

September 3, 2013

Tyson R. Smith, Esquire
Winston & Strawn, LLP
101 California Street
San Francisco, CA 94111

Dear Mr. Smith:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter dated May 17, 2013, which disputes a portion of the fees that the NRC assessed for the Honeywell International Inc., Metropolis Works uranium conversion facility. Your letter disputes \$507,859 in licensing fees and \$184,744 in inspection fees (for a total of \$692,603). The NRC submitted these fees to Honeywell in an invoice dated April 18, 2013.

The fees that Honeywell disputes are fees that relate to corrective actions that Honeywell voluntarily committed to take in response to findings in an NRC inspection report. The NRC initially captured Honeywell's commitment to take these actions through issuance of a confirmatory action letter (CAL)¹ dated July 13, 2012. Honeywell later agreed to a confirmatory order,² issued by NRC on October 15, 2012. Through this confirmatory order, Honeywell agreed to take actions to correct two apparent violations of NRC regulations that the NRC discovered during an inspection. The confirmatory order more specifically addresses Honeywell's voluntary commitments originally described in the CAL, makes those commitments legally enforceable, and (assuming Honeywell satisfies its commitments) forecloses NRC enforcement action based on the two apparent violations. Consistent with NRC's longstanding practice, the agency did not assess Honeywell any fees to recover the agency's costs in preparing the CAL or the confirmatory order. The NRC did, however, collect fees for the inspection and licensing activities associated with evaluating compliance with the Honeywell confirmatory order.

Notably, Honeywell previously disputed fees that arose from this same set of operative facts in a letter dated January 24, 2013, to the NRC. In that letter, Honeywell challenged the assessment of \$450,867 by the NRC for licensing and inspection fees that arose from this confirmatory order. NRC denied Honeywell's dispute in a letter dated April 24, 2013.

Once again, Honeywell has not identified any applicable specific fee exemption that applies to its situation. I must continue, therefore, to disagree with Honeywell's conclusion that the NRC is precluded from charging fees for these activities.

¹ See *Agencywide Document Access and Management System (ADAMS) Accession No. ML12195A212*

² See *ADAMS Accession No. ML12289A800*

Honeywell does not dispute NRC's authority to impose fees under *Title 10 of the Code of Federal Regulations* (10 CFR) Section 170, Part 12, "Payment of Fees." Instead, Honeywell repeats its argument that footnote 2 of 10 CFR 170.31, "Schedule of Fees for Materials Licenses and Other Regulatory Services, Including Inspections, and Import and Export Licenses," provides an applicable fee exemption. Title 10 of the CFR 170, Part 31.2 states, "Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders." Honeywell argues that under the "plain meaning" of this regulation, the NRC cannot assess any fees to Metropolis that resulted from the confirmatory order. I disagree with Honeywell. As stated in my April letter, the exclusion in 10 CFR 170.31, footnote 2 cannot apply here because Honeywell *consented* to undertaking the actions described in the confirmatory order.

Honeywell downplays its voluntary consent to the confirmatory order by emphasizing that the order also contains legally binding requirements. Honeywell argues, "...the fact that Honeywell consented to the order's issuance by waiving its right to a hearing does not, in any sense, make the requirements of the order voluntary." This is erroneous; Honeywell's interpretation of the footnote 2 exclusion assumes that *every* NRC order would lead to a fee exemption. Yet this is simply not the case. Some orders do, in fact, result in NRC charging fees. As stated in 10 CFR Part 170 Section 31 footnote 2, "For orders unrelated to civil penalties or other civil sanctions, fees will be charged for any resulting licensee-specific activities not otherwise exempted from fees under this chapter."

All "orders" contain legally enforceable requirements and impose compulsory obligations. Therefore, the confirmatory order issued by the NRC to Honeywell imposed "binding obligations" on Honeywell. The relevant question is not whether this order is legally binding-it is-but rather whether the order "relates" to a civil penalty or sanction. It does not. As the order states on Page 6, "consistent with Section 3.7 of the NRC's Enforcement Policy, the NRC is issuing this Confirmatory Order *in lieu of issuance of a Notice of Violation and consideration of civil penalties for the apparent violations described above*," (emphasis added). Page 6 of the order further explains that "Honeywell consented to issuance of this Order with the commitments described in Section IV below." The confirmatory order, therefore, merely "confirmed" Honeywell's own proposed voluntary actions to remedy the inspection violation. Honeywell had committed to taking voluntary action *before* the NRC issued this order. Honeywell's voluntarily agreement to take the actions that were eventually included in the order renders the exclusion in 10 CFR 170.31, footnote 2 inapplicable to this situation. A plain meaning understanding of the terms *sanction* and *penalty* shows why—"penalties" are usually not proposed by the punishee and are not agreed-to in advance.

In its latest dispute, Honeywell analogizes confirmatory orders to consent decrees or consent orders, arguing that *Welch v. Spangler*³ supports its position. But Honeywell's reading of the case ignores the distinction between legally binding requirements and penalties.

³ 939 F.2d 570, 572 (8th Cir. 1981).

The court in *Welch* noted, “Without enforcement mechanisms such as fines or similar remedial sanctions, consent decrees cannot have their intended coercive effect.”⁴ This important distinction between the “enforcement mechanisms” within the consent decree and the substantive terms of the consent decree itself supports my reading of the exclusion. The fines or “other remedial sanctions” for *violating* a consent decree (or, in our instance, a confirmatory order) would probably qualify as an order that relates to a civil penalty. However, the consent decree *itself* is not a “fine” or “remedial sanction” and nor is a confirmatory order. If Honeywell ignored the terms of the confirmatory order, *then* the NRC could issue an order that penalized Honeywell for noncompliance. The confirmatory order, standing alone, simply does not relate to a civil sanction or penalty under a reasonable understanding of those terms. The exclusion in 10 CFR 170.31, footnote 2, therefore, does not apply.

Ultimately, the \$507,859 in licensing fees that the NRC assessed to Honeywell resulted from NRC staff work reviewing Honeywell’s technical submissions in response to the confirmatory order. As noted above, the NRC charges its licensees for its activities relating to evaluating compliance with such orders. Honeywell was the direct recipient and beneficiary of these NRC regulatory services. As such, NRC properly assessed to Honeywell 10 CFR Part 170 user fees for these licensing activities (*see, e.g., Mississippi Power & Light Co v. NRC*, 601 F.2d 223 (5th Cir.1979), *cert. denied*, 444 U.S. 1102 (1980)).

The \$184,744 in inspection fees were also properly assessed by the NRC. To recap, these inspection fees resulted from the NRC staff’s performance of follow-up inspections to ensure that Honeywell adequately complied with the confirmatory order. These NRC inspections, therefore, were fee-recoverable regulatory activities under 10 CFR, Part 170, Section 12. Other than the exclusion in 10 CFR 170.3.2, Honeywell’s fee-dispute letter does not point to any regulatory text to show that these inspection fees were improperly assessed to Honeywell. For the reasons stated above, Honeywell cannot claim 10 CFR 170.31, footnote 2, as a basis to avoid paying inspection fees for the Metropolis site.

In conclusion, the order issued to Honeywell simply does not impose civil sanctions or penalties. Therefore, the assessment of fees in the invoice dated April 18, 2013, were properly assessed to Honeywell by the NRC. If you have any questions, please do not hesitate to contact Patty Silva, NMSS, at (301) 492-3114 or Arlette Howard, of my staff, at 301-415-1481 for any fee-related questions.

Sincerely,

/RA/

J. E. Dyer
Chief Financial Officer

⁴ *Id.* at 572.

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