

October 17, 2001

Frank J. Congel, Director  
Office of Enforcement  
U.S. Nuclear Regulatory Commission  
One White Flint, North  
11555 Rockville Pike  
Rockville, MD 20852-2738

Subject: Reply to Notice of Violation (EA-99-290)

Dear Mr. Congel:

This is the reply of Earthline Technologies, formerly RMI Environmental Services, to the Notice of Violation (EA-99-290). Earthline denies that it has violated 10 CFR 40.7 for the reasons stated in the Answer to Notice of Violation and Protest of Proposed Penalty which is being sent to you concurrent with this reply and which is incorporated herein.

Moreover, the radiation protection technician in question has grossly misstated the facts and has outright fabricated others. No adverse employment action was taken against the technician. He was merely placed on paid medical leave until he was able to return to work. Moreover, my February 12, 1999 memorandum was not intended to limit his communications to the NRC. In fact, I had no knowledge of what contact, if any, he had had with the NRC at that time. My February 12<sup>th</sup> memorandum was prompted solely by the technician's statements that he had an attorney, which indicated to me that he intended to initiate a lawsuit against the company. I had also been informed that the technician, while off work, was calling various employees and requesting copies of company records and information without going through the proper channels of communication. My memorandum, therefore, was merely intended to protect the interests of the company from possible legal action by the technician. At no time did I attempt to or, in fact, interfere with the technician's communications with the NRC or his right to voice any concerns concerning safety issues. The conditions and privileges of the technician's employment were not affected or changed in any way. My intention was to assure that the communications with the technician be channeled through one person, namely the Manager of Human Resources.

Very truly yours,

EARTHLINE TECHNOLOGIES

By 

JAMES W. HENDERSON, DIVISION MANAGER

ENVIRONMENTAL SERVICES AND SOLUTIONS

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NRC Office of Enforcement  
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SWORN TO AND SUBSCRIBED IN MY PRESENCE, this 17<sup>th</sup> day of October, 2001.

A handwritten signature in cursive script that reads 'Cynthia Wilson Sleigh'.

Notary Public

**CYNTHIA WILSON SLEIGH, Notary Public**  
**STATE OF OHIO**

**My Commission Expires July 1, 2003**

JWH:cws

Attachments: Position Statement of Earthline Technologies  
Memorandum of Earthline Technologies

c w/atts: J. E. Dyer, Regional Administrator, USNRC Region III  
Roger Suppes, Ohio Department of Health, Bureau of Radiation Protection  
Ruth Vandegrift, Ohio Department of Health, Bureau of Radiation Protection  
Anthony J. DiVenere, Esq., McDonald, Hopkins, Burke & Haber

## Position Statement of Earthline Technologies re: NRC Proceedings

### I. Introduction

Earthline Technologies, previously known as RMI Environmental Services, has an exemplary safety record over the course of its 28 years of operation and 10 years of decommissioning activities. To date, there have been no radiological overexposures. Earthline Technologies has a history of maintaining low exposures to employees and the environment. This is the only instance in 38 years of operation of a contaminated item leaving the site improperly.

This record is a result of the company maintaining a comprehensive environmental, safety and health program. Earthline Technologies has adopted the ALARA principle (a program to maintain exposures As Low As Reasonably Achievable). Earthline has made a firm commitment to its practice and implementation.

In order to fulfill this commitment, ALARA practices are implemented routinely through the Health Physics organization using the Health Physics Manual, Entry Control Program, radiation Work Permit Program, and many sub-tier procedures as instruction. An active ALARA committee, consisting of representatives of various segments of the work force, including staff management, plays a key role in fulfilling this commitment. Issues of any kind, including non-ALARA, are encouraged and solicited from all segments of the workforce.

Until November, 1999, Earthline Technologies held NRC licenses for radioactive material. Earthline Technologies (then RMI Environmental Services) was inspected many times for regulatory compliance. During these inspections, Earthline has never received a violation above a Severity Level IV. Most inspections yielded no findings, observations or violations.

Again, this excellent record is the result of a comprehensive, inclusive, and well-maintained program.

In November, 1999, Ohio was granted Agreement State Status by the NRC. During turnover meetings between NRC and Ohio Department of Health (ODH), NRC personnel described RMI as a cooperative licensee with a good radiation protection program. NRC stated that RMI had always maintained communications with them, and openly shared concerns about decommissioning activities.

