

December 11, 2008

The Honorable Edward J. Markey
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Markey:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter of October 23, 2008, regarding the NRC's policies related to sharing documents with stakeholders. Specifically, you asked how documents associated with two Regulatory Issue Summaries (RISs) (RIS-2008-10 and RIS-2008-10, Supplement 1) were disseminated for stakeholder comment.

Public involvement in the NRC's activities is a cornerstone of strong, fair, and transparent regulation of the nuclear industry. The NRC recognizes the public's interest in the appropriate regulation of nuclear activities and provides opportunities for citizens to make their opinions known. The NRC elicits public involvement early in the regulatory process so that safety, security, and environmental concerns that may affect a community can be resolved in a timely and practical manner. The NRC considers this process to be vital to assuring the public that the NRC is making sound, balanced decisions about nuclear safety.

The NRC is proactive in pursuing public involvement in the decision making process as reflected in the NRC's policy statement, "Enhancing Public Participation in NRC Meetings." This policy statement describes the NRC's public meeting categories and establishes the requirements and guidance for public availability of draft documents and public participation in NRC meetings.

The NRC staff has reviewed Mr. Riccio's October 8, 2008 letter and determined that he is correct that the NRC did not post the two documents on the Documents for Comment webpage, which was a departure from agency internal guidance. However, as described below, the NRC staff did take several other steps to provide stakeholders with opportunities to comment on these draft documents through other mechanisms. The NRC provided stakeholders with opportunities to comment on draft RIS-2008-10 and draft RIS-2008-10, Supplement 1. Both of these communications describe existing statutory requirements governing the eligibility of individuals to possess firearms. Because these documents do not communicate new policy, they were not published in the Federal Register. The NRC staff held public meetings with the Nuclear Energy Institute on March 14, 2008, to discuss the original RIS and on September 3, 2008, to discuss the supplemental RIS. Both meetings were open to public attendance and participation and were noticed in advance on the NRC public website. To facilitate discussion and provide every stakeholder with the opportunity to review the documents before the respective meetings, the NRC posted an electronic version of the draft RISs on the NRC Public Meeting Schedule webpage adjacent to the meeting notice and agenda. The draft RISs were subsequently available at each public meeting so any attendee that did not have an opportunity to review the online version prior to the meeting would be able to review the draft RIS and provide comments.

Although an electronic copy of the PDF format of each draft RIS was posted in advance of each meeting on the NRC's "Public Meeting Schedule" webpage along with the notice of the meeting, the draft RISs were not posted to the "Documents for Comment." This is a departure from Management Directive 3.5, "Attendance at NRC Staff Sponsored Meetings." The staff posted draft RIS 2008-10, Supplement 1, to the "Documents for Comment" webpage following receipt of the October 8 letter from Greenpeace.

Detailed responses to the questions contained in your letter are provided in the enclosure. If you have any additional questions about the NRC activities related to sharing draft documents with stakeholders, please do not hesitate to contact me.

Sincerely,

/RA/

Dale E. Klein

Enclosure: Response to Questions

Response to Questions

Question 1. According to the Greenpeace letter, the NRC staff afforded the Nuclear Energy Institute (NEI) an exclusive opportunity to comment on two Regulatory Issue Summaries (RIS) concerning Federal Firearms Background Checks and Individuals Under a Federal Firearms Disability (RIS-2008-10 and RIS-2008-10, Supplement 1, respectively). Is this true? If so, who at the NRC authorized the activity and to whom in the industry were the documents provided?

Answer 1.

The NRC did not provide NEI with an exclusive opportunity to comment on the two draft Regulatory Issue Summaries (RIS-2008-10 and RIS-2008-10, Supplement 1). The NRC provided all stakeholders the opportunity to comment on the two draft Regulatory Issue Summaries (RISs). The NRC staff held a public meeting with NEI on March 14, 2008, to discuss the original RIS and on September 3, 2008, to discuss the supplemental RIS. Both meetings were open to public attendance and participation and were noticed in advance on the NRC public website. Draft RIS 2008-10 and draft RIS 2008-10, Supplement 1, were not posted to the Documents for Comment webpage prior to the public meetings which was a departure from our internal guidance. However, to facilitate discussion and provide every stakeholder with the opportunity to review the documents before the respective meetings, the NRC posted an electronic version of each draft RIS on the NRC Public Meeting Schedule webpage adjacent to the related meeting notice and agenda. The draft RISs were subsequently available at each public meeting so any attendee that did not have an opportunity to review the online version prior to the meeting would be able to review the draft RIS during and following the meeting and provide comments.

