

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
OFFICE OF FEDERAL AND STATE MATERIALS AND
ENVIRONMENTAL MANAGEMENT PROGRAMS
OFFICE OF NEW REACTORS
WASHINGTON, DC 20555-0001

March 30, 2009

NRC INFORMATION NOTICE 2009-07: WITHHOLDING OF PROPRIETARY
INFORMATION FROM PUBLIC DISCLOSURE

ADDRESSEES

All current holders of and potential applicants for licenses, certificates of compliance, permits, or standard design certifications, as well as any other persons submitting a request that information be withheld from public disclosure under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) Section 2.390, "Public inspections, exemptions, requests for withholding."

PURPOSE

The U.S. Nuclear Regulatory Commission (NRC) is issuing this information notice (IN) to inform addressees of recent problems with licensee submittals that request withholding proprietary information under 10 CFR 2.390. The NRC expects that recipients will review the information for applicability to their facilities and consider actions, as appropriate, to avoid similar problems. Suggestions contained in this IN are not NRC requirements; therefore, no specific action or written response is required.

DESCRIPTION OF CIRCUMSTANCES

Over the last year, NRC staff has received several licensee requests for withholding of proprietary information under 10 CFR 2.390 that were too broad in that most of the information that the licensee requested be withheld from public disclosure did not satisfy the conditions of 10 CFR 2.390. Rather than limiting the request to the specific information in a document where release to the public could harm private commercial interests, much of material that licensees requested be withheld had no bearing on proprietary information. This resulted in agency discussions and correspondence with the licensees to obtain revised 10 CFR 2.390 submittals.

DISCUSSION

The above describes problems with licensee 10 CFR 2.390 submittals in which most of the information that the licensee requested be withheld from public disclosure did not satisfy the conditions of 10 CFR 2.390. This resulted in delays and expenditure of resources to obtain revised 10 CFR 2.390 submittals from these licensees. The following information describes

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existing NRC requirements, policies, and practices regarding 10 CFR 2.390 submittals related to the problems discussed in this IN.

NRC Review. 10 CFR 2.390(b)(2) states that a person who submits commercial or financial information believed to be privileged or confidential or a trade secret shall be on notice that it is the policy of the Commission to achieve an effective balance between legitimate concerns for protection of competitive positions and the right of the public to be fully apprised as to the basis for and effects of licensing or rulemaking actions, and that it is within the discretion of the Commission to withhold such information from public disclosure. The NRC is required by 10 CFR 2.390(b)(3) to determine whether information sought to be withheld from public disclosure is a trade secret or confidential or privileged commercial or financial information and, if so, whether it should be withheld. The NRC staff reviews all proprietary submittals that require NRC approval to ensure that the basis for withholding is supportable in accordance with 10 CFR 2.390(b)(4) and that submittals comply with the affidavit and marking requirements. The staff must then, pursuant to 10 CFR 2.390(b)(5), determine (1) whether the right of the public to be fully apprised of the proposed action outweighs the demonstrated concern for protection of a competitive position, and (2) whether the information should be withheld.

Requirements for Submittals. 10 CFR 2.390(b)(1) states that the submitter shall request withholding at the time the document is submitted and shall comply with the document marking and affidavit requirements set forth in 10 CFR 2.390(b)(1).

- (1) Affidavit. 10 CFR 2.390(b)(1) states the affidavit must identify the document or part sought to be withheld and must address the factors set out in 10 CFR 2.390(b)(4), including the owner's specific reasons as to why the document is considered to contain proprietary information, the release of which would cause harm to the competitive position of the owner of the information. 10 CFR 2.390(b)(1)(ii) and (iii) specifies that the request for withholding and the affidavit must be submitted at the same time as the proprietary information sought to be withheld and that the affidavit must—
 - (a) Identify the document or part sought to be withheld.
 - (b) Identify the official position of the person making the affidavit. If the affidavit has been submitted by a company, this person shall be an officer or upper level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. Further, the affidavit shall be executed by the owner of the information, even if the information is submitted to the Commission by another person.
 - (c) Declare the basis for proposing the information be withheld, including the considerations set forth in 10 CFR 2.390(a).
 - (d) Contain a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public.
 - (e) Indicate the location(s) in the document of all information sought to be withheld.

- (f) Contain a full statement of the reason for claiming the information should be withheld from public disclosure. The statement shall address, with specificity, the considerations listed in 10 CFR 2.390(b)(4).
- (2) Marking of Information Sought To Be Withheld. 10 CFR 2.390(b)(1)(i) requires that the submitter ensure that the document containing information sought to be withheld is marked as specified in 10 CFR 2.390(b)(1)(i)(A) and (B). This includes marking the top of the first page of the document and the top of each page containing such information as "proprietary" to indicate it contains information the submitter seeks to have withheld and must indicate, adjacent to the information, or at the top if the entire page is affected, the basis (*i.e.*, trade secret, *etc.*) for proposing that the information be withheld from public disclosure.

While 10 CFR 2.390 specifies that the information that the NRC determines is not exempt from disclosure will be made public, the regulations do not describe how this is accomplished when only a portion of the document is exempt. Although not explicitly required, the Commission's expectation¹ (which many licensees have adopted in their administrative procedure) is that the submitter of the proprietary information should provide a nonproprietary version with brackets showing where the proprietary information has been deleted. In instances in which a nonproprietary version would be of no value to the public because of the extent of the proprietary information, the agency does not expect a nonproprietary version to be submitted.

¹ See NRC Management Directive 3.4, "Release of Information to the Public," which can be found on the NRC's public Web site in the Agencywide Documents Access and Management System (ADAMS), under Accession No. ML080250350.

CONTACT

This information notice requires no specific actions or written response. If you have any questions about the information in this notice, please contact the technical contact listed below or the appropriate regional office.

/RA/

Daniel H. Dorman, Director
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Materials Safety
and Safeguards

/RA/

Robert J. Lewis, Director
Division of Materials Safety
and State Agreements
Office of Federal and State Materials and
Environmental Management Programs

Theodore R. Quay for

Timothy J. McGinty, Director
Division of Policy and Rulemaking
Office of Nuclear Reactor Regulation

/RA/

Barbara K. Gusack, Director
Division of Program Management,
Policy Development and Analysis
Office of New Reactors

Technical Contact: T.D. Naquin, NMSS
(301) 492-3187
E-mail: Tyrone.Naquin@nrc.gov

Note: NRC generic communications may be found on the NRC public Web site, <http://www.nrc.gov>, under Electronic Reading Room/Document Collections.

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