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Joan Claybrook, President

March 28, 2005

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attn: Rulemakings and Adjudications Staff

Re: Comments on the Proposed Rule to Amend Regulations for the Protection of Safeguards Information (RIN 3150-AH57)

To Whom It May Concern:

Enclosed you will find the comments of Public Citizen on the U.S. Nuclear Regulatory Commission's proposed rule to amend its regulations for the protection of Safeguards Information.

Overall, it is the opinion of Public Citizen that these amendments unduly and perhaps illegally broaden the scope of security information that would be restricted from public access. If instituted, these new regulations would compromise the public's ability to hold the nuclear industry and its government regulators accountable for their management of nuclear facilities and materials. Therefore, Public Citizen asks that this proposed rule be withdrawn or, at minimum, drastically revised. The reasoning for this position is presented fully in our comments.

Please enter these comments into the official record of this proceeding.

Sincerely,

Joseph P. Malherek
Policy Analyst, Public Citizen

Scott Nelson
Staff Attorney, Public Citizen

CC: Sen. James M. Inhofe
Sen. James M. Jeffords
Rep. Dennis J. Kucinich

Rep. Edward J. Markey
Rep. Christopher Shays
Rep. Henry A. Waxman

[Enclosure]

Public Citizen's Comments on the NRC's Proposed Rule to Amend Regulations Regarding Safeguards Information (SGI)

Overall comments

The stated rationale for the proposed rule, published in the February 11 issue of the *Federal Register*, is to amend regulations governing the protection of Safeguards Information (SGI) and thereby codify the U.S. Nuclear Regulatory Commission's (NRC) current policy on the handling of SGI. The NRC bases its authority for this proposal on language in the Atomic Energy Act of 1954 (AEA). Instead of issuing SGI orders on a case-by-case basis, the Commission wants to "codify requirements in the regulations and not...rely on orders indefinitely to impose requirements that should have generic application" (70 FR 7197).

We agree with the Commission that requirements with generic application are more appropriately promulgated through rulemaking proceedings than through "orders," but in order to justify the proposed rule under the terms of the AEA, the following essential legal questions must be satisfactorily answered in the affirmative:

- 1) Could the unauthorized disclosure of SGI as defined by the Commission in its proposed rule "reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility," within the meaning of § 147.a.(3) of the Atomic Energy Act of 1954 (AEA)?
- 2) Has the Commission exercised its authority "so as to apply the *minimum restrictions* needed to protect the health and safety of the public or the common defense and security," (emphasis supplied) as required by § 147.a.(3)(A) of that same law?

After reviewing the proposed rule, it is the view of Public Citizen that the NRC would be inappropriately expanding its legal authority under the AEA were it to institute the proposed changes to its regulations. Therefore, the Commission should withdraw—or, at minimum, greatly revise—this rule.

The proposed amendments to existing SGI regulations are unacceptably broad, and they would unduly restrict the public's access to information essential to keep the nuclear industry accountable and subject to proper oversight. It is the opinion of Public Citizen that the proposed regulations go beyond the "minimum restrictions needed to protect the health and safety of the public or the common defense and security," as required by the AEA, and instead apply such restrictions to information to which the public has a right to access, such as elements of the Design Basis Threat (DBT), public knowledge of which has led to progressive reforms. For example, following the truck bombing of the World Trade Center in 1993, it was primarily because of pressure from citizen groups that such

a scenario was adopted into the DBT in 1994.¹ The Oklahoma City bombing the following year confirmed the wisdom of such a move.

But despite the proven utility of such public oversight, which depends on at least a modicum of knowledge, this rulemaking utterly disregards the “minimum restrictions” statutory requirement on SGI, addressing it in name but not in substance. Rather than applying the minimum restrictions required, the Commission here has expanded the category of SGI to include virtually anything it wants—including such things as engineering and safety analyses, emergency planning procedures, inspections, reports, or any other information the NRC considers may be a security threat. Broadly, the Commission appears to be removing virtually all limiting qualifications to its regulations regarding SGI.