Earthline further fulfills its commitment to employee safety by maintaining a proactive Industrial Safety program. A Safety Committee, consisting of representatives of different departments, including staff management and bargaining unit personnel, meets regularly. Issues of any kind, including non-safety, are encouraged and solicited from all segments of the workforce.

In addition, a work control program is in place that allows all departments to review non-routine projects prior to the work. During this review, Health Physics makes Radiation Work Permit decisions, Safety prescribes safety-related items on a Safe Work Permit, and Environmental evaluates environmental concerns.

In summary, Earthline Technologies has and implements comprehensive programs for radiological safety, industrial safety, environmental protection, and work control. Earthline Technologies' personnel charged with implementing these programs are conscientious employees who carry out their duties with integrity. An employee responsible for implementing the these programs has nothing to gain by willfully choosing to ignore requirements of the program.

A. Violation Assessed a Civil Penalty  
(Charge of Discrimination)

Summary

The NRC Office of Investigations has concluded that Earthline placed the radiation protection technician (hereinafter "the Technician") on paid medical leave due in part to his protected activities in violation of 10 C.F.R. 40.7, "Employee Protection". The protected activities allegedly are raising nuclear safety concerns in July, 1998 and February, 1999.

Earthline categorically rejects this conclusion and states that the Technician was placed on paid medical leave for legitimate business and medical reasons that were in no way connected to the alleged concerns raised by the Technician relating to nuclear safety. Although it is a fact that on or about July 31, 1998, the Technician identified certain sections of concrete pipe which apparently had an elevated Frisker reading, it is also a fact that the pipe was erroneously removed from the plant premises without the specific knowledge of Earthline management. Once Earthline realized that the contaminated pipe had left the plant premises, it took immediate action without any prompting from the Technician to retrieve the pipe, transport it back to the plant, and place it in a contaminated zone. All of these actions were taken independently by management and not at the urging of the Technician. Earthline management took immediate and proper corrective action once the problem of the contaminated pipe was known.

Moreover, Earthline voluntarily immediately notified the NRC and the Department of Energy (DOE) of the circumstances of the contaminated pipe. The NRC investigated and determined that the circumstances constituted a non-citable violation, and the matter was closed. The DOE investigation concluded Earthline handled the incident properly. Also, on August 7, 1998, Earthline held a meeting with all employees to review the incident. The Technician did not even attend this meeting because it was held after his shift ended. During that meeting, the

Technician was recognized for having done a good job in bringing this issue to management's attention.

### Facts

I would like to review the operative facts so that the primary issue can be better understood. Approximately in January, 1999, supervisors at Earthline reported that the Technician was exhibiting abnormal behavior and personality swings. Some of the events which caused the supervisors to make these reports were the following:

1. In approximately October/November, 1998, the Technician thought that he had "caught" another employee cheating at cards in the lunchroom during lunch. A shouting match ensued between the Technician and the other employee. When the Technician was later recounting the incident to his supervisor, he became unusually angry and loud. His face reddened. Such actions were not characteristic of the Technician.
2. The Technician later approached the Manager Quality Assurance, demanding that the other employee be fired for improper crossing into a Radiation Work Permit (RWP) area. The Technician appeared to be anxious and distraught and was speaking in a loud voice and nervously pacing back and forth. The Manager, who was a golf teammate of the Technician, noted a significant personality change in the Technician's behavior at that time.
3. In January, 1999, the Technician was assigned to the Molten Salt Oxidation (MSO) project. This involved accelerated efforts to disassemble, survey, decontaminate, and re-assemble this equipment to

perform treatability studies for mixed waste. The Technician had exclusive responsibility for this project. he was required to report to work earlier in the day and had greater responsibilities than he previously had as an HP Tech. At that time, the Technician had discussions with his supervisors, Ron Fine and Ken Covell. His conversations were rambling, disjointed, and incoherent. His face was pale, and his voice trembled. Although the Technician apparently had some concerns over some vague potential violations, he was unwilling to give any specifics relating to these or the pipe incident so that management could properly investigate them. He said he was being harassed by the hourly workers because he identified the contaminated pipe in July, 1998.

