# POLICY ISSUE
## NOTATION VOTE

August 3, 2007 SECY-07-0129

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: REVISIONS TO POLICY GOVERNING PUBLIC AVAILABILITY OF INFORMATION ASSOCIATED WITH CATEGORY I FUEL FACILITIES

PURPOSE:

To obtain Commission approval of proposed revisions to the U.S. Nuclear Regulatory Commission's (NRC) policy regarding public availability of information pertaining to Category I fuel facilities that provide services under contract to the U.S. Department of Energy (DOE). The revised policy would make more information available to the public.

BACKGROUND:

In conjunction with the 2007 Agency Action Review Meeting and the development of the 2006 Abnormal Occurrence Report to Congress, the Commission directed the staff to re-evaluate the criteria used to determine whether information associated with the Category I fuel facilities is made available to the public [see Staff Requirements Memorandum (SRM) M070530C, dated June 22, 2007]. The NRC staff developed its existing guidelines based on an assessment of the sensitivity of the information already in the public domain as of 2004. The staff transmitted these guidelines to the Commission in SECY-04-0155, "Request from Department of Energy Office of Naval Reactors to Designate Information Related to Nuclear Fuel Services, Inc. and BWX Technologies, Inc. as Official Use Only." In SECY-04-0155, the staff informed the Commission that it initiated action to deny public access to approximately 1,700 full text

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documents in the Agency-wide Documents Access and Management System (ADAMS), as well as about 10,000 documents in the Public Legacy Library, and planned to treat future correspondence and other documents related to the Category I fuel facilities [Nuclear Fuel Services (NFS) and BWX Technologies, Inc. (BWXT)] as, "Official Use Only" (OUO) Information, unless the documents contained Restricted Data or National Security Information.

Under an agreement that dates back to the late 1990s, DOE has served as the Cognizant Security Authority (CSA) for classified information at NFS and BWXT to avoid duplicative, and thereby potentially inconsistent, control of information security. In May 2004, DOE sent a letter to the NRC which stated that documentation pertaining to DOE activities pertaining to Naval Reactor programs at NFS and BWXT should be considered, at a minimum, OUO information. DOE's position was based on an analysis of publicly available information released by the NRC, and DOE expressed concern that public access posed a threat to national security. The staff prepared the 2004 guidelines in response to DOE's letter and although DOE's analysis focused on BWXT's and NFS's activities conducted under contract with DOE, the NRC staff adopted a policy resulting in a more comprehensive withholding of information associated with these licensees because of the similarities of processes and the potential value of information associated with non-DOE activities to potential adversaries.

On June 18, 2004, the staff responded to DOE/Naval Reactors (NR) stating that NRC agreed, with the exception of non-NR commercial information, that the future submission of information to the NRC regarding these two licensed facilities would be treated as OUO at a minimum, and would not be made publicly available. Based on numerous meetings between the NRC and DOE staff, NRC staff understood that DOE would provide guidance to NFS and BWXT for clearly marking sensitive information in a manner consistent with DOE's designation of the information as OUO. The NRC staff has implemented this approach since 2004, so most information regarding these two licensed facilities has been withheld from the public.

Recently, NRC's Congressional oversight committees have raised concerns with NRC's policy of withholding information, particularly with regard to the NFS spill event in March 2006. The NRC released limited information regarding the event in a notification to the International Atomic Energy Agency in May 2006 and in the 2006 Abnormal Occurrence Report to Congress, which was published in May 2007. In several letters, members of Congress expressed displeasure with NRC's failure to provide Congress with timely information on the March 2006 incident, but also with NRC's withholding policy. Congressmen Dingell and Stupak, in a letter to the Chairman of the NRC dated July 3, 2007, requested that the "NRC make every effort to withhold from public view only those documents that contain sensitive security information, and restore to the public view all other documents that have been withheld as a result of the August 2004 OUO policy." Congressmen Barton and Whitfield recommended the same approach in a letter to the Chairman also dated July 3, 2007. Senator Inhofe, in a letter to the Chairman dated July 13, 2007, also expressed concerns about the agency's information disclosure policies regarding NFS, as did Senators Carper and Voinovich in a July 17, 2007, letter to the Chairman. These concerns reinforced the Commission's direction to re-evaluate the 2004 policy.