Public Citizen does not object absolutely to every aspect of the rulemaking. We support, for example, such responsible changes as those proposed for Title 10 of the Code of Federal Regulations (CFR) at § 73.22(c) through § 73.22(g) and § 73.23(c) through § 73.23(g), which would institute prudent measures required of persons handling SGI to prevent the release of such sensitive information to unauthorized parties. On the whole, though, the proposed amendments to regulations reflect an undue restriction on public access to nuclear security information that will inevitably compromise proper accountability of the industry and its government regulators, contrary to the letter and spirit of § 147.a.(3)(A) of the AEA.

This rulemaking—in addition to other recent NRC orders and actions that have tended the agency's policy towards greater secrecy and increasingly limited public involvement in and knowledge of its operations and activities—has prompted U.S. Rep. Edward J. Markey of Massachusetts to call for an investigation by the NRC's auditor, the Inspector General. In a statement accompanying his March 21 request for an investigation into alleged information suppression by the NRC, Rep. Markey said, “I am concerned that the Commission may be improperly restricting public access to specific documents that should be releasable without compromising security. This behavior must stop.”² Rep. Markey further indicated his concern that “the totality of the Commission's actions reflect a systemic effort to withhold important information from Members of Congress and their staffs, non-industry stakeholders, the press and members of the public, rather than a genuine effort to be protective of national security.”³ As evidence, Rep. Markey pointed to this proposed rule on SGI, a recent shutdown of the NRC's online document library that persisted for several months, and the NRC's suppression of a report by the National Academy of Sciences (NAS) about the security vulnerabilities of the pools in which reactor operators store irradiated nuclear fuel. The NAS report has been kept

¹ “Final Rule: Protection Against Malevolent Use of Vehicles at Nuclear Power Plants,” *Federal Register*, Volume 59, August 1, 1994: 38889-38900.

² “Markey Investigates Nuke Agency's Use of Secrecy Designations,” *News from Ed Markey* [press release], March 21, 2005.

³ Edward J. Markey, letter to Huber T. Bell, Inspector General, U.S. Nuclear Regulatory Commission, March 21, 2005.

secret on the basis that it contains SGI, a judgment that has been challenged by Rep. Markey and others.⁴

Public Citizen agrees with Rep. Markey's concerns and supports his request for an investigation into these matters.

This rulemaking to amend the protection of SGI is excessively broad, and it unduly restricts the public's access to important information about the competency of the nuclear industry and its government regulators. Therefore, we respectfully request that the rule be withdrawn.⁵

Legal Authority

SGI Classification by Order

The proposed language for § 73.22(a)(5)—which would expand, without qualification, the category of information the Commission may classify as SGI by order—improperly violates the “minimum restrictions” requirement of § 147.a.(3)(A) of the AEA by greatly expanding, without bound, the sphere of information that may be identified by the Commission as SGI.

“Broad Authority and Flexibility”

The suggested new paragraph at § 73.21(b) that recognizes the Commission's “*broad authority and flexibility*” under section 147 of the AEA to designate information as SGI or SGI-M and to impose levels of handling requirements on any person who produces, receives, or acquires SGI” (emphasis supplied) (70 FR 7200) is not in accord with the directive in § 147.a.(3)(A) of the AEA which directs the Commission to exercise its authority over SGI “so as to apply the *minimum restrictions* needed to protect the health and safety of the public or the common defense and security” (emphasis supplied).