4. On February 3, 1999, the Technician met with his supervisors to discuss his concerns about the free release procedure. Specifically discussed was the corrective action request (CAR) covering the pipe incident and its outcome. At the end of the meeting, the Technician stated all of his concerns were resolved.
5. On February 2<sup>nd</sup> and 3<sup>rd</sup>, the head of HR also met with the Technician. These meetings were initiated by HR because the Technician's supervisor had reported that the Technician said he was being "harassed" by his co-workers. The Technician had also said that he had been called a "cheeser" by some hourly workers. When the HR Manager met with him, he asked the Technician to identify the individuals who were "harassing him", but the Technician refused.

When the Technician was asked why he thought people were picking on him, he was unable to give any reasons. The Technician, later in that conversation, described an incident when he “caught” another employee throwing a padlock. He approached the other employee and said, “Do you want to come with me when I tell on you, or should I tell on you by myself.” the HR Manager suggested that the Technician in the future approach people in a less threatening way. the HR Manager told the Technician that by threatening to “tell on them”, people will become defensive and less apt to listen to his instructions.

During that meeting when the HR Manager specifically asked the Technician whether any of his concerns were still unresolved, he replied that all of his concerns had, in fact, been resolved.

6. On January 18, 1999, the Technician did not come in to work; he called in and stated that he was taking a personal day. On January 25, 1999, the Technician again called in, stating he would not be coming in to work and would be taking a personal day. On January 29, 1999, the Technician called in sick. On January 30, 1999, the Technician walked off the job without informing his supervisor or other management because he said no one was available to sign off on a document. This was a significant error in judgment because the Technician could have easily checked with his supervisors on how to proceed. The MSO project was delayed by the Technician’s action.

7. On February 4, 1999, the Technician met with his supervisors, HR, and the Division Manager. At that time, the Technician stated that all of his concerns except for the pipe incident had been satisfactorily resolved. The Division Manager asked the Technician if he had written down his concerns about the pipe incident as he had been requested to do by the Division Manager during an earlier meeting. The Technician said he had not.

At this time, the Technician was again told that he should be more tactful in the way he approached people on the job. For example, he should not inform people that he would "tell on them". At that time, the Technician asked somewhat sarcastically if he should apologize to the people he offended in the past. All of the individuals at the meeting said, "No, that's not what we are saying. We don't want you apologizing to people." Instead, he was told that he should inform people when they are doing something wrong and try to educate them on the proper way to do things rather than threatening to "tell on them". Later that day, the Technician was heard to go from office to office apologizing to people if he had ever offended them in the past. He even apologized to people he had never met before.

8. After the meeting of February 4<sup>th</sup> in the Division Manager's, the Technician met in the HR office concerning the work restrictions that the Technician's doctor had imposed on February 1, 1999. The Technician stated that due to his back, he was asking to be taken off the MSO project.

The HR Manager stated that he had not seen the doctor's note yet and that an appointment would be made for him to see the company physician on Friday, February 5<sup>th</sup>. The Technician agreed to see the doctor on that date.

9. However, on February 5<sup>th</sup>, the Technician called in sick and did not appear for the exam with the company physician. He also left a message saying he should be taken off the MSO project and to reschedule someone else for the early morning shift. This was very significant because the Technician was involved in the project from the start, he was trained; he was a member of the team, and now another Health Physics Technician would have to be trained to replace the Technician. This caused delays in the completion of the project.
10. On February 8<sup>th</sup>, the Technician again called in sick. When asked if he would be in to work on February 9<sup>th</sup>, the Technician said he couldn't say because he may have to take medication for his back.
11. On February 11, 1999, the Division Manager and HR Manager telephoned the Technician and asked him to come in for a meeting on Friday, February 12<sup>th</sup> to discuss his work restrictions and his recent behavior. The Technician stated that since he was on medication, he would not be able to come in to the office for that meeting. At that time, the Technician was informed that due to his work restrictions, increasing absences, and recent behavior, he was being placed on paid medical leave until such time as he underwent a medical examination and was cleared to return to work. It

was also suggested that due to recent behavioral issues, that he accept a referral to the employee assistance program (EAP). The Technician said that there was no way he was going to go to that program.