Question 2. Please describe the NRC's regulations or policy for requesting and accepting comments on agency documents. Is the practice or policy detailed in any agency document and if so, please provide a copy(ies). Was the NRC staff action described in the Greenpeace letter consistent with these regulations or policy? If not, what actions has NRC taken to investigate these incidents, hold those responsible accountable, determine whether other similar instances have occurred in the past and prevent future such instances from occurring?

Answer 2.

The two public meetings related to the RISs were conducted in conformance with the NRC's policy on public meetings. The NRC's policies for requesting and accepting comments on agency documents vary according to document type. For documents associated with public meetings, the NRC published a policy statement entitled, "Enhancing Public Participation in NRC Meetings" in the Federal Register on May 28, 2002 (Attachment 1). The Commission policy enhanced public participation in NRC meetings. The policy statement describes the NRC's public meeting categories and establishes the requirements and guidance for public availability of draft documents and public participation in NRC meetings. This policy forms the

Enclosure

basis for the associated Management Directive 3.5 (MD 3.5), "Attendance at NRC Staff Sponsored Meetings" (Attachment 2).

In accordance with this policy, the staff issued a meeting notice that contained the agenda, names of participants, and the draft RIS. This meeting notice was posted on the NRC Public Meeting Schedule webpage.

The draft RISs did not require a formal opportunity for the public to comment because no new policy or regulatory positions are communicated in these RISs; therefore, they were not published in the Federal Register for public comment. The purpose of RIS 2008-10 and RIS 2008-10, Supplement 1, is to underscore the importance of continued vigilance by licensees, certificate holders, applicants, and their respective security personnel in complying with current Federal law prescribed by the Gun Control Act and to provide time for advance planning by licensees, certificate holders, applicants, and their respective security personnel before the NRC issues new requirements on firearms background checks. These new requirements stem from the new authority provided to the Commission in the Energy Policy Act of 2005. The new authority will be implemented by issuance of Firearms Guidelines and promulgation of a rule which will be noticed in the Federal Register for public comment. To ensure that the complex information contained in each RIS was clear to the licensees, certificate holders, and their armed security personnel, the staff held public meetings with the industry.

Draft RIS 2008-10 and draft RIS 2008-10, Supplement 1, were not posted to the Documents for Comment webpage prior to the associated meetings but were available on the NRC public website. This is a departure from the guidance contained in MD 3.5. The staff posted draft RIS 2008-10, Supplement 1, to the Documents for Comment webpage following receipt of the October 8 letter from Greenpeace. The importance of adhering to the guidance in MD 3.5 has been communicated to the staff.

Question 3. Does the agency always publish documents on which the NRC solicits comment in the Federal Register?

Answer 3.

The NRC solicits comment on all proposed NRC rules, and these rulemaking documents are published in their entirety in the Federal Register. Select other documents for comment are published in the Federal Register, including Policy Statements.

When the NRC seeks public comment on many non-rulemaking documents, the documents are typically not published in the Federal Register. Instead, the NRC publishes a notice in the Federal Register announcing the availability of the document and providing the public information for accessing and commenting on the document through the NRC's Agencywide Documents Access and Management System (ADAMS) and the Federal e-rulemaking portal at <http://www.regulations.gov>. This process eliminates duplicative publication costs, saving agency resources while providing the public an efficient method of accessing and commenting on NRC documents.

Question 4. Did the agency publish the two RISs in question in the Federal Register? If so, please provide date and FRN page number for each. If not, why not?

Answer 4.

These notices were not published in the Federal Register for the reasons indicated in the response to question 2. No new policy or regulatory positions were communicated in these RISs; therefore, they were not published in the Federal Register for public comment.

Question 5. Please explain how the agency determines when a document should be published in the Federal Register; when a document should be posted on the “Documents for Comment” section of the website; or both? What specific agency procedures are followed when making these decisions?

Answer 5.

The NRC’s policies for publishing agency documents vary according to document type. As discussed in the response to question 3, the NRC typically publishes a notice of availability in the Federal Register for many non-rulemaking documents and some rulemaking support documents when seeking public comment. Documents noticed in the Federal Register are posted or linked to the Documents for Comment webpage.

