

September 26, 2011

EA-11-071

Hassan Tajick
Vice President and Radiation Safety Officer
Construction Testing and Engineering, Inc.
P.O. Box 381
Springfield, VA 22150

SUBJECT: NOTICE OF VIOLATION AND PROPOSED CIVIL PENALTY (\$1,750)
(NRC INSPECTION REPORT NO. 15000045/2011006)

Dear Mr. Tajick:

This letter provides you the U.S. Nuclear Regulatory Commission (NRC) enforcement decision for the apparent violations identified during the NRC inspection conducted on March 15, 2011, at the Construction Testing and Engineering, Inc. (CTE) facility in Manassas Park, Virginia. The purpose of the inspection was to examine general licensed activities as they relate to radiation safety and to compliance with NRC regulations. The inspection also included a review of the loss of one of CTE's portable moisture density gauges from a temporary job site in the District of Columbia (DC) on October 26, 2010. In addition to the on-site review, the inspection also involved an in-office review of additional information CTE provided the NRC during a telephone call with Mr. Nadew Hailu of your organization on March 24, 2011, and in correspondence from CTE dated March 22, 2011; April 11, 2011; and April 13, 2011. This information related to CTE's planned and completed corrective actions. The NRC discussed its findings during a telephonic exit meeting with you on April 20, 2011. The findings were also described in the NRC inspection report sent to you in a letter dated May 19, 2011 (ML111430816)¹.

In the May 19, 2011, letter that forwarded the inspection report, the NRC informed CTE that three apparent violations were identified, and that two of the violations were being considered for escalated enforcement. In that letter, the NRC also offered CTE the opportunity to attend a pre-decisional enforcement conference or reply in writing to provide its position on the apparent violations, their significance, root causes, and CTE's corrective actions. In a letter dated June 14, 2011 (ML111721564), CTE provided a written response that acknowledged the violations and restated some of CTE's corrective actions.

Based on the information developed during the inspection, the NRC has determined that three violations of NRC requirements occurred. These violations are cited in the enclosed Notice of Violation (Notice, Enclosure 1) and the circumstances surrounding them are described in detail in the subject inspection report.

¹ Designation in parentheses refers to an Agency-wide Documents Access and Management System (ADAMS) accession number. Documents referenced in this letter are publicly-available using the accession number in ADAMS.

The first violation is related to the event that occurred on October 26, 2010, when one of CTE's portable moisture density gauges (containing a cesium-137 sealed source and an americium-241 sealed source) was apparently stolen from a CTE temporary job site in DC. The violation involved the failure by CTE to use a minimum of two independent physical controls that form tangible barriers to secure the portable gauge from unauthorized removal, whenever the portable gauge was not under the control and constant surveillance of CTE. Specifically, on October 26, 2010, a CTE technician was using a gauge at a temporary jobsite in DC, and stored the gauge (which was in its locked transport case) inside of the locked trunk of the technician's vehicle, believing this to be an acceptable means of secure storage. The locked trunk had served as the single barrier to prevent unauthorized removal of the gauge from the storage location. When the technician subsequently left the vehicle unattended, the vehicle was stolen, and the gauge, which was inside the trunk, was removed by an individual or individuals not authorized to do so. The gauge was subsequently found outside of its storage case by a member of the public on October 27, 2010, in a location near where the vehicle had been stolen. CTE retrieved the gauge and verified that the source handle was locked and that the gauge was neither damaged nor leaking.

Although the vehicle, rather than the gauge, may have been the target of the theft, not securing the gauge with two independent physical controls made it easier for the gauge to be removed without authorization. In fact, the gauge was removed from its transport case and was left in a public area, thereby creating the potential for a member of the public to be exposed to radiation or to use the gauge for malevolent purposes. Therefore, in accordance with the NRC Enforcement Policy, the NRC has categorized this violation at Severity Level (SL) III.

As stated in the NRC's May 19, 2011, letter, for violations involving the loss of regulated material, the NRC does not utilize its standard civil penalty assessment process, in which the NRC considers a licensee's inspection history, whether it identified the violation, and the licensee's corrective actions. Rather, in accordance with Section 2.3.4 of the Enforcement Policy, the NRC typically exercises discretion to propose imposition of a civil penalty of at least the base amount. A base civil penalty in the amount of \$3,500 is considered for a SL III violation involving the loss of this quantity and type of regulated material.