12. It is important to emphasize that the decision to place the Technician on paid medical leave and ask that he participate in the EAP program was a decision made by consensus of management only after considered review of all of the circumstances and deliberation and only after consultation had occurred with legal counsel for the company. The decision was made after discussion with his supervisor and with the company physician and the company legal counsel. [The company doctor has signed a statement attesting to this fact.] The decision was not the sole decision of HR. Also, it is important to understand this decision resulted in the Technician continuing to be paid during convalescence for his back, which was explained to the Technician.

### Conclusion

The significant factors which drove the decision to place the Technician on paid Medical leave were:

1. The Technician's deteriorating medical condition as evidenced by his increasing call-ins and absences from work;
2. The work restrictions imposed by The Technician's doctor for a non-work related injury;
3. The Technician's request to be taken off of the MSO project and requesting different work hours for other work situations;

4. The advice of Earthline's physician;
5. The Technician's erratic behavior and personality changes which were thought to perhaps be related to the medication that he was taking;
6. The Technician's failure to report for examination with the company physician.

It should be noted also that no disciplinary action was taken against the Technician. All the Technician needed to do was to take a medical examination by the company physician and be cleared to return to work or be on paid medical leave. Instead, the Technician chose to voluntarily terminate his position.

In conclusion, the action to place the Technician on paid medical leave was taken by Earthline management after due deliberation based upon the reasonable belief that Mr. Lewis was not able at the time to perform his duties and that this action was in his best interest as well.

Moreover, the action taken by Earthline placing the Technician on paid medical leave does not constitute "adverse employment action" pursuant to 10 CFR 40.7. See the Memorandum of Law submitted by Earthline, a copy of which is attached.

**MEMORANDUM OF EARTHLINE TECHNOLOGIES**  
**RE: REPORTS NOS. 3-1999-008 AND 3-2000-002**

**I. PLACING THE TECHNICIAN ON PAID MEDICAL LEAVE DOES NOT CONSTITUTE ADVERSE EMPLOYMENT ACTION.**

Generally federal agencies in interpreting their own laws and regulations relating to discrimination look to the law under Title VII as interpreted by the Courts. For example, see Bartlik v. United States Department of Labor, (6<sup>th</sup> Cir. 1996) 73 F.3<sup>rd</sup> 100. A prima facie case of retaliatory discrimination exists if there is proof that:

1. The party charged with discrimination is covered under the discrimination laws;
2. The complaining employee was discriminated against with respect to his compensation, conditions or privileges of employment; and
3. The alleged discrimination arose because the employee participated in a protected activity. DeFord v. Secretary of Labor, (6<sup>th</sup> Cir. 1983) 700 F.2d 1981.

Other courts have stated that a prima facie case is proved when there is evidence that (1) the employer is covered under the subject rules or laws; (2) the employee was engaged in protected activity; (3) the employee was subject to an adverse employment action; and (4) a nexus exists between the protected activity and the discharge. Kahn v. Secretary of Labor, (7<sup>th</sup> Cir. 1995) 64 F.3d 271.

Once a prima facie case is shown, the employer may offer evidence of legitimate business reasons justifying the action against the employee. The burden then shifts back to the employee to prove that the reasons given by the employer are pretextual.

While under some circumstances, proximity in time between the protected activity and the alleged retaliation by the employer may justify an inference of retaliatory discrimination, temporal proximity by itself is not sufficient to make a prima facie case.

Throughout this proceeding, Earthline has consistently maintained that there was no adverse employment action taken against the Technician by Earthline. Consequently, there is not even a prima facie case of retaliatory discrimination that can be proved in this proceeding.

It is undisputed in this action that the Technician was not terminated from his employment. The Technician was not suspended from his employment. The only action which was taken by his employer was to place the Technician on a paid medical leave so that he would have an opportunity to recover from his medical condition which disabled him from being able to work on a consistent basis. The Sixth Circuit has consistently held that to constitute an adverse employment action, the plaintiff must show a “materially adverse change in the terms of employment such as termination of employment, demotion evidenced by a decrease in wage or salary, a less distinguished title, material loss of benefits, or significantly diminished material responsibilities.” Kocsis v. Multi-Care Management, Inc., (6<sup>th</sup> Cir. 1997) 97 F.3d 876; Jackson v. City of Columbus, (6<sup>th</sup> Cir. 1999) 194 F.3d 737. Where an employee has been suspended with continuing pay and benefits a prima facie case of adverse employment action cannot be shown. To further illustrate this point, for example, reassignments without salary reduction or work hours shift changes also do not constitute adverse employment decisions in employment discrimination claims. Yates v. AVCO Corp., (6<sup>th</sup> Cir., 1987), 819 F.2d 630.