DISCUSSION:

Following the terrorist attacks of September 11, 2001, the NRC conducted several reviews of information that was made publicly available, to determine whether public access should be

maintained or adjusted. The early reviews focused primarily on potentially sensitive information regarding nuclear power plants. DOE's request to the NRC to reduce public access of information pertaining to NFS and BWXT occurred in late Spring of 2004. Subsequent concerns in the Fall of 2004 regarding public accessibility to information that could be Security-Related Information prompted the NRC to deny public access to a large amount of information until it could be systematically screened to remove sensitive information that could be exploited by adversaries. This effort ultimately culminated in the establishment of a broad staff policy for protecting Sensitive Unclassified Non-Safeguards Information (SUNSI), which was announced and implemented in 2005 (Yellow Announcement No. 77, "Policy Revisions: NRC Policy and Procedures for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information").

The criteria for determining whether information pertaining to NFS and BWXT should be withheld from the public described in SECY-04-0155 predated the more systematic and broadly applicable guidelines contained in the SUNSI policy and procedures that were transmitted to the Commission in COMSECY-05-0054, "Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)." The earlier 2004 guidance resulted in the withholding of more information and is based on a less comprehensive security analysis by the NRC staff than the more refined guidelines that are being implemented for other facilities under the SUNSI policy.

Continued application of the policy set forth in SECY-04-0155 can be expected to prompt further questions about whether NRC is withholding information associated with NFS and BWXT that, if publicly disclosed, would not raise security concerns. For example, the staff recently concluded that the Confirmatory Order issued to NFS in February 2007 needed to be published in the Federal Register to allow interested parties the opportunity to request a hearing. In addition, NRC's decision to withhold the event notice for the March 2006 potential criticality event limited some nearby residents and other stakeholders of knowledge about the event and the response actions taken by NFS and the NRC. In publishing the Order, in the Federal Register, the staff determined that the security information protected as OUO information could now be decontrolled in the interest of public involvement since the security issues had been mitigated by corrective actions.

In re-evaluating the existing policy, the NRC staff recognized that the NRC is obligated, under Section 189 of the Atomic Energy Act, to make public information regarding proposed license amendments and enforcement orders, to allow members of the public the opportunity to request a hearing. The NRC had not been making many of these actions pertaining to NFS and BWXT public pursuant to the 2004 policy and is now in the process of making information about those actions available to the public in ADAMS. The NRC staff is also cognizant that the NRC, upon receiving a Freedom of Information Act (FOIA) request, is only permitted to withhold from the public information that falls within one of the FOIA exemptions.

As a result of its review, the staff developed three options for the Commission's consideration. These options are as follows:

**Option 1:** Apply SUNSI guidance to newly generated documents related to NFS and BWXT; except for proposed actions covered by Section 189 of the Atomic Energy Act, do not prepare and release redacted versions for the public of documents that contain sensitive information.

**Option 2:** Apply SUNSI guidance to newly generated documents related to NFS and BWXT; prepare and release redacted versions for the public.

**Option 3:** Apply SUNSI guidance to all documents related to NFS and BWXT; prepare and release redacted versions of documents containing sensitive information. This would include a retrospective review of documents previously generated that are now in non-public ADAMS. Under Section 189 of the Atomic Energy Act, make public, information regarding proposed license amendments and proposed Orders.

The pros and cons associated with each option, including the resources required to implement these options, are summarized in the Enclosure to this paper.