Weakening Congressional Oversight

The limitation applied to those persons who may have access to SGI—which would be codified in the proposed § 73.22 (b)(1)(i) [changed from the current § 73.21 (c)(1)(i)] as well as the similar § 73.23(b)(1)(i) regarding the category “Safeguards Information—Modified Handling” (SGI-M), which changes “United States Government” to the “*Executive Branch* of the United States Government” (emphasis supplied)—is described as “necessary because for purposes of access to SGI, members of Congress are covered separately in the occupational category specified in proposed § 73.22(b)(1)(i)” (70 FR 7202). While that new category is expanded in the new language—which now includes, broadly, *any* member of Congress instead of the present language which specifies access for only a “member of a duly authorized committee of the Congress”—the limitation of

⁴ Nuclear Security Coalition, letter to Dr. Kevin D. Crowley, Director, Board of Radioactive Waste Management, National Research Council, The National Academies, March 15, 2005; *see also* Shankar Vedantam, “Storage of Nuclear Spent Fuel Criticized,” *Washington Post*, March 28, 2005: A1.

⁵ For the record, the national advocacy group Union of Concerned Scientists agrees with the comments of Public Citizen and joins them in requesting that the NRC not issue the proposed rulemaking in its present form.

access to only the executive branch of the U.S. Government would appear to exclude the federal courts and the auditing agencies of Congress, such as the U.S. Government Accountability Office (GAO). Such a limitation would preclude proper judicial and Congressional oversight of the NRC and the nuclear industry and breach the “minimum restrictions” requirement of § 147.a.(3)(A) of the AEA.

Undue Removal of Qualifying Terms

The addition of the phrase “All portions of” [presently § 73.21(b)(1)(i), proposed § 73.22(a)(1)(i); presently § 73.21(b)(1)(viii), proposed § 73.22(a)(1)(viii); presently § 73.21(b)(1)(ix), proposed § 73.22(a)(1)(ix); and presently § 73.21(b)(2)(i), proposed § 73.22(a)(2)(i)] and the removal of the words “Details of” [presently § 73.21(b)(1)(iii), proposed § 73.22(a)(1)(iii); and presently § 73.21(b)(2)(iii), proposed § 73.21(a)(2)(iii)] and “Details regarding” [presently § 73.21(b)(2)(v), proposed § 73.21(a)(2)(v)] from the defining criteria of SGI demonstrate a broadening of that category that may compromise the public’s ability to hold the nuclear industry accountable, contrary to the “minimum restrictions” language in § 147.a.(3)(A) of the AEA. The similar language in the proposed § 73.23(a)(1) relating to the handing of SGI-M is also exceedingly restrictive.

“Decontrolling” SGI

We are concerned with how the new language proposed for § 73.22(h) [replacing § 73.21(i)], as well as the similar language relating to SGI-M at § 73.23(h), might be implemented. The new language affirms that “[c]are must be exercised to ensure that any document decontrolled not disclose Safeguards Information in some other form *or be combined with other unprotected information* to disclose Safeguards Information” (emphasis supplied). What measures will be instituted to ensure that this passage is not interpreted too broadly such that any information that *may* contain SGI is withheld on this basis? Public Citizen is concerned that the implementation of this regulation may exceed the “minimum restrictions” bounds established in § 147.a.(3)(A) of the AEA.

Security Analyses and Emergency Plans

Public Citizen has serious concerns that the proposed rule would effectively eliminate public oversight of nuclear operators’ security and safety infrastructure. In particular, the new category of SGI that includes “emergency planning procedures or scenarios” [§ 73.22(a)(1)(xii)] encompasses a broad class of information, including evacuation routes. Under this expansive, inclusive description, the NRC could prevent the public and first responders from providing valuable input in emergency planning or even, potentially, from having the necessary evacuation information in the event of an emergency at a nuclear power plant.

These wide-reaching revisions must satisfy some weighty legal questions:

- How does restricting access to information about emergency planning procedures or scenarios (*see* 70 FR 7197 and 7212; proposed for § 73.22) contribute to the protection of “the health and safety of the public or the common defense and security,” as required by § 147.a.(3)(A) of the AEA?

- How could disclosure of such information “reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility” [AEA § 147.a.(3)]?

