

June 8, 2007

The Honorable Hillary Rodham Clinton
United States Senate
Washington, D.C. 20510

Dear Senator Clinton:

On behalf of the Commission, I am responding to your May 16, 2007 letter to Mr. Samuel Collins, the U.S. Nuclear Regulatory Commission's (NRC's) Region I Regional Administrator. Your letter related to the May 14, 2007 letter from the Westchester County Department of Emergency Services, which requested that proposed civil penalty funds related to Entergy Nuclear Operations, Inc.'s (Entergy's) non-compliance with a Commission order be distributed to the counties surrounding the Indian Point Nuclear Generating Station (Indian Point Plant), for use in local emergency planning activities.

On April 23, 2007, the NRC issued a Notice of Violation and Proposed Imposition of Civil Penalty - \$130,000 (NOV) against Entergy, the operator of the Indian Point Plant. The NRC issued the civil penalty for Entergy's failure to install, by April 15, 2007, an operational backup power supply for the Emergency Notification System for the Indian Point Plant. The new backup power requirements were mandated by the Energy Policy Act of 2005 and were implemented through the NRC's January 13, 2006 Confirmatory Order to Entergy.

Westchester County requested that the NRC redirect the funds from the proposed civil penalty to the four counties in the 10-mile radius of the Indian Point Plant. By a letter from the Director of NRC's Office of Enforcement to Commissioner Sutton, Westchester County (copy enclosed), the NRC is informing Westchester County of the statutory restrictions that prevent the NRC from meeting the County's request.

The NRC shares your goal of enhancing safety for residents of the counties in the vicinity of the Indian Point Plant and works diligently to achieve that goal within its regulatory regime and legal constraints. This is not the first time a proposal similar to Westchester County's has been received. Most recently, a similar request was received from Congresswoman Marcy Kaptur relating to redirecting funds involving a civil penalty imposed on First Energy Nuclear Operating Company regarding the Davis Besse Facility. As we noted in our response to Congresswoman Kaptur (copy enclosed), and as explained in more detail in the letter to Westchester County, once NRC receives a civil penalty payment, it is mandated to deposit the funds in the Treasury. The Government Accountability Office has made it clear that NRC cannot redirect the civil penalty payments it receives and has also identified significant statutory impediments to the granting of proposals to direct licensees to make payment to third parties in lieu of a civil penalty.

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The Commission appreciates your interest in emergency preparedness at the Indian Point Plant. We will continue to monitor Entergy's progress closely to comply with the new emergency notification requirements and will take appropriate action as deemed necessary.

Sincerely,

/RA/

Dale E. Klein

Enclosures: As stated

Identical letter sent to:

The Honorable Hillary Rodham Clinton
United States Senate
Washington, D.C. 20510

The Honorable Nita M. Lowey
United States House of Representatives
Washington, D.C. 20515

June 8, 2007

The Honorable Anthony W. Sutton
Commissioner
Department of Emergency Services
Westchester County
4 Dana Road
Valhalla, NY 10656

Dear Mr. Sutton:

I am responding to your letter, dated May 14, 2007, to Mr. Samuel Collins, U.S. Nuclear Regulatory Commission's (NRC) Region I, Regional Administrator. Your letter related to the NRC's April 23, 2007, Notice of Violation and Proposed Imposition of a Civil Penalty issued to Entergy Nuclear Operations, Inc. (Entergy). The civil penalty was issued in the amount of \$130,000 for a violation at the Indian Point Nuclear Generating Station (Indian Point Plant). The NRC issued the civil penalty for Entergy's failure to install, by April 15, 2007, an operational backup power supply for the Emergency Notification System for the Indian Point Plant. The backup power requirements were mandated by the Energy Policy Act of 2005, and were implemented through an NRC January 31, 2006, Confirmatory Order to Entergy.

In your letter, Westchester County requested that the NRC redirect the funds from the proposed civil penalty to the four counties in the 10-mile radius of the Indian Point Plant. These counties are tasked with maintaining radiological emergency preparedness plans. Your letter indicated that the funds would be useful to the counties for their emergency planning and possibly for enhancement of their public emergency notification capabilities.

The NRC shares your goal to ensure the health and safety of the Westchester County's residents and the residents of the other counties in the vicinity of the Indian Point Plant. The NRC works diligently to achieve that goal. However, Entergy has already paid the \$130,000 civil penalty, and as such, the NRC is required to deposit the funds to the U. S. Treasury pursuant to the Miscellaneous Receipts Act. The relevant portion of the Act, which is codified at 31 U.S.C. 3302(b), states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." The NRC does not have the authority to redirect such funds for non-appropriated programs. See Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties, B-238419, 70 Comp. Gen. 17 (1990). Once these funds were sent to the NRC, we were mandated to deposit the funds in the Treasury. As such, the NRC is unable to honor your request.

