

LAW OFFICE

CLIFFORD & GARDE

JOHN M. CLIFFORD*
BILLIE PIRNER GARDE**
AOIFE O'NEILL †

* ALSO ADMITTED IN MD
** ALSO ADMITTED IN TX, WI

† ONLY ADMITTED IN CA
(NOT ADMITTED IN D.C.)

1707 L STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 289-8990
FAX (202) 289-8992
www.cliffordgarde.com

February 10, 2006

(Via Facsimile: 610-337-5241 and U.S. Mail)

Sam Collins
Regional Administrator
Region I
U.S. Nuclear Regulatory Commission
475 Allendale Road
King of Prussia, PA 19406

Re: Confirmatory Order

Dear Mr. Collins:

On behalf of Mr. Ted Simmons, please accept this as a supplemental written response to the Confirmatory Order issued by the Nuclear Regulatory Commission (NRC) as part of the agreement reached between Mr. Simmons and the NRC through the Alternative Dispute Resolution (ADR) process. We had welcomed the opportunity to resolve this dispute through the ADR process, believing that it would serve the public interest, as well as those of the parties. However, as detailed below, the failure of the NRC to disclose the Office of Investigation's report prior to the ADR session, which would have enabled the parties to have a common understanding of the NRC's view of the evidence, coupled with the lack of timeliness of the NRC's action, has made this process difficult and unsatisfying.

As you know, Mr. Simmons agreed that in the fall of 2002 he: (1) caused NASA to violate NRC requirements when he failed to perform a reasonable and necessary evaluation, pursuant to 10 CFR 20.1501, of information provided to him by a health physics technician, to determine whether the licensed material reported as missing reached the threshold for reportability under 10 CFR 20.2201; and (2) provided information, some of which turned out to be inaccurate, to an NRC inspector during the December 18-19, 2002, inspection. As part of the agreement, he also committed to take certain actions as detailed in the Confirmatory Order.

While he agrees to the accuracy of the agreements made as part of the ADR process, we feel it is equally important to present some context to the Order as part of the public record in this matter.

Background Information

Mr. Simmons has worked in the Radiation Safety industry his entire adult career, and has over thirty (30) years experience in health physics; seventeen (17) of those years have been at the NASA-Goddard Space Flight Center (NASA-Goddard). His work experience has included naval nuclear-powered ships, both surface and submarine, work at the Northrop Grumman Newport News facility; several commercial nuclear power plants; the University of Maryland-Baltimore; and NASA-Goddard. He has received several Group Achievement Awards from NASA-Goddard, and one NASA Agency Award in recognition of his outstanding efforts on the Radiation Safety Team. He has been, and continues to be, proud of the work he has done to help our nation's space program.

When Mr. Simmons accepted the job to return to NASA-Goddard in January, 2002, much had changed. His goal was to help the organization return to the state of excellence it had previously been in before contracting, staffing and organizational changes led to a lack of continuity and some confusion in record-keeping and documentation.

At the heart of the enforcement action is the NRC's position that Mr. Simmons should have acted more aggressively on an inventory report provided to him by one of his employees, which stated that a number of radiation sources were allegedly missing. For a variety of reasons, he did not believe that any sources were missing; but he did undertake to make that determination. Among the more significant reasons he did not believe the information provided could be accurate was because the document contained multiple factual errors. Once he had completed the review, he determined that two sources, emitting non-regulatory reportable quantities of radiation -- less than is emitted from a smoke detector -- were missing. All other sources were located and accounted for.

In hindsight, as Mr. Simmons has agreed to in the Confirmatory Order, he recognizes that he should have reacted in a more timely manner to the information provided to him by his staff. In good faith, he was making judgments and setting priorities on the issues that he believed were most important to address at the time. In his mind, looking for sources that he truly believed were not missing did not take precedence over other important commitments.

