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Edward McGaffigan, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Commissioner McGaffigan;

I read with interest your comments of February 15, 2005, at the "Briefing on NMSS Programs, Performance, and Plans – Waste Safety". In particular the comment about Agreement States being in "civil disobedience" for failing to adopt the registration requirement for Generally Licensed devices. I suspect, if you had all of the facts you might have chosen your comments more carefully. I suspect you were not aware of all of the following issues.

1. Several Agreement States had asked to Commission staff for years prior to February 2001, to adopt such a requirement and were rebuffed on the grounds it was unnecessary for the protection of the public health and safety.
2. The above request was made pursuant to the Agreement with each State which promises that both the State and the U.S. Nuclear Regulatory Commission will use "its best efforts to cooperate with the State and other Agreement States in the formulation of standards and regulatory programs of the State and the Commission for protection against hazards of radiation and to assure that the State and Commission programs for protection against hazards of radiation will be coordinated and compatible." (Article V, AZ – AEC Agreement dated March 30, 1967.) Despite the agreement wording, the states were rebuffed each time they made the request.
3. A review of the history of the rules in question, 10CFR31.5, indicates nothing about the adoption was considered an "emergency" by the Commission. Further, the compatibility requirement was changed from "C" to "B" without additional state input. This is similar to the action taken by the Commission on part 35 several years earlier. In both cases I question whether the Commission was using "its best efforts to cooperate" with the Agreement States. In the instant case, the change was made at the suggestion of industry claiming a hardship of have differing requirements, yet no one asks why the industry had been able to sell the devices for decades with the then existing differing requirements without complaint.
4. States have very specific requirements in the adoption of regulations and rules. The legislatures have the adopters of rules to conform to the needs of their people. When a state program is trying to comply with the legal requirements of their state, is not the occasion of "civil disobedience."

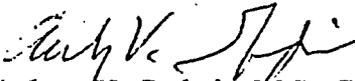
Particularly, since as noted above, there is a question of whether the Commission has followed the Agreement with the States. Further, the Commission did not seek all of the available information about the problem but rushed to a conclusion, which may have been better considered in less haste.

5. If the Commission had indicated an "emergency" existed, the AZ for one could have initiated rulemaking on the issue in a much faster manner. Absence such urgency, the state law requires a careful and deliberate rulemaking process. This process must be carefully followed. For example in Arizona's case, the change of the compatibility level from "C" to "B" would require a restart of the whole process. Arizona law, apparently, unlike federal law, guarantees notice and an opportunity for comment on such significant changes.
6. Last but not least, the requirement of strict compatibility is requiring several states to reduce the requirements they already had in place. Note these differing requirements apparently were not a problem for the industry since we had not been overwhelmed with petitions from them to change.

I would suggest that the real situation is less of "civil disobedience" and more of inadequate communications between parties. States want a well coordinated regulatory program. The inability to comment on significant changes made to the proposed regulation in the adoption process, is a definite problem in our relationship. Further, the state regulatory review programs complain about the large number of needed changes being made in our regulations. The Governor's Regulatory Review Council staff, continually point out this rather small Agency has the largest set of regulations in Arizona State government. At the same time we are being pressed to adopt more and faster, changes to our regulations.

Thank you for your attention to this sensitive matter.

Sincerely



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Director

Cc NRC Commissioners
Agreement States