As for your reference to the U.S. Environmental Protection Agency (EPA), we understand that the EPA has adopted a policy and established well-defined procedures for using so-called supplemental environmental projects (SEP) that may be considered if proposed by violators who may be otherwise subject to civil monetary penalties. Guided by the referenced Comptroller General decision directly applicable to the NRC's statutory civil penalty authority and other policy considerations, the NRC has not established procedures that would allow the

A. W. Sutton

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diversion of NRC civil penalty funds to other projects. The U.S. Government Accountability Office decisions have identified significant statutory impediments to the granting of proposals to direct expenditures for projects carried out by a third party in lieu of payment of a civil penalty.

We will continue to closely monitor Entergy's progress to comply with the new emergency notification requirements and will take appropriate action as deemed necessary.

Sincerely,

/RA/

Cynthia A. Carpenter, Director
Office of Enforcement

August 10, 2004

The Honorable Marcy Kaptur
United States House of Representatives
Washington, D.C. 20515

Dear Congresswoman Kaptur:

Thank you for your letter of July 23, 2004. I am responding on behalf of the U.S. Nuclear Regulatory Commission (NRC). In your letter you ask how any NRC civil fine, or a portion of it, that was levied against the operator of the Davis-Besse Nuclear power plant can be used to help establish a nuclear training and engineering endowment program at the University of Toledo's Engineering School.

This is not the first time a proposal similar to yours has been presented to the NRC. In 1990, Senator John B. Breaux asked the NRC to redirect its civil penalties to help fund nonprofit research and educational organizations relating to radiological health and safety. In 1997, the State of Connecticut asked the NRC to redirect fines to fund a nuclear safety inspector position.

As with the prior requests, I must inform you that a fine received by the U.S. Government must be paid to the general treasury and cannot be used for other purposes. In response to the NRC's request for an opinion on Senator Breaux's suggestion, the Comptroller General decided in 1990 that such allocations would be in "circumvention of the congressional appropriations process," resulting in an impermissible "augmentation of NRC appropriations" forbidden under the Miscellaneous Receipts Act. The relevant portion of that Act, which is codified at 31 U.S.C. 3302(b), states that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." The Comptroller General went on to state that Congress specifically defined the remedies NRC has available to correct violations. Congress, however, granted NRC no authority to mitigate penalties by permitting licensees to fund nuclear safety research projects at universities. Please see the enclosed Comptroller General opinion, which is also reported at 70 Comp. Gen. 17 (1990), under the title, "Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties."

In short, the Commission is not able to redirect fines for the purpose that you propose, absent legislation that would remove the current legal prohibitions. Of course, Congressional appropriation of funding for such training is an alternate approach. The Commission appreciates your interest in promoting advanced training and engineering in the nuclear fields for your region.

Sincerely,

/RA/

Nils J. Diaz

Enclosure: As stated



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nuclear Regulatory Commission's Authority
to Mitigate Civil Penalties

File: B-238419

Date: October 9, 1990

DIGEST

The Nuclear Regulatory Commission (NRC) lacks authority to permit licensees who violate NRC requirements to fund nuclear safety research projects in lieu of paying monetary civil penalties. See 42 U.S.C. § 2282(a).

DECISION

This responds to a request from the General Counsel, Nuclear Regulatory Commission (NRC), regarding the Commission's authority to mitigate civil penalties levied against licensees who violate NRC requirements. The General Counsel asks whether NRC may permit a licensee, in lieu of paying a penalty, to fund nuclear safety research projects at universities or other nonprofit institutions. We conclude that NRC has no authority to mitigate penalties in such a manner.

BACKGROUND

Pursuant to the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5811, the NRC carries out an enforcement program to promote and protect the radiological health and safety of the public. Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2282, authorizes the NRC to impose civil penalties, not to exceed \$100,000 per violation per day, for the violation of certain specified licensing provisions of the act, rules, orders, and license terms implementing these provisions, and for violations for which licenses can be revoked. Section 234 also authorizes the NRC to "mitigate" such penalties.