In the CTE letter dated June 14, 2011, CTE requested that the NRC consider that it is a small company and that it has encountered financial difficulties in continuing to operate. In addition, during a telephone conversation on June 30, 2011, CTE requested that the NRC consider mitigating the civil penalty amount, given the CTE financial situation. At the NRC's request, in a letter dated July 21, 2011, CTE forwarded to the NRC copies of its financial records for the previous two years to support its request.

As stated in Section 2.3.4 of the Enforcement Policy, it is not the intention that the economic impact of a civil penalty be so severe that it adversely affects a licensee's ability to safely conduct licensed activities or puts a licensee out of business (the NRC has other means to suspend or terminate licensed activities when such action is warranted). Therefore, after carefully considering the circumstances of this violation and the bases of CTE's request to mitigate the amount of the civil penalty based on the company's financial situation, I have been authorized, after consultation with the Director, Office of Enforcement, to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice) in the amount of \$1,750 for this SL III violation. This reflects a fifty percent reduction in the amount of the civil penalty

typically imposed for a violation of this type. A civil penalty is warranted to emphasize the importance of maintaining security and control of regulated materials. In addition, issuance of this Notice constitutes escalated enforcement action that may subject you to increased inspection effort.

The second violation involved the failure by CTE to file for reciprocity prior to working in an area of exclusive federal jurisdiction. CTE is the holder of a license issued by the Commonwealth of Virginia (an NRC Agreement State) that authorizes the use, storage, and transfer of portable nuclear gauges within the Commonwealth. Such licenses do not authorize use of radioactive material in areas of exclusive federal jurisdiction. 10 CFR 150.20 grants an NRC general license to Agreement State licensees allowing them to conduct the licensed activities authorized by the Agreement State, in areas of exclusive federal jurisdiction, provided, in part, that the Agreement State licensees file with the NRC, using NRC Form 241, "Report of Proposed Activities in Non-Agreement States," at least three days prior to engaging in licensed activities within that jurisdiction. However, during the NRC inspection, the NRC identified that from September 14, 2010, through October 26, 2010, CTE stored and/or used portable moisture density gauges at a temporary jobsite in DC, an area of exclusive federal jurisdiction, without filing NRC Form 241 with the NRC. CTE staff indicated to the NRC inspectors that they were unaware that DC was an area of exclusive federal jurisdiction.

This violation impacted the NRC's regulatory process because the NRC was not provided an opportunity to conduct inspections of licensed activities since the NRC was not informed that regulated material was being used at this location. Therefore, this violation has been categorized in accordance with the NRC Enforcement Policy at Severity Level (SL) III. In accordance with the NRC Enforcement Policy, a base civil penalty in the amount of \$3,500 is considered for a SL III violation. Because your facility has not been the subject of escalated enforcement actions within the last two years or the last two inspections, the NRC considered whether credit was warranted for *Corrective Action* in accordance with the civil penalty assessment process in Section 2.3.4 of the Enforcement Policy. The NRC has concluded that credit is warranted for your corrective action taken to address the violation because CTE documented its commitment to not conduct licensed activities outside of the Commonwealth of Virginia. Therefore, to encourage prompt and comprehensive correction of violations, and in recognition of the absence of previous escalated enforcement action, I have been authorized, after consultation with the Director, Office of Enforcement, not to propose a civil penalty in this case. However, significant violations in the future could result in a civil penalty. In addition, issuance of this SL III violation constitutes escalated enforcement action that may subject you to increased inspection effort in the future.

A third violation, also documented in the attached Notice, has been categorized in accordance with the NRC Enforcement Policy at SL IV. This violation is being cited because it was identified by the NRC. The circumstances surrounding the violation are documented in detail in the aforementioned inspection report.

Pursuant to 10 CFR 2.201, you are required to provide a response to the enclosed Notice of Violation and Proposed Imposition of Civil Penalty identifying whether you admit or deny the violations, as well as to provide appropriate payment of the civil penalty. Please follow the instructions in the attached Notice when preparing your response. The NRC has concluded that

information regarding: (1) the reason for the violations; (2) the actions planned or already taken to correct the violations and prevent recurrence; and, (3) the date when full compliance was achieved, is already adequately addressed on the docket in Inspection Report No. 15000045/2011006, and in the information presented by CTE in its June 14, 2011 letter. Therefore, you are not required to provide that information in your civil penalty response, unless the descriptions in the aforementioned correspondence do not accurately reflect your position.