Detailed responses to these questions are lacking the proposed rule. Instead, the NRC merely asserts that the proposed rule meets these legal conditions based its own judgment, a claim that is repeated *ad nauseam* throughout the February 11, 2005 *Federal Register* notice of the proposed rule. This language from the AEA (including the phrase “significant adverse effect”) is recited fourteen times in the notice, both in the language of the new rule and its explanation, at 70 FR 7198, 7200, 7201, 7203, 7211, 7212, 7214, and 7215. Recitation of this legal language is not enough to demonstrate that its conditions have been met under the broad new proposed language.

Safety and Security Information

The addition of § 73.22(a)(1)(xi) and § 73.22(a)(1)(xii) [as well as the related § 73.22(a)(2)(vii) and § 73.22(a)(2)(viii), regarding protection *in transit*, and the proposed regulations at § 73.23(a) regarding SGI-M]—which add to SGI protections (1) the “elements and characteristics” of nuclear facilities’ requisite “Design Basis Threat” (DBT) plans, which describe the types and degrees of attacks the facility is designed to defend against; and (2) engineering and safety analyses, emergency planning procedures or scenarios, and “any other information related to the physical protection of the facility,”—constitutes an unacceptably broad amendment to existing regulations that transcends the bounds of the “minimum restrictions” requirement of § 147.a.(3)(A) of the AEA.

It is crucially important that the public has access to information regarding protective measures taken by operators to defend their facilities so that they may be held accountable. The broad category of information that is included in these sections, including, especially, safety analyses, emergency planning procedures, and *any other information* related to the security of a nuclear facility, sharply hinders the public’s ability to judge the competency of nuclear operators and the adequacy of their programs to protect their facilities and materials.

Transparency of Investigation Reports on Safety and Security

The regulations currently ensconced at § 73.21(b)(3)(i) would be severely weakened by the language proposed for § 73.22(a)(5) [as well as the similar language regarding SGI-M at § 73.23(a)(3)], in violation of the requirements of § 147.a.(3)(A) of the AEA. The current regulations allow for the release of reports of investigations that describe “defects, weaknesses or vulnerabilities” of nuclear facilities after corrections to these problems have been made. But the proposed regulations only allow for the release of “reports of investigations containing general information” after corrections have been made. This is an incredible expansion of government secrecy that could allow instances of extreme operational incompetence to go unnoticed by the public.

Proper accountability of nuclear operators cannot be assured if this drastic language goes into effect. In defense of this revision, the NRC argues that “[d]etailed information regarding defects, weaknesses or vulnerabilities is generally not released because identical circumstances may apply to a licensee or applicant employing similar security measures” (70 FR 7201). But it is for precisely this reason that such information should be publicly available: only then may nuclear operators be held accountable for correcting security vulnerabilities at their facilities.

Safeguards Information vs. Classified National Security Information

Under the regulations governing SGI, it appears to be up to each licensee or other person in possession of SGI to recognize it as such under the broad new terms of the order, and then apply an appropriate marking. This means each licensee will have to determine whether a particular document related to such things as “engineering and safety analyses” or “emergency planning” “could reasonably be expected to have a significant adverse effect on the health and safety of the public” [AEA § 147.a.(3)] if it were disclosed. There are no requirements about who within each licensee makes such a determination, or whether that person even has any training.

By contrast, Executive Order (EO) 13292⁶ provides that Classified National Security Information may only be designated as such in the first instance by an original classification authority, who must be a designated governmental official who has received training in the application of national security classification principles (§ 1.1(a) and 1.3).

In addition, when information is classified under this EO, the duration for its classification is supposed to be specified, which in most cases is 10 years or less, and in almost all cases is 25 years or less (§ 1.5). The agency is required to declassify whenever the information no longer meets the criteria for classification (§ 3.1), must automatically declassify most information when specified numbers of years have passed (§ 3.3), must “systematically” review all other information for declassification (§ 3.4), and must conduct mandatory declassification reviews upon request from members of the public (§ 3.5). Persons who are not satisfied with the result of a mandatory declassification review may appeal to the Interagency Security Classification Appeals Panel. In addition, internal agency declassifications are subject to oversight from the Information Security Oversight Office (§ 5.1 and 5.2).

