



NUCLEAR ENERGY INSTITUTE

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Robert Willis Bishop

VICE PRESIDENT &

GENERAL COUNSEL

December 18, 1996

Mr. John C. Hoyle
Secretary
U.S. Nuclear Regulatory Commission
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PROJECT NUMBER
PROPOSED RULE PR 30,32 et al.
(61 FR 51835)

SUBJECT: Proposed *Deliberate Misconduct By Unlicensed Personnel*
(61 Fed. Reg. 51,835, October 4, 1996)

Dear Mr. Hoyle:

On behalf of the nuclear industry, the Nuclear Energy Institute (NEI)¹ hereby submits the following comments on the NRC's proposed rule, *Deliberate Misconduct By Unlicensed Personnel* (61 Fed. Reg. 51,835; October 4, 1996).

In 1991, the NRC promulgated the Deliberate Misconduct Rule (56 Fed. Reg. 40,664, August 15, 1991; see 10 CFR 36.10, 40.10, 50.5, 60.11, 61.9b, 70.10, 72.12, and 110.7b) to notify licensees, licensee contractors, licensee subcontractors or any of their employees that they may be subject to enforcement action for certain kinds of deliberate misconduct. Now, in the proposed rule, the NRC seeks to enlarge the application of the Deliberate Misconduct Rule to six additional categories of persons, including certain categories of applicants and their employees, contractors, subcontractors, and consultants.

The industry recognizes the NRC's need to take steps to avoid receiving and, in turn, relying on incorrect or inaccurate information. Without question, such misinformation potentially could have a very serious effect on the public health and safety. Thus, it is reasonable for the NRC to seek to establish penalties to deter individuals and entities from engaging in that and other forms of deliberate

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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misconduct. However, and as is discussed at greater length below, the NRC has exceeded its statutory authority under the Atomic Energy Act, as amended, in expanding the Deliberate Misconduct Rule as now proposed.

Our comments² on the Deliberate Misconduct Rule promulgated in 1991 questioned the NRC's reliance on the broad statutory authority provided in sections 161 and 234 of the Atomic Energy Act for jurisdiction over persons who are not licensees. Despite the fact that the 1991 Deliberate Misconduct Rule was promulgated and currently stands, we continue to believe that Sections 161 and 234 of the Atomic Energy Act, as amended, do not endow the NRC with the extremely broad jurisdiction the Agency claims. Authority over non-licensee persons was not established by Congress other than in the limited circumstances carved out in the Act as exceptions. While section 161i(3) permits the NRC to "prescribe such regulations or order[s] as it may deem necessary to govern any activity authorized pursuant to [the] Act" and "in order to protect health and to minimize danger to life or property..." (42 U.S.C. 2201(i)(3)(1982)), neither it, nor any other of the subsections of section 161 contain the operative phrase "any person." As such, the NRC's claim of jurisdiction over non-licensees appears to be unfounded.

Absent statutory authority, no federal agency, including the NRC, may establish its own enforcement authority. Unless and until Congress modifies the Atomic Energy Act to provide the NRC with the *in personam* jurisdiction it currently lacks, the NRC may refer such wrongdoers to the Department of Justice under 18 U.S.C. 1001, the general criminal statute applicable to the federal government and its agencies. Until Congress expands the NRC's authority to reach non-licensees under its organic statute, 18 U.S.C. 1001 provides an adequate deterrent and remedy.

Also, as currently holds for the Deliberate Misconduct Rule (10 CFR 50.5(a)(2)), one of the rule's standards for enforcement action -- knowingly providing incomplete or inaccurate information which is "in some respect material to the NRC" -- is overly broad. This standard appears to permit the NRC to take enforcement action whether or not a violation of NRC regulations has occurred or would have occurred but for detection. At a minimum, the standard should be sufficiently clear to fairly inform the public of the elements of the prohibited action. We believe that if challenged, the NRC's standard may fail under a claim of vagueness.

In sum, NEI believes that the proposed rule expanding the Deliberate Misconduct Rule should be rescinded because of a lack of jurisdiction and vagueness. If the

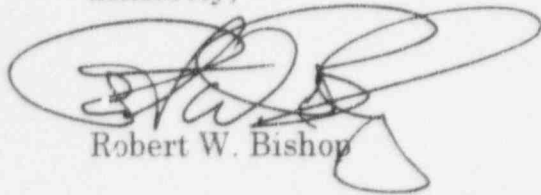
² The comments were filed by letter dated June 18, 1990, on behalf of the nuclear industry by Nuclear Management and Resources Council, one of NEI's predecessor organizations.

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NRC chooses not to rescind the proposed rule, it should be modified in a manner consistent with these comments and again published for comment in the *Federal Register*.

Please do not hesitate to call Ellen Ginsberg, (202) 739-8140, NEI's Assistant General Counsel, or me if you have any questions about our comments or would like to discuss them further.

Sincerely,

A handwritten signature in black ink, appearing to be "R. W. Bishop", enclosed within a large, loopy oval. The signature is stylized and cursive.

Robert W. Bishop