In accordance with 10 CFR 2.390 of the NRC "Rules of Practice," a copy of this letter and its enclosures, as well as your response, will be made available electronically for public inspection in the NRC Public Document Room and from the Agencywide Documents Access and Management System (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. The NRC also includes significant enforcement actions on its Web site, at <http://www.nrc.gov/reading-rm/doc-collections/enforcement/actions/>.

To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such information, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information).

In addition, a copy of this action is being provided to the Commonwealth of Virginia, to inform it of this action against its licensee, and so that it may assess CTE's ability to continue to safely conduct licensed activities, in light of CTE's stated financial hardship.

Sincerely,

/RA/

William M. Dean
Regional Administrator

Enclosures:

1. Notice of Violation and Proposed Imposition of Civil Penalty
2. NUREG/BR-0254 Payment Methods

cc:
Commonwealth of Virginia

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Sincerely,

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William M. Dean

Regional Administrator

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cc:

Commonwealth of Virginia

Distribution: see next page

SUNSI Review Complete: MMM (Reviewer's Initials)

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NOTICE OF VIOLATION
AND
PROPOSED IMPOSITION OF CIVIL PENALTY

Construction Testing and Engineering, Inc.
Springfield, VA

Docket No. 15000045
VA License No. 683-298-1
EA-11-071

Based on an NRC inspection of Construction Testing and Engineering, Inc. (CTE), violations of NRC requirements were identified. The inspection was conducted onsite on March 15, 2011, and also consisted of an in-office review of information provided to the NRC by CTE: 1) in correspondence dated March 22, 2011, April 11, 2011, and April 13, 2011; and 2) during a telephone conversation on March 24, 2011. An inspection exit was held on April 20, 2011. In accordance with the NRC Enforcement Policy, the violations are listed below:

I. VIOLATION ASSESSED A CIVIL PENALTY

10 CFR 30.34(i) requires that each portable gauge licensee shall use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal, whenever portable gauges are not under the control and constant surveillance of the licensee.

Contrary to the above, on October 26, 2010, CTE did not use a minimum of two independent physical controls that form tangible barriers to secure a portable gauge from unauthorized removal, at a time when the portable gauge was not under CTE's control and constant surveillance. Specifically, CTE stored a portable gauge in its locked transport container, inside of the trunk of a vehicle at a temporary jobsite. However, the gauge was secured from unauthorized removal with only a single independent physical control (the lock to the trunk). On that date, the vehicle was stolen and the gauge inside was removed from the storage location, by an individual or individuals not authorized to do so, by defeating only one barrier, namely, the locked trunk.

This is a Severity Level III violation (Section 6.3).

Civil Penalty - \$ 1,750

II. VIOLATIONS NOT ASSESSED A CIVIL PENALTY

- A. 10 CFR 30.33(a) states, in part, that no person shall own, possess, or use byproduct material except as authorized in a specific or general license issued in accordance with the regulations in this chapter.

10 CFR 150.20(a) states, in part, that any person who holds a specific license from an Agreement State is granted an NRC general license to conduct the same activity in areas of exclusive federal jurisdiction within Agreement States subject to the provisions of 10 CFR 150.20(b).

10 CFR 150.20(b)(1) requires, in part, that any person engaging in activities in areas of exclusive federal jurisdiction within Agreement States shall, at least three days before engaging in each such activity for the first time in a calendar year, file four copies of

NRC Form-241, "Report of Proposed Activities in Non-Agreement States," with the Regional Administrator of the appropriate NRC regional office.

Contrary to the above, between September 14, 2010, and October 26, 2010, CTE, which held a Virginia (Agreement State) license, engaged in activities involving the use of byproduct material (using a portable gauge containing cesium-137 and americium-241 sealed sources) in an area of exclusive federal jurisdiction without obtaining a specific license issued by the NRC or filing NRC Form-241 with the NRC, as required.

This is a Severity Level III violation (Section 6.9).

- B. 10 CFR 71.5(a) states, in part, that each licensee who transports licensed material outside the site of usage, as specified in the NRC license, or where transport is on public highways, or who delivers licensed material to a carrier for transport, shall comply with the applicable requirements of the Department of Transportation (DOT) regulations in 49 CFR parts 107, 171 through 180, and 390 through 397.

49 CFR 171.8 defines a hazmat employee, in part, as a person who is employed by a hazmat employer and who in the course of such employment directly affects hazardous materials transportation safety, including individuals who load, unload, or handle hazardous materials; prepare hazardous materials for transportation; are responsible for safety of transporting hazardous materials; and operate a vehicle used to transport hazardous materials. This regulation defines a hazmat employer, in part, as a person who employs or uses at least one hazmat employee on a full-time, part time, or temporary basis; and who transports hazardous materials in commerce.

