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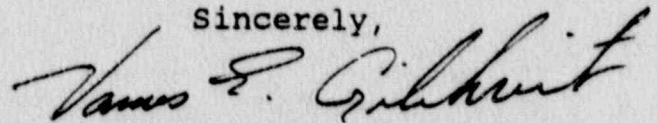
Secretary

U.S. Nuclear Regulatory Commission
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Attention: Docketing and Service Branch

Enclosed for your consideration are comments prepared by the American Mining Congress on the proposed Nuclear Regulatory Commission rulemaking appearing in the April 3, 1990, Federal Register relating to Willful Misconduct by Unlicensed Persons. AMC very much appreciates the opportunity to comment on this rulemaking proposal.

Sincerely,



James E. Gilchrist
Vice President

Enclosure

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grounds. First, NRC's statement that it can issue demands to show cause to those who held a license or were engaged in licensable activities in the past but who no longer hold a license specifies neither a time frame of reference for such demands nor any criteria. How far back in time does NRC anticipate going to pursue information from a former licensee? And are such demands only going to be addressed to potentially serious matters such as willful violations? AMC is concerned that a potential for abuse may exist if the Commission goes too far back in time to review past actions when the current personnel and policies may be far different than at the time of the matter in question.

If a demand is issued, the individual in question apparently does not have a right to an adjudicatory proceeding of any sort but must provide certain information. For example, a uranium mill tailings licensee who has completed final reclamation and terminated its license could be forced to provide "information" to NRC if 25 to 30 years after final reclamation there was damage to the tailings impoundment and NRC was attempting to assess the cause for the damage. Without some specific safeguards and more specific criteria about when this might be applied, AMC believes that this is far too broad an assertion of jurisdiction to issue demands for information.

Second, AMC is concerned with the NRC's assertion that when there is a show cause demand that is part of an order requiring action, hearing rights will be available only with respect to provisions of the order requiring action. It is entirely possible that the information solicited by the demand to show cause will be related to the actions required under the order. Requiring an individual or a licensee to provide information that could be prejudicial to legal rights that are subject to hearing would be improper and inequitable.

The NRC's statement that there will be "procedural rules" governing the issuance of an order or demand to show cause "once the proposed rules are in effect" is like closing the barn door after the horse has left. To put a mechanism in place and then develop procedural rules that define when that mechanism may be utilized suggests that individual rights are merely an afterthought rather than an important concern of the Commission. Moreover, those procedural rules themselves would be improper under the Administrative Procedure Act as standards that affect the rights of private parties but were not developed after notice and opportunity for comment. AMC assumes that this is not intended and requests further rulemaking on this point.

II. Willful Misconduct by Unlicensed Persons.

NRC is proposing regulations to:

put unlicensed persons on notice that they may be subject to enforcement action (1) for willfully causing, a licensee to violate any of the Commissions requirements or (2) for other willful misconduct that (a) arises out of activities within the jurisdiction of the NRC and (b) places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety.

55 Fed. Reg. 12,374, Col. 1.

Apparently, NRC is concerned that its current enforcement program, which holds licensees responsible for the conduct of employees, consultants or contractors, may only have an "indirect" impact on individual wrongdoers. The Commission also asserts that it is necessary to be able to reach individuals whose deliberate or willful violations cause licensees to be in violation of rules, orders, regulations or license conditions and that may adversely impact public health and safety.

The proposal focuses on "willful misconduct" that is defined to mean:

A violation is willful if an individual either knew that the conduct was prohibited or showed a careless disregard for whether the conduct was prohibited.

55 Fed. Reg. 12,375, Col. 1 (emphasis added).

The discussion then goes on to indicate that "careless disregard" has been described as a "showing of disregard for the governing statute or an indifference to its requirements." Id. And, further that "careless disregard" connotes a "reckless regard or callous . . . indifference toward one's responsibilities and for the consequences of one's actions." Id. Further, the discussion states that "willfulness . . . embraces a spectrum of violations ranging from a deliberate intent to violate and including careless disregard for requirements." Id.

The proposal contrasts "careless disregard" with violations caused by "simple error, misjudgment, miscalculation, ignorance or confusion on the part of the individual." Id. In cases involving "negligent conduct, action against the individual is more appropriately handled within the licensees remedial program." Id. See also id. at 12,377, Col. 1.

Unfortunately, in spite of the discussion in the preamble and the proposal's attempt to indicate that simple negligence does not constitute willful misconduct, the Commission's reliance on the phrase "careless disregard" poses serious problems for future application of the proposed criteria for willful misconduct. The legal meaning of this standard is not stated accurately, and the NRC has proposed a standard that sweeps far too broadly by subjecting actions involving mere negligence to full-blown NRC investigation.