In this regard, the NRC proposes to "mitigate" civil penalties by permitting violators to fund nuclear safety research projects. The NRC notes that it has authority under section 31 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2051(a), to award contracts to nonprofit educational institutions to conduct nuclear safety-related research. As part of an effort to expand its research

program, the NRC asks whether it has authority, without further legislation, to implement any of the following options:

- The NRC would accept "contributions" from a violator, in lieu of a civil penalty, for use by the NRC Office of Research to fund research grants to universities and other nonprofit institutions. Currently, the NRC deposits in the Treasury penalties paid to it by licensees. See 31 U.S.C. § 3302(b) (1982).
- In lieu of paying a civil penalty, the violator would agree to contribute the amount of the penalty, or a portion thereof, directly to a university or nonprofit institution to fund a research project competitively selected by the Office of Research.
- In lieu of paying a civil penalty, the violator would agree to contribute the amount of the penalty, or a portion thereof, to a university to fund a research project selected by the violator.

As a general matter, NRC states that the contributions under each of these three options, would be treated as fines for Internal Revenue Code purposes and not as charitable contributions.

DISCUSSION

In a 1983 decision, we concluded that the Commodity Futures Trading Commission (CFTC) lacked authority to adopt an enforcement scheme similar to that proposed by NRC. B-210210, Sept. 14, 1983. CFTC had proposed that in lieu of imposing a monetary civil penalty, it might accept, as a remedy for violating the Commodity Exchange Act, a promise from the violator to make an educational donation. We noted that although the Congress empowered the CFTC with discretion in enforcing that act, the Congress specifically defined the remedies available to the CFTC. We determined that CFTC's discretion did not extend to remedies, such as that proposed by CFTC, that are not within the ambit of CFTC's statutorily authorized prosecutorial objectives, i.e., correction or termination of a condition or practice, punishment, and deterrence.

For similar reasons, we conclude that NRC is not authorized to impose its proposed alternative punishment. As we pointed out in the CFTC decision, an agency's authority is limited to the powers delegated to it by the Congress. The Congress, in

section 234, has specifically defined NRC's enforcement authority as follows:

"[a]ny person who (1) violates any licensing provision, . . . or any rule, regulation, or order issued thereunder, or any term, condition or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked . . ., shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed \$100,000 for each such violation."

42 U.S.C. § 2282(a). By its terms, section 234 authorizes the NRC to impose civil monetary penalties.

Section 234 also provides that "the Commission shall have the power to compromise, mitigate, or remit" such penalties. Id. Clearly, this authority confers discretion. "Mitigate," for example, means "to make less severe; to alleviate; to diminish." United States v. One Ford Coach Automobile (Motor No. 18-2396048), 20 F. Supp. 44, 46 (W.D. Va. 1937). Thus, with authority to compromise, mitigate or remit, NRC may adjust the penalty to reflect the special circumstances of the violation or concessions exacted from the violator.

Such discretion, however, like CFTC's prosecutorial discretion, does not empower the NRC to impose punishments unrelated to prosecutorial objectives. See B-210210, Sept. 14, 1983. Under NRC's proposal, a violator would contribute funds to an institution that, in all likelihood, has no relationship to the violation and has suffered no injury from the violation.

From an appropriations law perspective, such an interpretation would require us to infer that the Congress intended to allow the NRC to circumvent 31 U.S.C. § 3302 and the general rule against augmentation of appropriations. Section 3302(b) requires the NRC to deposit into the Treasury as miscellaneous receipts monies collected under section 234. Section 3302(b) provides that

". . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable"

31 U.S.C. § 3302(b). See, e.g., 39 Comp. Gen. 647, 649 (1960).

The purpose of section 3302(b) is to ensure that the Congress retains control of the public purse, and to effectuate

Congress' constitutional authority to appropriate monies. See, e.g., 67 Comp. Gen. 353, 355 (1988); 51 Comp. Gen. 506, 507 (1972). Each of the three proposals identified by the NRC would result in an augmentation of NRC's appropriations, allowing the NRC, in varying degrees, to control, in circumvention of the congressional appropriations process, the amount of funds available for nuclear safety research projects. See 59 Comp. Gen. 294, 296 (1980); B-210210, Sept. 14, 1983. We are unwilling to interpret "compromise, mitigate, or remit" in such a manner where neither the language of section 234 nor its legislative history provides any basis for such an interpretation.

Accordingly, we do not read section 234 as authorizing the NRC to implement any of the three options proposed. If NRC believes such authority is important to its operations or the amount of funding for such purposes is inadequate, it should submit a legislative proposal to the Congress either to amend section 234 or to increase its appropriation for its nuclear safety research program.

for Milton J. Aorlar
Comptroller General
of the United States