Mr. Simmons has already explained to the NRC in detail the basis for his belief that the sources were not missing. Because of the importance of this issue, he wants to include that information in the public record. As he has previously explained, he understood that it would be very easy for a radiation staff member, inexperienced with the NASA research facility and experimentation process, to overlook sources during an inventory. The majority of sources in use at Goddard range in size from one quarter of an inch in diameter to approximately the size of a quarter. These sources are of microcurie quantity used as check sources for instrument calibration by scientists building detectors for launching into space. These detectors are used to detect distant galaxies and stars, and the energy lines they are detecting are very weak.

In order to properly calibrate the instruments, the scientists require very weak sources to duplicate the space environment. In addition to the small size and weak radioactive intensity of the sources, and in accordance with accepted practices, inventory source locations can vary within a building or room listed on the working inventory sheet, making it more difficult to locate the sources. For example, the source might be listed as being in Building 9, Room 740, however, when the Radiation Safety staff member goes to that room, the source may be located in one of several places. The source could be in the source storage locker, it could be in a vacuum system, in an experiment or in an apparatus used in an experiment. Sometimes tracking down a source may require input from the source custodian/users. It would be a challenge for anyone not familiar with the use locations, experiments, and day-to-day operations to find these sources.

Fundamentally, Mr. Simmons did not think the new employees working for him understood the NASA-Goddard inventory system. The new staff had not been adequately trained, and the combination of their lack of familiarity and his lack of confidence in their NASA-Goddard experience, led him to question the validity of their concerns, and he did not agree with, or act on, their conclusions. He now recognizes that he did not fully appreciate the significance of the issues in the eyes of the employees. Thus, he did not address their concerns in a timely or effective manner, and the employees chose to take their issues elsewhere for resolution.

Mr. Simmons had no intent to deceive the NRC Inspector

With that said, Mr. Simmons strenuously disagrees with the conclusion of the investigation by the NRC's Office of Investigations (OI) that he deliberately failed to report missing licensed material as required by 10 CFR 20.2201, or that he provided incomplete and inaccurate information orally and in writing to the NRC in violation of 10 CFR 30.9 (a). His disagreement is reflected in the agreed-upon language of the Confirmatory Order, but it bears enhancement in this reply. The OI concluded that, because Mr. Simmons had received two memos from the health physics technician, he "knew" the radioactive sources were missing, yet deliberately failed to provide true and accurate information regarding this situation to the NRC Inspector in December 2002. The OI conclusion is wrong. In fact, based on what we understand the OI conclusions were formulated from, it is so far removed from having any basis in fact as to be irrational.

It is true that Mr. Simmons had received two memos from a contract employee stating that some source materials were missing, but the information was inconsistent with other information provided by the same inexperienced staff member, and was not plausible. Based on Mr. Simmons' own knowledge and experience, the obvious errors in the memo, and his lack of confidence in the author, he believed that the technician's conclusions were wrong. His subsequent investigation, i.e., personally re-doing the inventory, confirmed that his belief was correct: All regulatory reportable sources were located.¹

¹ As it turned out, two non-reportable sources, with less radioactivity than a smoke alarm, could not be located. NASA had no obligation to report those items as missing.

Yet, contravening reason, the OI concluded that Mr. Simmons deliberately failed to provide "true and accurate information" to the NRC because he did not report information that he sincerely and correctly believed to be false. This conclusion does not make any sense.²

It is also important to advise the Commission that Mr. Simmons' experience with the OI investigation process has been extremely disturbing. He was never advised by the OI of the scope of the charges against him, i.e., deliberately deceiving the NRC in the course of an inspection. Instead, he was advised that he had been accused of harassment of one of the contract employees, a charge which after three years, the NRC did not substantiate. He did not learn until August, 2005 that he had been accused of, and investigated for, providing inaccurate information to the NRC. This accusation was never presented to him during the OI interviews that he voluntarily participated in. Had he been advised of these serious charges, which could have had criminal implications for him, he likely would have sought legal advice at the time. Instead, since he was confident that he had never retaliated against any employee or contractor, he willingly agreed to be interviewed.