The cases cited by the Commission to support a "careless disregard" standard for willful misconduct illustrate the inaccuracy of such a definition. The Commission cites Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). 55 Fed. Reg. 12,375, Col. 1. In affirming, however, the Trans World court noted as reasonable the lower court decision which defined the "willful" standard as being met if the defendant "knew or showed reckless disregard for the matter of whether its [defendant's] conduct was prohibited." Air Line Pilots Ass'n. Intl. v. Trans World Airlines, Inc.; 713 F.2d 940, 956 (1983) (emphasis added). In United States v. Illinois Cent. R. Co., 303 U.S. 239 (1938), another case cited to support the "careless disregard" interpretation, the court described "willfully" as meaning "purposefully or obstinately" and as a term designed to "describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." Id. at 243 (emphasis added). As these cases illustrate, "willful misconduct" is distinguishable from negligence, and therefore the use of "careless disregard" unnecessarily blurs the distinction. Thus, AMC believes that the NRC has made an error in its choice of terminology. Willful misconduct requires a greater degree of intent or recklessness than is involved in the "careless" disregard standard that it seeks to apply under this rulemaking.

The term "careless disregard" is on its face more directly descriptive of simple negligence than it is of willful misconduct. Common dictionary definitions conflict with the NRC's usage. For example, Black's Law Dictionary includes the following in its discussion of negligence: "involuntary and casual," "accidental"; "synonymous with heedlessness,

carelessness, thoughtlessness, disregard, inattention, inadvertence, remissiveness and oversight." Black's Law Dictionary 1184 (5th ed. 1979) (emphasis added).

In addition, it should be noted that both of the above-cited cases involved companies who benefitted from prior notice through their relationships to regulatory agencies or because of their responsibility to oversee employees. In contrast, the proposed rule focuses on individuals who are less likely to have such prior notice. The distinction between willful misconduct and negligence becomes more crucial because otherwise an unlicensed individual may find himself subject to civil and criminal sanctions because of an inadvertent violation. The inadvertent act would be considered willful misconduct because knowledge would be imputed to the individual and the act would show "careless disregard." It is a violation of individual rights if the responsibilities that follow from the notice to licensees, who are participants in a regulatory system, are extended to individuals who do not benefit from such notice. The Commission should, therefore, refine the definition of "willful misconduct" so as to protect the individual from being sanctioned for unknowingly committed violations.

Thus, despite NRC's attempt to use the phrase "careless disregard" to describe more serious, willful violations, there is real conflict with the meaning that may reasonably be ascribed to the phrase. It would be far better to define a "willful violation" to require a wanton, intentional, reckless, or callous disregard for one's duty or responsibility rather than a "careless" disregard. Because the Commission plainly believes that actions under the new regulations should be limited to somewhat extraordinary failures to perform by individuals, it should be careful about choosing the terms it uses to describe those kinds of failures. AMC recommends that the Commission drop the use of the phrase "careless disregard" since it may be subject to misinterpretation. The Commission needs to take care to be precise because enforcement action for willful disregard may lead to substantial civil penalty liability or even criminal exposure.

The Commission has also addressed a potential situation in which an individual's willful misconduct may involve activities within the jurisdiction of the NRC but which misconduct "does not in itself constitute or create a violation of Commission requirements, either because of the wording of a particular requirement . . . or because NRC has not acted in an area." Id. at 12,376. The proposal states that the Commission should be able to issue an order in such situations to assure its continued confidence in licensee protection of public health and safety.

In cases where there is a reasonable basis for regulatory concern, the Commission would consider issuing orders or demands to show cause pursuant to proposed revisions to 10 CFR §§ 2.202 and 2.204.

AMC believes that this proposal also touches on the potentially sensitive issue of individual rights. The very notion of "misconduct" requires some kind of wrongful act, and yet the NRC seeks to extend its investigating powers to situations where no violation of NRC standards has occurred. This fundamental inconsistency makes the standard unworkable. Simply stated: How can there be "willful" misconduct" to trigger an order or demand if no misconduct has occurred? Individual rights to due process and privacy should not be subjected to such a frivolous and facially invalid standard.

AMC understands the Commission's concerns about persons, licensed or unlicensed, whose conduct violates Commission rules and may endanger public health and safety -- whether those acts occur on or off the licensed site. However, to hold such individuals responsible for a willful act where understanding of the act's consequences can not be inferred from some rule or clearly stated policy is unreasonable and improper. The proper approach would be for the NRC to promulgate a regulation that specifies the kind of "misconduct" that can give rise to these public health and safety concerns and then develop, through rulemaking, the procedures that will be followed to issue orders or demands to show cause.