and a final rule is under development.

the identity of the individual requesting access to the information and that individual's need for the information in order to meaningfully participate in the adjudicatory proceeding. It is anticipated that access to SGI also would require: (1) a showing of the technical competence of the requester to understand and use the requested information to provide the basis and specificity for a proffered contention and (2) completion of a background check to establish trustworthiness and reliability (including fingerprinting for a criminal history records check and a credit check release). Because such background checks may take up to several months to complete, the Commission has also approved development of a "pre-clearance" process by which potential parties who may seek access to SGI could request initiation of the background check prior to a notice of hearing and thus minimize delays in the preparation (and, if appropriate, adjudication) of security-related contentions. The NRC staff intends to propose such a process in conjunction with the aforementioned draft access procedures that will be made available for public comment.

Based on an evaluation of the information submitted, the NRC staff would determine whether (1) there is a reasonable basis to believe that a potential party is likely to establish standing to intervene or to otherwise participate as a party in an adjudicatory proceeding and (2) the proposed recipient of the information has demonstrated (i) a need for SUNSI or (ii) "need to know" for SGI and that the proposed recipient is trustworthy and reliable. If the request for access to SUNSI or SGI is granted, the terms and conditions for this access would be set forth in a draft protective order and affidavit of non-disclosure. If the request for access to SUNSI or SGI is denied by the NRC staff, the staff would briefly state the reasons for the denial. The requester could challenge the staff's adverse determination or denial of access. Depending on the applicable access procedures and provisions of the SGI rule (once they become effective), such a challenge would be filed with any presiding officer assigned to the

proposed NRC licensing action; or if no presiding officer has yet been assigned, with the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, or if he or she is unavailable, with another administrative judge, or with an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or, if another officer has been designated to rule on information access issues, with that officer.

As explained above, requests for such information at this stage of a proceeding would initially be made to and decided by the NRC staff. However, that feature of the draft access procedures would not apply to: (1) license transfer adjudications (for which the Commission has already chosen a different procedural approach),³ and (2) the pending High Level Waste (HLW) Pre-License Application proceeding (PAPO), or any subsequent adjudication regarding the Department of Energy's expected application for a construction authorization for a HLW repository.⁴

It is expected that the draft access procedures also would include time periods for submission of requests for access, for staff determinations, for filing of contentions, and for challenges to appeal adverse staff determinations. These periods would be intended to minimize the potential for delay in the admission of contentions.

As evident in the discussion that follows, this proposed rulemaking deals with interlocutory review (review permitted immediately rather than at the end of a proceeding) by

³ See *Consolidated Edison Co.* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 231 (2001); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000). In these decisions, the Commission established a procedure for making confidential commercial information available to petitioners to intervene in which the applicant and petitioners may negotiate a confidentiality agreement or a proposed protective order. If no agreement can be reached, one or more individuals may move for issuance of a protective order.

⁴ The Commission has directed that the draft procedures for access to SUNSI and SGI not apply to the pending PAPO proceeding or the subsequent proceeding on the HLW repository.

the Commission of an order on such an “appeal.” The proposed amendments to 10 CFR 2.311 recognize the importance of access to information on the proposed licensing action by potential parties in determining whether to request a hearing or to intervene in a hearing or to support these requests. Extending the opportunity to seek interlocutory review by the Commission of orders relating to these requests could enhance both public involvement in NRC adjudicatory proceedings and the effectiveness and efficiency of these proceedings.

II. Discussion

Section 2.311 provides for “interlocutory” review by the Commission of Orders issued by a presiding officer or Atomic Safety and Licensing Board⁵ on requests for hearing or petitions to intervene and selection of hearing procedures. However, there is no comparable provision for interlocutory Commission review of orders relating to requests by potential parties for access to information described previously. To address this omission, the Commission is proposing changes to the rules of practice in Part 2 as described below.

The definitions in § 2.4 would be modified to add a definition of *Potential party* as follows: *Potential party* means any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2, other than hearings conducted pursuant to Subparts J and M of Part 2.

This proposed definition does not rely on the definition of *Party* in § 2.1001 of Subpart J, applicable to a *party* in a proceeding for the issuance of licenses related to a high-level radioactive waste (HLW) geologic repository. As stated in § 2.1001, the term *Party* is defined

⁵ The term “Atomic Safety and Licensing Board” would be deleted because the definition of “presiding officer” in 10 CFR 2.4 includes that term.

only for purposes of Subpart J of part 2.⁶ Similarly, the proposed definition by its terms, does not apply to a proceeding conducted pursuant to Subpart M (“Procedures for Hearings on License Transfer Applications”).

The proposed § 2.311 would allow potential parties (persons who may intend to request a hearing or petition for leave to intervene in a hearing), to seek expedited review by the Commission of certain orders. Among these are orders relating to a request by potential parties for access to SUNSI and SGI. This amendment is necessary to provide these requesters or petitioners an avenue for promptly obtaining Commission review of such determinations, which might ultimately result in denial of a request for a hearing or for leave to intervene for failure to meet the requirements for standing and admissibility of contentions. Specific proposed changes to § 2.311 are discussed below.