Moreover, as the Confirmatory Order makes clear, Mr. Simmons does not agree that he deliberately provided false information to the NRC. He agrees that the spreadsheet, requested by the NRC inspector, was inaccurate with respect to two sources of non-reportable quantities, however he was not aware of the inaccuracies at the time he gave the spreadsheet to the inspector. He also agreed that he should have acted sooner on the concerns of his employees, and that doing so would likely have avoided this situation, but those actions are a far cry from what he was accused of.

As Mr. Simmons has explained to the NRC, and we repeat here for the record, the initial meeting with the NRC Inspector during the unannounced December 2002 inspection was held in a small program office. In addition to Mr. Simmons and the inspector, there were several other people present in the room. To the extent that he was able to recall or reconstruct the details of the meeting, when the Inspector asked for a copy of the inventory, he requested that one of the health physics technicians print out a copy, which was then handed to the Inspector. It was exactly the same spreadsheet that Mr. Simmons was going to use to do the fourth quarter inventory, which the Inspector knew had not yet been completed.³ He does not believe that the Inspector inquired whether it was an accurate inventory of all radioactive materials at NASA-Goddard, and since the fourth quarter inventory had not yet been conducted, he would not have been able to answer that question. No information was ever provided by the NRC that would support a contrary interpretation of that conversation.

² In addition, without violating the confidentiality of the mediation process, it is important to note that other aspects of the OI report, disclosed during the mediation, demonstrate that its conclusions were without foundation. Additional information regarding the inaccuracies in the OI report will be provided upon its receipt and review.

³ As the NRC knows, NASA was conducting inventories twice as often as required by regulation.

Mr. Simmons provided to the Inspector exactly what he understood had been asked for, a complete list of all radioactive materials at NASA-Goddard. The complete list included all sources, even those not required by NRC regulations to be inventoried. He had no intention to deceive the NRC Inspector or any motive to attempt to do so. The office space is small and any conversation in the room can be heard by all present. Since everyone in the office heard what the Inspector asked for, Mr. Simmons can only assume that everyone was in agreement with whatever comments were passed between the Inspector and him, when he provided the inventory document. Deliberate deception would not have been possible, is not logical, and did not happen.

The causes for this event

Mr. Simmons has spent a substantial amount of time considering how and why this situation developed in the first place, and has shared those observations in detail with the Regional Staff. We include here a list of contributing causes for the record:

- A lack of a management of change process in the transition of contractors and organizational changes;
- Inadequate time, training, and/or resources to adequately perform and maintain control over the licensed activities;
- Inability to provide adequate time, training, and attention to the staff.

Conclusion

In summary, Mr. Simmons was proud to have the opportunity to help the NASA-Goddard radiation safety program. He was hired to help get it back on track, as well as provide leadership to the laser radiation program. He was in the process of trying to do so, to the best of his ability, but at the time of the December 2002 NRC Inspection, had not yet completed this task. It was never his intention to give inaccurate or incomplete information to the NRC. All information he provided was what he believed to be true, based on the available documents, files and records in the Radiation Safety office at the time. His actions and responses were based upon existing NASA-Goddard work practices, available files and records and his previous 17 years of experience at NASA-Goddard.

He has agreed to share the many lessons he has learned through this process with others. However, the record should be clear that this experience has been a personal and financial nightmare for Mr. Simmons and his family, and has tarnished a lengthy career as a Radiation Safety Officer of which he has been very proud. While he is prepared to and has accepted responsibility for his actions in connection with the events of the fall of 2002, we believe the extraordinary lack of timeliness or fairness of the NRC's OI report must be addressed if the Agency's oversight process is to have credibility. To be clear, if the public health and safety was ever in jeopardy as a result of a belief in Mr. Simmons' trustworthiness, how can the Agency justify taking three years to act on that concern?

Mr. Simmons has voluntarily resigned his position as the Radiation Safety Officer on the NASA-Goddard contract, and is happy to be serving NASA in a different capacity.

Sincerely,

A handwritten signature in black ink, appearing to read "Billie P. Garde". The signature is written in a cursive style with a large initial "B" and a distinct "P".

Billie Pirner Garde

cc: Michael Johnson, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555