By contrast, although the proposed SGI regulations say that information should be removed from the SGI category “whenever the information no longer meets the criteria contained in this part” [§ 73.22(h)], it does not specify procedures or oversight mechanisms for ensuring that that takes place. Moreover, it says that authority to “decontrol” information “shall be exercised only by the NRC or with NRC approval, or in consultation with the individual or organization that made the original determination, if possible.” It is difficult to judge the meaning of this phrase, especially given the fact that

⁶ Executive Order 13292, “Further Amendment to Executive Order 12958, as Amended, Classified National Security Information,” *Federal Register*, Vol. 68, No. 60, March 28, 2003: 15315-15334.

a great many original designations will be made by licensees. Would licensees have to get NRC approval for each document they decontrol, or would they be expected to do this on their own volition? Either way, a program for decontrolling seems unlikely to develop under the present and proposed language. It seems unlikely that many licensees will seek approval from the NRC to decontrol their material once it is designated if there is not a clear mandate and program for this.

Probably of most importance, moreover, the SGI regulations provide no mechanism for the public to challenge designations of documents as SGI, so the agency and its licensees will be able to use the broad new definition of SGI (especially the “emergency planning” and “engineering and safety analyses” parts of the definition) to unilaterally declare broad swaths of their materials to be SGI, with no opportunity for review.

Finally, EO 13292 on Classified National Security Information explicitly provides that “[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security” [§ 1.7(a)]. With its extremely broad definitions, which are constrained by no such substantive limitations and are to be implemented with little oversight and virtually no procedural protections to prevent over-designation, the new SGI regulation invites precisely these kinds of abuses.

Definitions

“Changes in the threat environment”

The Commission purports to justify this rulemaking to expand the types of information that may be protected under the SGI category by invoking the vague phrase, “changes in the threat environment” (70 FR 7197). Nowhere does the Commission define this term or offer any explanation of the nature of these “changes” or how they justify the proposed amendments to the regulations.

“Safeguards Information”

The expansion of the definition of “Safeguards Information” (§ 73.2; 70 FR 7199, 7211) is unacceptably broad, far exceeding the “*minimum restrictions* needed to protect the health and safety of the public or the common defense and security” [AEA § 147.a.(3)(A) (emphasis added)]. The elimination of the definition’s key qualifier, “licensee’s or applicant’s,”—which properly limits the applicability of the rule—from § 73.2 (70 FR 7199, 7211), expands the definition of SGI to an unacceptable degree, apparently even to entities outside of the NRC’s jurisdiction! This goes beyond the bounds of the AEA at § 147.a., which directs the Commission to prescribe regulations governing SGI *explicitly within the universe of its own licensees and applicants*, which is even acknowledged in the notice of this proposed rule at 70 FR 7200.

Moreover, the expansion of kinds of information that may fall under SGI to include (1) “control and accounting procedures for special nuclear material,” (2) “security plans, procedures, and equipment” for the protection of “source, byproduct, or special nuclear

material” and (3) “*any other information*” (emphasis supplied) (*see* 70 FR 7211; proposed for § 73.2) gives far too much latitude to the Commission to categorize SGI, eliminating all qualifications and going far beyond the “minimum restrictions” required to ensure public health and safety.

Finally, what new categories of information relating to “source, byproduct, or special nuclear material” subject to SGI protection would be created? What, specifically, would these categories include? Does this new, expansive definition cover the entirety of the nuclear fuel cycle? We support the requests of the States of Washington⁷ and Illinois⁸ to clarify this definition.

