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Submitter Information

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General Comment

Hogan Lovells, on behalf of itself and certain clients, submits the attached comments in response to the NRC's proposed incorporation of a "deliberate ignorance" standard into the NRC's willful misconduct rules.

Attachments

Hogan Lovells et al. — Comments on Deliberate Misconduct Rulemaking

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May 12, 2014

Ms. Annette Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ATTN: Rulemaking and Adjudication Staff

RE: Comments on Proposed Rule, "Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders," 79 Fed. Reg. 8,097 (Feb. 11, 2014); Docket ID NRC-2013-132

Dear Ms. Vietti-Cook:

The law firm of Hogan Lovells, on behalf of itself and certain clients including Exelon Generation Company, LLC,[1] and NAC International Inc.,[2] respectfully submits the following comments for the Commission's consideration regarding the proposed rulemaking on the "Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders," 79 Fed. Reg. 8,097 (Feb. 11, 2014). We support the comments submitted by the Nuclear Energy Institute on behalf of the industry on this rulemaking. We write to add some specific comments on the proposed addition of "deliberate ignorance" as a basis for finding deliberate misconduct within the meaning of the rule.

As explained below, we do not believe the NRC has provided sufficient justification for adopting the deliberate ignorance standard. The proposed change would represent a significant expansion of the scope of the deliberate misconduct rule by borrowing an ill-suited concept from criminal law that would create uncertainty for both the NRC and licensees.

1. The Deliberate Ignorance Standard is Vague and Would Create Uncertainty

The proposed rule would import the concept of "deliberate ignorance" from criminal law without seriously considering and evaluating whether that concept—with its inherently vague and subjective nature—is appropriate for the regulation of nuclear facilities. In fact, the Commission rejected such a standard in 1990 when promulgating the original deliberate misconduct rule because of the uncertainty such a standard could create for licensees and their personnel.

"Deliberate ignorance," also referred to as "willful blindness," is a concept borrowed from criminal law. The NRC defines "deliberate ignorance" in the proposed rule, based on dicta in a Supreme Court patent law case, as when a defendant (1) subjectively believes that there is a high

[1] Exelon Generation Company, LLC, is the operating licensee for 22 nuclear units (including those owned by Constellation Energy Nuclear Group, LLC).
[2] NAC International Inc. is a leading nuclear fuel cycle consulting and technology company that provides nuclear fuel storage systems, transportation, and consulting services.

probability that a fact exists and (2) takes deliberate actions to avoid learning of that fact. 79 Fed. Reg. at 8,102 (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011)). The purpose of the doctrine is to preclude criminal defendants from claiming they did not knowingly violate a statute because they purposefully avoided learning whether a particular act was illegal.

The proposed rule lifts the deliberate ignorance standard from criminal case law without a critical examination of the cases.[3] Even in criminal cases, courts have noted that deliberate ignorance should not apply generally, but instead should be used rarely and with great hesitation because it risks penalizing the acts of people who truly did not know better. *See, e.g.*, *United States v. Geisen*, 612 F.3d 471, 486 (6th Cir. 2010); *United States v. Alston-Graves*, 435 F.3d 331, 340–41 & nn.10–14 (D.C. Cir. 2006) (citing cases suggesting that use of the deliberate ignorance concept should be limited).

Significantly, the D.C. Circuit has not accepted the deliberate ignorance standard as a general matter, noting that "[i]t makes obvious sense to say that a person cannot act 'knowingly' if he does not know what is going on. To add that such a person nevertheless acts 'knowingly' if she intentionally does not know what is going on is something else again." *Alston-Graves*, 435 F.3d at 337. And as Justice Kennedy points out in his dissent in *Global-Tech*, while the conventional reasoning is that willfully blind defendants are "just as culpable" as those with actual knowledge, it is unclear whether that is actually the case in most instances. 131 S.Ct. at 2072–73 (Kennedy, J., dissenting). Without explanation, the NRC ignores the hesitance of the courts to employ deliberate ignorance and proposes to apply the concept generally to all persons subject to NRC regulatory authority.

If the proposed rule is implemented as written, the NRC is likely to do just what the courts fear—that is, penalize the acts of people who truly did not know better. This risk is heightened by the fact that the NRC has a lower evidentiary standard for civil enforcement actions—a "preponderance of the evidence"—than criminal law. As a result, innocent individuals are more likely to be investigated and subject to NRC enforcement action, all based on a standard the NRC has failed to demonstrate is necessary to serve its regulatory purpose of protecting public health and safety.