There is a separate issue associated with public access to licensing and oversight information related to safeguards and security at these fuel cycle facilities. The staff uses the SUNSI guidance, in conjunction with the classification guide "Classification and UCNI Guide for Safeguards and Security Information (CG-SS-4)," dated September 2000, to determine appropriate information controls. In 2006, the NRC revised its approach to withholding security oversight information under the Reactor Oversight Process as discussed in SECY-06-0036, "Public Disclosure Options Within The Security Cornerstone of the Reactor Oversight Process." Based on the experience to date with this revised approach, the staff is developing options to increase openness of its oversight of security at nuclear power plants and make comparable adjustments in the procedures for releasing security oversight information associated with the fuel cycle and spent fuel facilities. The staff will provide a paper to the Commission regarding these procedure changes by October 2007.

RECOMMENDATION:

As a result of the staff's re-evaluation, the staff recommends that the Commission adopt Option 3. The staff would implement it to the extent that resources are available to support the retrospective review of documents pertaining to NFS and BWXT. The work to implement this option is currently an unbudgeted activity. If no additional funds are authorized to perform this work, staff would reprogram resources allocated for two fuel cycle renewals which would delay licensing into FY-10. To accommodate resource constraints, the staff would use several rehired annuitants to assist in the document review to expedite the release of information consistent with the NRC's SUNSI guidance. Staff has determined that it would take approximately eight months to complete the retrospective review and release of documents.

COORDINATION:

The staff of DOE has reviewed the proposed policy and believes expectations for redacted documents need to be defined and the process for releasing documents needs to be addressed. DOE has noted that releasing documents in batches would facilitate the notification of stakeholders and the processing of questions. The NRC staff believes these issues can be addressed in communication plans and other implementation documents after Commission direction is received.

The General Counsel has reviewed this paper and has no legal objections. The Chief Financial Officer has reviewed this paper and has no resource objections.

***/RA/***

Luis A. Reyes
Executive Director
for Operations

Enclosure:
Revisions to Policy Governing Public
Availability of Information Associated
with Category I Fuel Facilities

The General Counsel has reviewed this paper and has no legal objections. The Chief Financial Officer has reviewed this paper and has no resource objections.

***/RA/***

Luis A. Reyes
Executive Director
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Enclosure:
Revisions to Policy Governing Public Availability of Information Associated with Category I Fuel Facilities

**ML072080036** **WITS 200700196/EDATS: SECY-2007-0225**

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**Revisions to Policy Governing Public Availability of Information Associated with Category I Fuel Facilities**

**Option 1:** Apply SUNSI guidance to newly generated documents related to NFS and BWXT; except for proposed actions covered by Section 189 of the Atomic Energy Act, do not prepare and release redacted versions for the public of documents that contain sensitive information.

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| Pros | 1. Applicable Agency-wide for all documents related to BWXT and NFS.<br>2. Appears to meet the intent of DOE/NR's concern in 2004, because all documents being marked by NFS and BWXT as sensitive will continue to be withheld, and the SUNSI guidance will withhold NRC-generated sensitive documents.<br>3. Staff knowledgeable in using SUNSI guidance.<br>4. Minimal resource commitment to review future DOE/NR and NRC-generated documents.<br>5. Affords members of the public an opportunity to request a hearing under Section 189 of the Atomic Energy Act.<br>6. Addresses recent inquiries involving events at NFS and BWXT.<br>7. Supports Agency value of Openness. |
| Cons | 1. Some additional unbudgeted resources required to perform SUNSI review.<br>2. Some additional training of DOE/NR contractor in applying SUNSI review criteria. |
| Resources Estimates | Estimated full-time equivalent (FTE): 0.4 each FY or $56K.<br><br>Assuming that NRC receives or prepares about 511 documents for BWXT and NFS per year, and we spend 1.0 hr per document to perform a SUNSI review, this would result in approximately 511 staff hours or 0.4 FTE. per year at $140K per FTE = $56K.<br><br>Budget Years: FY 07, continuous.<br><br>Work Impacts: Due to the small level of resource needs, the staff would implement Option 1 without the need for additional resources in the budget.<br><br>Resources Currently Budgeted: Unbudgeted activity. |

Enclosure

**Option 2:** Apply SUNSI guidance to newly generated documents related to NFS and BWXT; prepare and release redacted versions for the public.