“Safeguards Information-Modified Handling”

The definition of the new term “Safeguards Information-Modified Handling” (SGI-M) is unclear from the material presented in this proposed rule. It is described only as having been “previously established through Commission orders” (70 FR 7199) and as SGI that “the Commission has determined requires handling requirements modified from those for other Safeguards Information” (proposed § 73.2). How is SGI-M defined in the referenced Commission orders?

“Trustworthiness and Reliability”

While we agree with the concept in principle, it is conceivable that the criteria used to judge the specific qualities required of a person seeking to acquire SGI—newly defined as “trustworthiness and reliability” in § 73.2, which are required above and beyond the current “need to know” requirement for access to SGI under the proposed regulations at § 73.22(b)(1)(i)(A), § 73.22(b)(1)(i)(B), and § 73.22(b)(2); and for access to SGI-M under § 73.23(b)—could be applied arbitrarily to restrict access to information by persons deemed by the Commission or its licensees to have interests in opposition to the NRC or the nuclear industry, even if such a person were acting in the public interest.

How would such a requirement of “trustworthiness and reliability,” with its vague definition of “positive attributes,” be tested and applied, and who would be the authority in determining its results? Would there be explicit protections to prevent this qualification from being applied arbitrarily? Moreover, whereas previously this criterion applied only to nuclear power plant personnel with access to vital areas of nuclear facilities, it now appears that it is being applied to all persons seeking access to SGI, where before only the “need to know” criterion was a basis of such access. This expansion is unacceptable.

⁷ “Comments for STP-04-074 (RIN 3150-AH06) from Washington State,” Arden C. Scroggs, Supervisor, Radioactive Materials Section, Washington State Department of Health, e-mail to Marjorie Rothschild, Office of the General Counsel, U.S. Nuclear Regulatory Commission, October 25, 2004.

⁸ State Agreements Program Letter, STP-04-074, “Planned Solicitation of Public Comment on Draft Rule Wording: Revision of Certain Provisions of 10 CFR 2, 30, 40, 50, 70, 73, and 76 Related to Protection of Safeguards Information,” Joseph G. Klinger, Head, Radioactive Materials, Illinois Emergency Management Agency, Division of Nuclear Safety, letter to Paul Lohaus, Director, STP, U.S. Nuclear Regulatory Commission, November 8, 2004.

In order to determine whether an individual possesses the qualities of “trustworthiness and reliability,” the Commission has established the new requirement of a “comprehensive background check or other means as approved by the Commission” [§ 73.22(b)(1)(i)(B)]. This would be “in lieu of the FBI criminal history check” (70 FR 7202). How this “comprehensive background check” would be conducted or what “other means” would entail is unclear from the *Federal Register* notice. If applied to any person seeking access to SGI, this new requirement may be excessively rigorous and unnecessary in many cases, especially considering the potentially broadened category of SGI being proposed by the Commission. Further, if it is the case that “comprehensive background checks” would be conducted not only for licensees, but for anyone participating in a licensing or rulemaking proceeding who may have a need to know SGI in connection with that proceeding, one would presume that this added requirement would greatly slow NRC proceedings and impede the ability of representatives of the public to participate. It is also conceivable that, because of this new requirement, SGI requests would more likely be denied on “need to know” criteria, considering the NRC’s recent efforts to accelerate such proceedings.⁹

In the absence of indications that the existing process has resulted in breaches of security, why should this cumbersome and time-consuming new process be put in place?

Conclusion

Public Citizen believes that these amendments unduly and perhaps illegally broaden the scope of security information that would be restricted from public access. If instituted, these new regulations would compromise the public’s ability to hold the nuclear industry and its government regulators accountable for their management of nuclear facilities and materials.

Therefore, Public Citizen asks that this proposed rule be withdrawn or, at minimum, drastically revised.

⁹ Most notably, the NRC’s recent sweeping rule revisions that were established “to make the NRC’s hearing process more effective and efficient.” See Nuclear Regulatory Commission, “Changes to Adjudicatory Process,” *Federal Register*, Vol. 69, No. 9, Jan. 14, 2004: 2182-2282.