If the deliberate ignorance standard were incorporated into the deliberate misconduct rule as proposed, NRC investigators from the Office of Investigations (OI) would have to assess what an individual "subjectively believed" and whether he deliberately took action to "avoid learning" of a material fact. Making judgments about subjective motives of individuals, as opposed to their affirmative actions in light of procedural and regulatory requirements, will be difficult for OI investigators and will likely lead to greater uncertainty and disputes during the investigation and enforcement process.

2. The Commission Previously Rejected the Deliberate Ignorance Standard

The Commission expressly analyzed and rejected the willful blindness standard in its original deliberate misconduct rulemaking. As a result, the NRC's deliberate misconduct rule, 10 CFR 50.5, 70.10 and corresponding regulations in other parts of 10 CFR, applies only to knowing and

[3] Although the proposed rule refers to an Office of General Counsel (OGC) examination of case law, the result of the OGC examination of cases does not appear to be publicly available except as otherwise reflected in the proposed rule.

deliberate violations—specifically, "an intentional act or omission that the person knows" would, *inter alia*, cause a licensee or applicant to be in violation of an NRC requirement. Thus the person must take an intentional act (or omission) that he knows will cause a violation. The regulatory history of the original deliberate misconduct rule shows that the Commission chose this high threshold because of the significant impact that a finding of deliberate misconduct could have on licensee personnel, such as individual enforcement action against employees.

In the proposed rule published in April 1990, the NRC explained the type of misconduct standard it was initially considering as follows:

> The proposed regulations focus on willful misconduct. A violation is willful if an individual . . . showed a careless disregard for whether the conduct was prohibited. . . . [including] *a situation in which an individual blinds himself or herself to the realities of whether a violation has occurred or will occur*.

Proposed Rule, "Willful Misconduct by Unlicensed Persons," 55 Fed. Reg. 12,374 (Apr. 3, 1990) (emphasis added).

In response to licensee comments that such a broad rule would be a disincentive to employment in the nuclear industry, create additional stress, and undermine morale, the NRC amended its proposed standard to exclude careless disregard (including willful blindness) as grounds for finding "deliberate misconduct." *See* Final Rule, "Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons," 56 Fed. Reg. 40,664, at 40,675 (Aug. 15, 1991). As a result, the Commission decided that the current rule would apply only to deliberate and knowing violations. What the NRC now calls a "deficiency" in the deliberate misconduct rule was actually the result of the Commission's considered and intentional decision to exclude certain conduct from the scope of the rule.

3. The NRC Has Not Provided an Adequate Basis for the Rule Change

The proposed deliberate ignorance standard would be a reversal of existing NRC policy. A bedrock principle of administrative law is that federal agencies must adequately explain and justify revisions in regulations that change course with respect to longstanding agency policy. As the Supreme Court emphasized in *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 27, 42 (1983), "[i]f Congress established a presumption [under the Administrative Procedure Act] . . . , that presumption . . . [is] against changes in current policy that are not justified by the rulemaking record."

As noted above, the current deliberate misconduct rule establishes a high threshold for what constitutes "deliberate misconduct" and does not apply to acts resulting from negligence or careless disregard, including willful blindness. Nearly a quarter of a century after deciding this was the right line to draw, the NRC proposes to reverse course without providing an adequate basis for doing so.

In this regard, the proposed rulemaking was designed specifically in response to the *Geisen* enforcement matter. 79 Fed. Reg. at 8,098. In particular, the proposed rule addresses what the NRC calls an "anomaly": that "Mr. Geisen was convicted in a federal court under a 'beyond a reasonable doubt' criminal standard but exonerated before the NRC on a less demanding 'preponderance of the evidence' standard." 79 Fed. Reg. at 8,099. The proposed rule seeks to change the scope of the current rule so that "NRC enforcement proceedings and DOJ criminal

prosecutions that involve similar violations are carried out in a consistent manner." 79 Fed. Reg. at 8,099. These statements explain what the new rule is intended to do, but not *why* the change is necessary.

In *Geisen*, the only effect of the lack of a deliberate ignorance standard was that the NRC staff was unable to rely on collateral estoppel to take individual enforcement action against Mr. Geisen, a former employee at the Davis-Besse nuclear power plant. The lack of collateral estoppel did not harm the staff, but rather meant only that the staff had to make its case before an NRC Atomic Safety and Licensing Board that was considering Mr. Geisen's appeal from the enforcement action against him. After reviewing the evidence, the Licensing Board held that the NRC had not met its burden to prove that Mr. Geisen had made a knowing misrepresentation as alleged in the enforcement order. The fact that different results were reached in the two different forums does not alone justify undertaking a rulemaking to reverse 25 years of settled Commission policy.

