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August 19, 1985

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Advance Notice of Proposed Rulemaking

Dear Sir:

On June 7, 1985, NRC published advance notice that it is considering whether to amend its regulations to require some licensees to demonstrate they possess adequate financial means to pay for cleaning up accidental releases of radioactive materials. At least, that is the gist of the first sentence of the published announcement. At various later points the reader is left less certain of what the proposal is.

That is our principal comment. After opening with a statement about possible demonstration of adequate financial means, the announcement devotes much, if not most, of its text to "financial responsibility for cleaning up accidentally released materials." The two are radically different. It is one thing to consider whether there may be need for demonstrating financial capacity and quite another to consider "financial responsibility" for cleanup. "Responsibility" primarily connotes the state of being authoritatively accountable as a moral or legal proposition, i.e., liability. Resolving "responsibility" questions in that sense is for the courts, not for NRC. We well know that "financial responsibility" has become jargon popularly signifying financial capacity, as in the various State "financial responsibility" laws concerning automobile operation, but there the distinction is not lost and it is always clear that the laws are concerned with financial capacity rather than with

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"responsibility," i.e., with liability. However, the two seem to be intertwined in NRC's ANPRM. This is not mere quibbling about semantics. Rather, it appears that the shift from evincing financial capacity to "financial responsibility" led NRC astray here and there in the announcement. Is the matter under consideration whether to require licensees to demonstrate financial capacity, or is it whether to require them in some manner to assure the availability of funds plus regulatorily committing them, willy-nilly, to a cleanup regardless of who is legally responsible for releases? (As an NRC regulatory proposition, licensees are already required to keep licensed material within authorized bounds, so a new positive "clean-up" requirement, if that is being contemplated, may be duplicative.) The NRC staff should take a fresh look at the announcement, recast it in internally consistent language, and then see if there are some inappropriate passages.

An example of seeming inappropriateness that may have been generated by ambiguous purpose is in the second paragraph of the "Background" portion of the announcement. There, NRC drifted into a discussion of the Price-Anderson liability indemnity system (the "compensation program", as misphrased in the ANPRM), which is not a starting point from which one can logically reason whether licensees should be required to demonstrate financial capacity or should be required to assume automatic financial responsibility for possible cleanups. Similarly, in the first column on page 23961 of the Federal Register an "equity viewpoint" is asserted although NRC does not have the information and facts needed to make a judgment in equity, and its relevance to the initially stated issue is elusive.


For one more example of that kind, see the last sentence of the second paragraph of the Background statement. It is clearly unnecessary and, like numerous others in the announcement, would probably not have been adopted by NRC had it clung consciously and consistently to the issue with which the announcement opened. Furthermore, the sentence does not logically follow the preceding statements, which themselves seem to confound the Price-Anderson liability indemnity system with underlying liability issues that are mostly matters of state law and, which, curiously, state that Price-Anderson beneficiaries (a status having to do only with indemnity for liability) are to be exempt from whatever it is NRC may do about financial capacity in cleanups for which there may or may not be licensee tort liability.

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The announcement tells us NRC would broadly exempt Department of Energy facilities licensed by NRC, for the stated reason that "DOE has access to public funds to pay for cleanup. Additionally, DOE private contractors working at the repository ca. be indemnified under Section 170(d) of the Atomic Energy Act." Obviously, both statements are true, but each is beside the point. That a government agency has access to public funds demonstrates little about its capacity to clean up a spill and nothing about its alacrity. Neither does it forecast agency preferences about how to use public funds if they really are available. It is precisely comparable to announcing that "a private agency has access to private funds", and no more meaningful. If it is euphemism for a statement that DOE can be relied upon to exercise greater expedition and better citizenship than licensees who are private organizations or state agencies, the conclusive record to support it does not exist. The part of the statement about DOE's private contractors and Price-Anderson mixes the question initially posed with the one of liability or "financial responsibility". In addition, that the Price-Anderson indemnity system may in some circumstances be available to government contractors is immaterial if NRC's intent is to develop regulations that, regardless of liability, demand either a display of financial capacity or an assurance of funds. We suggest there is no factual warrant for excepting DOE or any other licensed federal agency, its contractors, nor any licensed state or municipal government, from the proposal if NRC intends to pursue it.

A large part of the announcement is devoted to statements showing that NRC does not know of any particular requirement for the new or changed regulations. If NRC is motivated merely by visceral impressions, as the announcement implicitly concedes, principle says it should drop the proposal until there is reason to believe there is need.

Very truly yours,


James P. Hogan
Senior Counsel

JPH/lm