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| Pros | 1. Applicable Agency-wide for all documents related to BWXT and NFS.<br>2. Appears to meet the intent of DOE/NR's concern in 2004, because all documents being marked by NFS and BWXT as sensitive will continue to be withheld, and the SUNSI guidance will withhold NRC-generated sensitive documents.<br>3. Staff knowledgeable in using SUNSI guidance.<br>4. Affords members of the public an opportunity to request a hearing under Section 189 of the Atomic Energy Act.<br>5. Addresses recent inquiries involving events at NFS and BWXT.<br>6. Supports Agency value of Openness. |
| Cons | 1. Additional unbudgeted resources required to perform SUNSI review, other than in Option 1 for the preparation of public versions of NRC generated documents.<br>2. Some additional training of DOE/NR contractor in applying SUNSI review criteria.<br>3. Some additional resources required for BWXT and NFS to prepare public versions of document. |
| Resources Estimates | Estimated FTE: 0.8 each FY or $112K<br><br>Assuming that NRC receives or prepares about 511 documents for BWXT and NFS per year, and we spend 1.0 hr for each document to perform a SUNSI review criteria and spend an additional 1.0 hr preparing a public version, this would result in approximately 1022 staff hours or 0.8 FTE. per year at $140K per FTE = $112K<br><br>Budget Years: FY 07, continuous<br><br>Work Impacts: For performing the SUNSI review, the staff would implement that portion of Option 2 without the need for additional resources in the budget. The staff would need approximately 0.4FTE or $56K of contract support for preparing a public version of documents.<br><br>Resources Currently Budgeted: Unbudgeted activity. |

**Option 3:** Apply SUNSI guidance to all documents related to NFS and BWXT; prepare and release redacted versions of documents containing sensitive information. This would include a retrospective review of documents previously generated that are now in non-public ADAMS.

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| Pros | 1. Applicable Agency-wide for all documents related to BWXT and NFS.<br>2. Appears to meet the intent of DOE/NR's concern in 2004, because all documents being marked by NFS and BWXT as sensitive will continue to be withheld, and the SUNSI guidance will withhold NRC-generated sensitive documents.<br>3. Staff knowledgeable in using SUNSI guidance.<br>4. Affords members of the public an opportunity to request a hearing under Section 189 of the Atomic Energy Act.<br>5. Addresses recent inquiries involving events at NFS and BWXT.<br>6. Supports Agency value of Openness. |
| Cons | 1. A significant amount of additional unbudgeted resources required to perform SUNSI review of documents in ADAMS currently listed as non-public. Other work activities would need to be delayed.<br>2. Some additional training of DOE/NR contractor in applying SUNSI review criteria. |
| Resources Estimates | Estimated full-time equivalent (FTE): 3.8 FTE or $532K.<br><br>Option 2 resources of 0.8 FTE per year. Plus, currently, there are approximately 1900 documents for BWXT and NFS in ADAMS from January 2004 to date, that are not currently publicly available, and if we spend 1.0 hr for each document performing a SUNSI review and an additional 1.0 hr for each document preparing a public version it would result in approximately 3800 staff hours or 2.7 FTE. For a total of 3.5 FTE or $490K (for FY-08) review resources. The staff also assumed that OCIO would require 0.20 hrs to return the documents or scan redacted documents into ADAMS. This would result in approximately 380 hrs or 0.3 FTE. Total: 3.8 FTE or at 140K per FTE = $532K.<br><br>Budget Years: FY 08 for retrospection review; FY 07, continuous, for prospective review.<br><br>Work Impacts: For performing the SUNSI review of the prospective portion of Option 3, the staff would implement that portion, without the need for additional resources in the budget. The staff would need approximately 3.4 FTE or $476K of contract support for preparing a public version of documents and having the redacted documents placed in ADAMS for the retrospective portion. If no additional funds are authorized by the Commission to perform Option 3, staff would reprogram 2.0 FTE and 250K currently allocated for performing 2 fuel cycle renewals. This will delay licensing decisions into FY-10.<br><br>Resources Currently Budgeted: Unbudgeted activity. |