The NRC does not explain why this single inconsistent result between NRC and criminal proceedings should justify the proposed rule. The proposed rulemaking does not identify—nor were we able to find—any other case in which a person violated NRC regulations and avoided liability by remaining deliberately ignorant. In fact, it is difficult to see how a deliberate ignorance standard that may apply in drug running cases would be necessary or appropriate in the heavily regulated nuclear industry, where there are detailed procedures governing all safety significant activities and extensive training of personnel. In short, then, the proposed rule seeks a solution to what appears to have been a one-off problem.

Moreover, the deliberate ignorance standard would not even have applied in *Geisen*, which was an *actual knowledge* case. The NRC Staff argued before the Atomic Safety and Licensing Board that Geisen had actual knowledge of the false statements, but the Board was simply not convinced. *See In re Geisen*, LBP-09-24, 70 N.R.C. 676, 721 n.90, 724 n.98 (2009), stating:

> [T]his is not a case in which an alleged drug runner disclaims knowledge of what . . . he is delivering, and a finding of a 'high probability' that he knew would fit the fact pattern, while any disclaimer would be inherently lacking in credibility. Instead, the entire basis of the defense here was that . . . Mr. Geisen 'actually believe[d] that' the information he was submitting was true. Either he knew it was false, or he believed it was true—on the evidence presented, 'high probability' had nothing to do with it and thus should not be employed in our decisionmaking process. (citation omitted) (emphasis added)

In affirming Mr. Geisen's criminal conviction, the Sixth Circuit found that "Geisen's convictions can be upheld under an *actual knowledge* theory." *United States v. Geisen*, 612 F.3d 471, 487 (6th Cir. 2010) (emphasis added). The court noted that the evidence on count 4—the facts of which were also the subject of the NRC's proposed enforcement action—was "perhaps the strongest against Geisen." *Id.* at 491. Thus, the *Geisen* "anomaly" seems to have resulted from the NRC's inability to carry its burdens of proof and persuasion before the Licensing Board rather than the lack of a deliberate ignorance standard in the regulations. Expanding the scope of the deliberate misconduct rule is therefore not an appropriate response to *Geisen*.

Although the NRC worries that "the scope of the current Deliberate Misconduct Rule differs from the range of actions subject to criminal prosecution," the NRC offers no principled reason why the deliberate misconduct rules should be precisely coextensive with criminal law, particularly 18

U.S.C. § 1001, which criminalizes making material false statements to the government. Instead, the proposed rulemaking simply quotes the Commission's earlier prediction that the scope of conduct covered by the deliberate misconduct rule "would 'not differ significantly from the range of actions that might subject the individual to criminal prosecution.'" 79 Fed. Reg. 8,100 (quoting 56 Fed. Reg. at 40,675). But the Commission's prediction remains accurate: The scope of the existing rule does not differ significantly from the criminal law. As discussed, the NRC has identified only a single instance in which the difference may have been of consequence.[4] *Geisen* thus appears to have been an exception rather than a failure of the existing rule.

Finally, the proposed rule fails to indicate any desirable real-world policy outcome that would be accomplished by harmonizing the deliberate misconduct standard with the criminal law's deliberate ignorance standard. Rather than any practical concern, the rulemaking appears to be driven by a philosophical desire for consistency between NRC regulation and the criminal law. It hardly needs to be stated that the U.S. criminal code covers a far more extensive range of conduct than is regulated by the NRC. Consistency for consistency's sake is not a substantial reason to expand the deliberate misconduct rule with a vague new standard that would create uncertainty for licensees and the NRC.

In sum, the NRC has failed to demonstrate a need for a deliberate ignorance standard. The NRC should withdraw the proposed revisions to the deliberate misconduct rule to avoid pointlessly increasing the uncertainty and regulatory burden for licensees and their employees.

Very truly yours,

Daniel F. Stenger
Amy C. Roma
Matthew B. Tynan

[4] As mentioned, it is not clear that the difference was in fact consequential, as the Sixth Circuit found there was sufficient evidence to convict on an actual knowledge theory. *See Geisen*, 612 F.3d at 487.