49 CFR 172.702 requires, in part, that each hazmat employer shall ensure that each of its hazmat employees is trained and tested by appropriate means on the training subjects covered in 49 CFR 172.704, and that no hazmat employee may perform any function subject to the requirements of 49 CFR Parts 171-180 unless instructed in the applicable requirements.

49 CFR 172.704(c) requires, in part, that a hazmat employee receive initial training within 90 days after employment or a change in job function, and recurrent training at least once every three years.

Contrary to the above, on October 26, 2010, a CTE hazmat employee transported licensed material from CTE's facility in Manassas Park, Virginia over public roads to a temporary jobsite in the District of Columbia, an area of exclusive federal jurisdiction, without having completed the necessary training required by 49 CFR 172.704(c). Specifically, licensee records indicate that the employee received initial training on November 8, 2003, and, as of October 26, 2010, a period of more than three years, recurrent training had not been provided.

This is a Severity Level IV violation (Section 6.3)

CTE may pay the civil penalty proposed above for the violation in Section I by using one of the payment methods described in NUREG/BR-0254. If payment is made, CTE is required to respond to this Notice by submitting to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, a statement indicating when and by what method payment was made.

Alternately, CTE may protest imposition of the civil penalty in whole or in part, by a written answer in accordance with 10 CFR 2.205 protesting the civil penalty. Such answer may request remission or mitigation of the penalty, and should be clearly marked as an "Answer to a Notice of Violation (EA-11-071)" and may: (1) deny the violations listed in this Notice, in whole or in part; (2) demonstrate extenuating circumstances; (3) show error in this Notice; or, (4) show other reasons why the penalty should not be imposed. In addition to protesting the civil penalty in whole or in part, such answer may request remission or mitigation of the penalty. In requesting mitigation of the proposed penalty, the response should address the factors addressed in Section 2.3.4 of the Enforcement Policy. Any written answer addressing these factors pursuant to 10 CFR 2.205, should be set forth separately from the statement or explanation provided pursuant to 10 CFR 2.201, but may incorporate parts of the 10 CFR 2.201 reply by specific reference (e.g., citing page and paragraph numbers) to avoid repetition. The attention of the Licensee is directed to the other provisions of 10 CFR 2.205, regarding the procedure for imposing a civil penalty.

The NRC has concluded that information regarding: (1) the reason for the violations; (2) the actions planned or already taken to correct the violations and prevent recurrence; and, (3) the date when full compliance was achieved, is already adequately addressed on the docket in Inspection Report No. 15000045/2011006, and in the information presented by CTE in its June 14, 2011 letter. Therefore, CTE's civil penalty response need not address these subjects. However, if the description therein does not accurately reflect CTE's position or its corrective actions, CTE is required to submit a written statement or explanation under 10 CFR 2.201. In that case, or if CTE chooses to respond, it should clearly mark this response as a "Reply to a Notice of Violation (EA-11-071)."

Should CTE fail to answer within 30 days of the date of this Notice, the NRC will issue an order imposing the civil penalty. Upon failure to pay any civil penalty which subsequently has been determined in accordance with the applicable provisions of 10 CFR 2.205 to be due, this matter may be referred to the Attorney General, and the penalty, unless compromised, remitted, or mitigated, may be collected by civil action pursuant to Section 234c of the Act, 42 U.S.C. 2282c.

The responses noted above, i.e., Statement as to payment of civil penalty, Answer to a Notice of Violation, and Reply to Notice of Violation, should be addressed to: Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852-2738, with a copy to the Regional Administrator, U.S. Nuclear Regulatory Commission, Region I, 475 Allendale Road, King of Prussia, PA 19406.

CTE's response will be made available electronically for public inspection in the NRC Public Document Room and from the NRC's Agency-wide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, any response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without

redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, then CTE should provide a bracketed copy of its response that identifies the information that should be protected and a redacted copy of its response that deletes such information. If CTE requests that such material is withheld from public disclosure, CTE must specifically identify the portions of its response that it seeks to have withheld and provide in detail the bases for your claim (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, CTE should provide the level of protection described in 10 CFR 73.21.

In accordance with 10 CFR 19.11, CTE may be required to post this Notice within two working days of receipt.

Dated this 26th day of September, 2011