The Seventh Circuit has also explained that to prove “a materially adverse employment action,” some material employment action must be shown such as: “t ermination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.” Cradey v. Liberty National Bank and Trust Co., (7<sup>th</sup> Cir. 1993) 993

F.2d 132. The Court further stated that a change in employment conditions “must be more disruptive than a mere inconvenience or an alteration of job responsibilities:

For example, it has been held that a transfer at no loss of title, pay or benefits does not amount to an adverse employment action. Darnell v. Campbell County Fiscal Court (E.D.KY. 1990) 731 F. Supp. 1309, Aff’d 924 F.2d 1057 (6<sup>th</sup> Cir. 1991)

Applying these legal principles to this proceeding, it is abundantly clear that there is no evidence to prove even a prima facie case of retaliation against Earthline Technologies since no adverse employment action was taken against the Technician. Moreover, there is ample evidence of legitimate business reasons justifying the actions relating to the Technician.

**II. THE FEBRUARY 12, 1999 MEMORANDUM WAS NOT A VIOLATION BECAUSE IT WAS NOT INTENDED TO LIMIT COMMUNICATION WITH THE NRC AND BECAUSE THE TECHNICIAN WAS NOT SEEKING INFORMATION THROUGH PROPER CHANNELS.**

In the letter of May 10, 2001 from the Nuclear Regulatory Commission, it is suggested that when the Division Manager issued a memorandum dated February 12, 1999, he was attempting to limit the Technician’s communications with the NRC which is a potential violation of 10 CFR 40.7, “Employee protection.” The sworn statement from the Division Manager submitted to the NRC makes clear that at the time he issued the memo, he was not even aware that the Technician had filed a complaint with the NRC and therefore the memo could not have been intended to limit the Technician’s communication with the NRC.

In addition, the sworn statement of the Division Manager makes clear that based on the telephone conversation he had with the Technician on February 11, 1999, the Division Manager was put on notice that the Technician had retained an attorney and wanted all communications to be placed in writing and forwarded to his attorney. This fact put the Division Manager on notice

that the Technician was preparing to file a lawsuit against Earthline. Consequently, the Division Manager's action in issuing the memo was a legitimate attempt to protect the interests of his employer from a possible lawsuit by the Technician.

The NRC also argues that the Division Manager, through the memo of February 12<sup>th</sup> " may have deliberately attempted to alter communications between the radiation protection technician and his co-workers, which is a potential change in the terms, conditions and privileges of the technician's employment . . ." There is no legal basis for this argument. This argument assumes that the Technician had an absolute right to information as a term, condition or privilege of his employment. This is not true.

The Division Manager's sworn statement also makes clear that the Technician had been calling various employees from his home and requesting that they forward documents and information to him without going through proper channels of communication. The Technician did not have an absolute right to any and all information and records which he requested from employees. Although an employee has a right to voice a safety concern or to report a possible violation to the NRC, an employee is not free to choose the precise manner in which he seeks necessary information from his employer. Lockert v. United States Department of Labor 867 F.2d 513, 1989. The law does not protect every act by an employee under the auspices of safety.

" Whistleblowing must occur through prescribed channels." Stone & Webster Engineering Corp. v. Herman 115 F.3d 1568 (11<sup>th</sup> Circuit 1997). The Technician did not have a right to go outside the proper channels of communication by calling from his home various employees and asking them to send him records and information.

Finally, the Division Manager's memorandum of February 12, 1999 which required that any communications with the Technician or his representatives while he was not working and on

medical leave be referred to the Manager of Human Resources was a proper exercise of business judgment based upon legitimate business reasons and was in no way a violation of 10 CFR 40.7.

### **III. CONCLUSION**

Neither placing the Technician on paid medical nor limiting his communications to the Human Resources Manager in light of the Technician's retention of an attorney constitute an adverse employment action which affects the terms, conditions and privileges of employment contrary to 10 CFR 40.7.