Question 6. The agency’s Management Directive Volume 3, Part III, “Scheduling and Announcing Meetings”, in the section entitled, “Procedures for Noticing Meetings (C)”, explains that for public meetings, the agency is to ensure that documents available for public comment are posted on the appropriate “Documents for Comment” page on the NRC’s public Website. Did the agency host public meetings regarding either of these documents, and if so, were the RISs available for comment in the “Documents for Comment” section of the website? If so, please provide the date and location of posting. If not, please explain why the management directive was not followed.

Answer 6.

As discussed in the response to questions 1 and 2, the NRC held two public meetings which were open to public attendance and participation and were noticed on the NRC public website. The NRC’s policy statement entitled “Enhancing Public Participation in NRC Meetings” specifies that an agenda, names of participants, and background documents be entered into ADAMS, and the ADAMS number provided in the meeting notice. In accordance with this policy, the staff issued a meeting notice for each meeting that contained the agenda, names of participants, and the draft RIS. These meeting notices were posted on the NRC Public Meeting Schedule

webpage. To facilitate discussion and provide every stakeholder the opportunity to review the documents before the respective meetings, the NRC posted an electronic version of the draft RISs on the NRC Public Meeting Schedule webpage adjacent to the meeting notice and agenda. Draft RIS 2008-10 and draft RIS 2008-10, Supplement 1, were not posted to the Documents for Comment webpage prior to the public meetings. This is a departure from the guidance contained in MD 3.5. The staff posted draft RIS 2008-10, Supplement 1, to the Documents for Comment webpage following receipt of the October 8 letter from Greenpeace. The importance of adhering to the guidance in MD 3.5 has been communicated to the staff.

Question 7. Are there any other instances in the last five years of a document being provided for comment solely to a single type of stakeholder? If so, for each instance please list the document by title, to whom it was provided, and the date of the occurrence, and the reason why it was withheld from all other stakeholders. Also, explain in each instance whether the NRC made changes to the document based upon the comments received, what specific changes were made, and if and where the comments received were made publically available.

Answer 7.

Other than the categories listed below, the NRC is not aware of any cases where information was provided to only one party for comment. Documents that the NRC has shared with limited stakeholders prior to issuance during the past five years can be grouped into the following categories:

- The NRC may share documents with Agreement States before they are publicly available. The Atomic Energy Act of 1954, as amended, authorizes the NRC to enter into formal Agreements with States that transfer regulatory authority over certain radioactive materials to the States. Current agency practice is to provide predecisional programmatic documents – such as preliminary drafts of rulemaking plans, proposed and final rules, and licensing and inspection guides that may affect their licensees – to the 35 Agreement States. Subsequently, these documents are noticed in the Federal Register for full public comment, including a discussion of the State's views, concerns, and comments. The formal procedure for providing information to Agreement States is "Providing NRC Predecisional Documents to Agreement States and Appropriate Working Groups of the Conference of Radiation Control Directors, Inc" (SA-800). The NRC publishes this internal procedure on our public website.
- The NRC may share copies of draft safety evaluation reports that discuss information submitted as part of a proprietary document with an applicant so that the applicant can confirm that there is not any proprietary information in the draft report, correct any factual inaccuracies, and agree to any conditions contained in the report. The NRC would remove the proprietary information before the safety evaluation report is finalized and made available to the public. An applicant may only provide input on potential proprietary information and correct any factual inaccuracies; the applicant is not allowed to comment on the staff's findings or try to influence the final report.