The proposed rule would amend 10 CFR 2.311(a) by making the following changes. In addition to deletion of the reference in paragraph (a) to the Atomic Safety and Licensing Board, paragraph (a) would be further modified. First, language would be added to include orders other than those issued by the presiding officer: e.g., if a presiding officer has not been designated, orders of the Chief Administrative Judge, or if he or she is unavailable, of another administrative judge, or of an administrative law judge with jurisdiction pursuant to § 2.318(a). This proposed change recognizes that a presiding officer might not have been designated at the stage in which a potential party is seeking interlocutory review by the Commission. Also, paragraph (a) would be divided into paragraphs (a)(1), (a)(2) and (a)(3), and a new paragraph (b). Paragraphs (a)(1) and (a)(2) would retain orders on a request for hearing or petition to intervene as orders on which interlocutory review by the Commission may be sought. New

⁶ See discussion in Section I regarding the inapplicability of the interlocutory appeal process that is the subject of this proposed rule to the pending HLW PAPO proceeding or to any subsequent adjudication regarding the expected application by DOE for a construction authorization for a HLW repository.

paragraph (a)(3) would add to these categories an order relating to a request for access to SUNSI (including, but not limited to, proprietary, confidential commercial, and security-related information) and SGI. Access to this information could be necessary for a potential party to determine whether to request a hearing or petition to intervene or to support such requests. This paragraph would also add language authorizing an appeal, in connection with such a request, of an order of an officer designated to rule on information access issues. This language is necessary because, as is contemplated by the draft access procedures discussed in Section I above and by the Commission's final rule in development concerning SGI, a judge may be specifically designated to adjudicate information access issues. The remainder of paragraph (a), addressing requirements relating to such matters as the initiation and filing of appeals, would be redesignated as paragraph (b).

In light of the above modifications, current paragraphs (b), (c), and (d) would be redesignated as paragraphs (c), (d), and (e), respectively. In redesignated paragraph (c), an order denying a request for access to the information described in paragraph (a), would be included as an order appealable by the petitioner/requester on the question as to whether the request and/or petition should have been granted. Former paragraph (c), redesignated as paragraph (d), concerns appeals by a party other than the requester/petitioner. This paragraph would be modified to address in paragraph (d)(1) appeals of orders granting a petition to intervene and/or hearing and in paragraph (d)(2), appeals of orders granting requests for access to information. The appealable issue in paragraph (d)(2) is whether the request for access should have been denied in whole or in part. Paragraph (d) in the current rule is redesignated as paragraph (e) but would be otherwise unchanged.

III. 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 is otherwise impractical. The NRC is proposing to permit potential parties to seek interlocutory Commission review of orders denying a request for access to information for the preparation of contentions. This action does not constitute the establishment of a government-unique standard as defined in the Office of Management and Budget (OMB) Circular A-119 (1998).

IV. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

V. Paperwork Reduction Act Statement

This proposed rule contains no 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.).

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

VI. Regulatory Analysis

A regulatory analysis has not been prepared for this regulation because it applies to the procedures to be used in NRC adjudicatory proceedings, and would not involve any provisions that would impose any economic burdens on licensees or the public.

VII. Backfit Analysis

The NRC has determined that the backfit rules (§§ 50.109, 70.76, 72.62, or 76.76) do not apply to this proposed rule because these amendments would not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required.

VIII. Plain Language

The Presidential memorandum dated June 1, 1998, entitled "Plain Language in Government Writing," published on June 10, 1998 (63 FR 31883) directed that the Government's documents be in plain, clear, and accessible language. The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the ADDRESSES caption of this document.

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; the Energy Policy Act of 2005, and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR part 2.

RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND FOR
ISSUANCE OF ORDERS

1. The authority citation for part 2 continues to read as follows:

Part 2 - Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders

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; sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 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. 10143(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. 161 b, 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. In § 2.4, a definition of *Potential party* is added in alphabetical order to read as follows:

§ 2.4 Definitions.

* * * * *

Potential party means any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2, other than hearings conducted pursuant to Subparts J and M of Part 2.

* * * * *

3. In § 2.311, the heading and paragraphs (a), (b), and (c), are revised and paragraph (b) is redesignated as (c), paragraph (c) is redesignated as paragraph (d) and paragraph (d) is redesignated as (e) to read as follows:

§ 2.311 Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedure, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information.

(a) An order of the presiding officer, or if a presiding officer has not been designated, of the Chief Administrative Judge, or if he or she is unavailable, of another administrative judge, or of an administrative law judge with jurisdiction pursuant to § 2.318(a), may be appealed to the Commission with respect to:

(1) a request for hearing,

(2) a petition to intervene, or

(3) a request for access to sensitive unclassified non-safeguards information (SUNSI), including, but not limited to, proprietary, confidential commercial, and security-related information, and Safeguards Information (SGI). An appeal to the Commission may also be taken from an order of an officer designated to rule on information access issues.

(b) These appeals must be made in accordance with the provisions of this section, within ten (10) days after the service of the order. The appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief. Any party who opposes the appeal may file a brief in opposition to the appeal within ten (10) days after service of the appeal. The

