

September 10, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

JAMES CHAISSON

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Docket No. IA-14-025-EA

ASLBP No. 14-932-02-EA-BD01

NRC STAFF RESPONSE TO BOARD QUESTIONS

In its Notice of Hearing and Initial Scheduling Order, issued on September 8, 2014,¹ the Atomic Safety and Licensing Board (Board) directed the Staff of the Nuclear Regulatory Commission (NRC) to address six questions, no later than September 10, 2014, regarding the availability and exercise of Mr. James Chaisson's right against self-incrimination under the Fifth Amendment to the United States Constitution. The Staff hereby provides individual responses to the Board's questions 1 through 3, and provides a single response for questions 4 through 6.

1. Whether there is any potential that the NRC will pursue criminal charges against Mr. Chaisson.

The Prohibitory Order issued to Mr. Chaisson in May 2012² (which, in turn, resulted in the 2012 Confirmatory Order³ and the 2014 Prohibitory Order⁴) was the enforcement action taken by the NRC at the conclusion of two investigations conducted by the NRC Office of Investigations into alleged deliberate misconduct by Mr. Chaisson. On March 5, 2010 and

¹ Notice of Hearing and Initial Scheduling Order, LBP-14-11, 80 NRC __ (Sept. 8, 2014). The Board's questions were initially posed during the Pre-Hearing Conference conducted on August 26, 2014. See Tr. at 92-93.

² See Mr. James Chaisson; Order Prohibiting Involvement in NRC-Licensed Activities, 77 Fed. Reg. 30,332 (May 22, 2012).

November 9, 2011, the Office of Investigations referred the results of its investigations to the Department of Justice, which declined prosecution in lieu of the administrative remedies available to the NRC. Although such a declination does not foreclose an eventual prosecution by the Department of Justice, the NRC has no intention to pursue the matter further with the Department of Justice or any other federal agency. Consequently, in the opinion of the Staff, the possibility of a criminal prosecution on the facts at issue in this hearing is remote.

As the Staff noted during the Prehearing Conference,⁵ the Office of Investigations is currently conducting another investigation concerning Mr. Chaisson regarding a related matter, but involving separate facts. Once this investigation is complete, the Office of Investigations may refer the results to the Department of Justice and further action may be taken at the discretion of that agency.⁶

2. Whether the NRC is aware that any other federal entity, such as the U.S. Department of Justice, is investigating this matter and/or may pursue criminal charges against Mr. Chaisson.

The NRC is currently unaware of any other federal entity either investigating this matter or potentially contemplating criminal charges against Mr. Chaisson.

3. Whether the Director or anyone on the NRC Staff has previously advised Mr. Chaisson of his Fifth Amendment right against self-incrimination, and if so, when and how.

Mr. Chaisson has not previously been advised by the NRC of his Fifth Amendment right against self-incrimination. On several occasions, Mr. Chaisson was interviewed in a non-custodial setting by NRC investigators. The investigators did not discuss the Fifth Amendment in either interview, and at no time did Mr. Chaisson refuse to answer questions.

4. Whether the right against self-incrimination attaches or has attached to Mr. Chaisson in this proceeding;
5. If so, when did it attach; and
6. If so, how we should handle this issue and protect Mr. Chaisson's constitutional rights.

⁵ Tr. at 91.

⁶ See Staff Requirements: SECY-88-236 - Memorandum of Understanding with the Department of Justice (Oct. 20, 1988) (ADAMS Accession Number ML010930222).

The Fifth Amendment states that “No person . . . shall be compelled in any criminal case to be a witness against himself” U.S. CONST. amend. V. The Amendment “not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”⁷ A person may exercise the right at any time, where there exists a reasonable and objective fear of prosecution.⁸

The protection against self-incrimination shields an individual only against criminal prosecution, not civil sanctions. Enforcement orders, like the one at issue in this proceeding, are civil and remedial, not criminal, in nature, even though the consequences might be financially or personally severe.⁹ In a civil proceeding, an individual may not invoke the Fifth Amendment to avoid answering any and all questions, only those where the answers might be incriminating.¹⁰ Further, in a civil proceeding, a trier of fact is permitted to draw a negative inference from an individual’s silence.¹¹

Mr. Chaisson is and has been free to assert the Fifth Amendment since the beginning of the NRC investigation and during the current proceeding. The Staff has identified no authority imposing an affirmative obligation on the NRC to inform the subject of a civil investigation of his

⁷ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

⁸ See, e.g., *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (issue is “whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination”); *Hoffman v. United States*, 341 U.S. 479, 486, (1951) (“this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer”). Whether an assertion of privilege is warranted is a matter of discretion for the trial court.

⁹ *United States v. Emerson*, 107 F.3d 77, 83 (1st Cir. 1997) (upholding court’s imposition of \$185,000 civil penalty and injunction barring pilot from aviation, rejecting contention of “criminal sanctions.”). See also *Morse v. C.I.R.*, 419 F.3d 829, 835 (8th Cir. 2005) (IRS civil fraud penalties are remedial rather than punitive); *Clarkson Const. Co. v. Occupational Safety & Health Review Comm’n*, 531 F.2d 451, 455 (10th Cir. 1976) (OSHA fines are civil); *Ryan v. IRS*, 568 F.2d 531 (7th Cir. 1977) (IRS penalties are civil).

¹⁰ See *In Re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 663–64 (7th Cir. 2002).

¹¹ See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Hinojosa v. Butler*, 547 F.3d 285, 291 (5th Cir. 2008).

Fifth Amendment rights.¹² In general, the remedy for a violation of the right against compelled self-incrimination is to have the improperly-obtained statements excluded as evidence from a criminal trial.¹³

The Staff acknowledges Mr. Chaisson's right to invoke the Fifth Amendment during this proceeding, including during any potential deposition, interrogatory, or other questioning on the record. The Staff will respect any assertions of Mr. Chaisson's Fifth Amendment rights during this proceeding, and, in rare circumstances, may seek Board review to verify that a reasonable basis exists for invocation of the privilege.

Respectfully submitted,

/Signed (electronically) by/

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¹² The Fifth Amendment requirements of *Miranda v. Arizona* are applicable to civil interrogations only when the individual has been taken into custody. See *Mathis v. United States*, 391 U.S. 1, 4 (1968) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (in-custody questioning by INS investigator must be preceded by *Miranda* warnings).

¹³ See *Miranda*, 384 U.S. at 462. In *United States v. Kordel*, the Supreme Court held that the use in a criminal trial of evidence obtained during an FDA investigation did not violate the Fifth Amendment, where the agency did not act in bad faith in obtaining the evidence. *United States v. Kordel*, 397 U.S. 1, 11–12 (1970). The Court noted that the defendants were represented by counsel during the civil investigation and aware of the parallel criminal proceeding. *Id.* The Ninth Circuit further explained in *United States v. Stringer* that courts have ordered suppression of evidence in criminal proceedings “where the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case,” noting that “[a]lmost every other circuit has denied suppression, even when the government agents did not disclose the possibility or existence of a criminal investigation, so long as they made no affirmative misrepresentations.” *United States v. Stringer*, 535 F.3d 929, 937, 940 (2008). The Staff notes that in *Stringer*, unlike in the case at hand, the SEC advised the subjects of its civil investigation of their Fifth Amendment rights when it issued subpoenas for questioning. *Id.* at 934.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRC STAFF RESPONSE TO BOARD QUESTIONS, dated September 10, 2014, has been served over the Electronic Information Exchange, the NRC's E-Filing System, this 10th day of September, 2014.

/Signed (electronically) by/

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