- In the 10 CFR 2.206 Petition for Rulemaking process, the proposed director's decision is sent to the petitioner and the licensee requesting their comments. It is also made publicly available. Although comments are not requested from the general public or other stakeholders, if any are received, the comments would be addressed in the final director's decision. The intent of sharing the draft document is to give the petitioner and the licensee an opportunity to identify any factual errors in the decision document.
- The NRC encourages the use of peer reviews for research products and has developed RES Office Instruction PRM-010, "Peer Review of RES Projects," which provides guidance for the conduct of these reviews. A peer review panel, generally comprised of technical experts from inside and outside the agency, may review a product before it is released to the public. In most cases external peer reviewers are paid contractors. PRM-010 specifically notes the need to withhold pre-decisional information from public release when conducting peer reviews; therefore, external peer reviewers would sign a non-disclosure agreement.
- Documents developed jointly with an external entity under a Memorandum of Understanding or a cooperative agreement are provided to those other entities for review before public release as part of the authoring process. This includes documents developed in cooperation with other Government agencies such as the recent report to Congress on the Global Nuclear Energy Partnership which was jointly developed with the Department of Energy.
- The current process for issuing accident sequence precursor analyses is described in Regulatory Information Summary (RIS) 2006-24. Under this process, NRC provide certain analyses to the licensee for review of the factual information regarding the event being analyzed. After the comments are resolved, the analysis and the comments are made public. No analyses have met the criteria and been transmitted to the licensee for comment since the RIS was issued.
- Classified, Safeguards Information (SGI), and Official Use Only (OUO) documents (which frequently contains security related information) are provided to stakeholders determined to have a "need to know" and, in the case of classified and SGI, those cleared for that information. These documents are routinely provided to other Federal agencies, the Agreement States, the licensees or their representative, as appropriate, for information and comment. The documents are withheld from other stakeholders in order to protect sensitive information which may be helpful to potential adversaries. These documents may include, for example, guidance documents related to security rulemakings, new reactor security programs, and documents related to inspections, assessments, and procedures for the interpretation of security results. The comments received are evaluated and in some cases documents are changed to incorporate the comments. Typically, the comments also are marked Classified, SGI, or OUO, and are not made publicly available.
- The staff periodically interacts with applicants regarding draft Requests for Additional Information (RAIs). The purpose of sharing these draft RAIs is to ensure a common and consistent understanding of questions posed by the NRC staff as it relates to meeting the regulatory requirements for the associated licensing action. Comments other than those on

the clarity of the request are not requested. Each of those discussions with the applicant are documented and the documentation is publicly available in ADAMS and is part of the licensing file for the attendant action.

- Draft minutes from public meetings are sometimes sent to stakeholders to ensure accuracy/clarity. While participant's comments may be considered, there is no requirement that suggested changes be incorporated in the final minutes.

Question 8. Does the NRC plan to make changes to the two RIS based upon NEI's lone comments on these documents, or will the NRC now offer other stakeholders the opportunity to comment before finalizing the documents? Did the NRC make NEI's comments on the documents publicly available? If so, how? If the agency has finalized the documents without affording others the opportunity to comment, for each substantive change suggested by NEI and adopted by the NRC, explain the rationale for accepting the comment and making the change.

Answer 8.

The NRC provided all stakeholders the opportunity to comment on the two draft RISs as discussed in response to question 1. The NRC made changes to RIS-2008-10 in response to verbal comments made during the public meeting on March 14, 2008, and subsequent written comments submitted by NEI, prior to issuance of the RIS on May 13, 2008. Upon receipt, the NRC made NEI's written comments on the RIS publicly available through the ADAMS system. The NRC has incorporated some changes to RIS-2008-10, Supplement 1, in response to verbal comments made during the public meeting on September 3, 2008. The supplemental draft RIS has been posted to the Documents for Comment webpage. The NRC has not finalized it. The public comment period closed on November 21, 2008.

Question 9. What steps does the NRC plan to take to ensure that, in the future, if the agency seeks comments on a public document that the invitation is an open invitation to all of the agency's stakeholders rather than a selective invitation to the industry? Does the agency plan to formalize its public participation process in a manner that might prevent future instances of mistakes or miscommunications? If so, when does the agency plan to have such a process in place?

Answer 9.

Public involvement in the NRC's activities is a cornerstone of strong, fair, transparent regulation of the nuclear industry. The NRC recognizes the public's interest in the proper regulation of nuclear activities and provides opportunities for citizens to make their opinions known. The NRC elicits public involvement early in the regulatory process so that safety, security, and environmental concerns that may affect a community can be resolved in a timely and practical manner. Because the NRC considers this process to be vital to assuring the public that the

NRC is making sound decisions, the NRC has developed a robust public participation process. Recently, the NRC has enhanced its ability to communicate with stakeholders by implementing a list server system that allows stakeholders to receive news and information about the issues they have an interest in. This system provides automatic notices by e-mail to stakeholders whenever a document within their area of interest is released.