



**UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION IV
611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064**

August 21, 2003

IA-03-026

Mr. Billy H. Berry
[HOME ADDRESS DELETED
UNDER 10 CFR 2.790]

**SUBJECT: PREDECISIONAL ENFORCEMENT CONFERENCE (NRC INVESTIGATION
REPORT NO. 4-2003-012)**

Dear Mr. Berry:

This is in reference to an investigation conducted by the NRC's Office of Investigations (OI) involving statements and information you provided to two NRC employees during the conduct of an inspection on February 11, 2002. The investigation found that you engaged in deliberate misconduct when you provided inaccurate information to the NRC regarding the possession of gauges containing licensed material. Enclosure 1 is a Factual Summary of Investigation Report 4-2003-012.

Based on our review of the investigation report, an apparent violation of the NRC's rule on deliberate misconduct, 10 CFR 30.10, has been identified. Enclosure 2 is a copy of 10 CFR 30.10, the NRC's Rule on Deliberate Misconduct. This rule prohibits an intentional act or omission that a person knows would cause a licensee to be in violation of any rule, regulation, or license condition, and prohibits individuals from deliberately providing inaccurate or incomplete information to the NRC

On August 4, 2003, we informed you by telephone of the results of the investigation, told you the NRC was considering enforcement action against you, and informed you that before taking any action we would like to conduct a predecisional enforcement conference. The conference will take place at 3:00 p.m. on September 15, 2003, in Pocatello, Idaho. The conference will be closed to public observation and will be transcribed.

As discussed with you, this conference is predecisional because the NRC has not made a final determination that violations of NRC requirements occurred or that enforcement action will be taken against you. The purpose of the conference is to discuss the apparent violation and the circumstances surrounding it, and to give you an opportunity to provide your perspective on the apparent violations and any other information that you believe is relevant to the NRC's enforcement determination. You are specifically invited to address the factors that the NRC would consider in determining whether enforcement action should be taken against you. These factors are described in Section VIII, Enforcement Actions Involving Individuals, of the NRC's Enforcement Policy. A copy of the Enforcement Policy is enclosed as Enclosure 3.

If the NRC concludes that you deliberately caused or committed a violation of NRC requirements, the possible sanctions include a Notice of Violation, a civil penalty,¹ or an order. An order may prohibit involvement in NRC-licensed activities, require notice to the NRC before resuming involvement in NRC-licensed activities, or require other action. Accordingly, you should be prepared to address why NRC should not issue you an order removing you from licensed activities.

Although not required, you may provide the NRC a written reply to the apparent violation prior to or during the conference. In addition, you may have an attorney or personal representative attend the conference, but it should be understood that the NRC will address its questions to you. Furthermore, you are not required to attend the conference, but you should understand that if you do not, the NRC will make an enforcement decision on the basis of the information developed during the investigation.

You will be advised by separate correspondence of the results of our deliberations on this matter. No response regarding these apparent violations is required at this time. Should you have any questions about this letter or the conference, please contact Mr. Michael Vasquez at 817-860-8121 or Mr. Gary Sanborn at 817-860-8222.

The NRC will delay making available a copy of this letter and Enclosure 1 to the Public until an enforcement decision has been made. At that time, in accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and Enclosure 1 may be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Sincerely,

/RA/

Elmo Collins, Director
Division of Nuclear Materials Safety

Docket No. 030-35321
License No. 11-27657-01

Enclosures:

1. Factual Summary, OI 4-2002-058
2. 10 CFR 30.10, Rule Prohibiting Deliberate Misconduct
3. NRC Enforcement Policy

¹ Civil penalties are not normally imposed on unlicensed individuals.

Mr. Billy H. Berry

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bcc w/Enclosures 1-3 (via ADAMS distrib):

P Gwynn
 D Chamberlain
 FCongel, OE
 DACool
 FBrown
 GFSanborn
 RWis
 HFreeman
 KDSmith
 G Longo, OGC
 E Collins
 CLCain
 MRShaffer
 JEWhitten
 J Thompson
 NMIB File
 RIV File (5th Floor)
 OEMail
 N Bhala

ADAMS: X Yes No Initials: gmv
 Publicly Available Non-Publicly Available Sensitive Non-Sensitive

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C:NMIB		D:DNMS	
MRShaffer*		EECollins	
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08/20/03		08/21/03	

*Previously concurred OFFICIAL RECORD COPY T=Telephone E=E-mail F=Fax

ENCLOSURE 1

FACTUAL SUMMARY OFFICE OF INVESTIGATIONS REPORT 4-2003-012

Investigation 4-2003-013 was initiated by the NRC's Office of Investigations in March 2003 to determine if the General Manager and Radiation Safety Officer (RSO) for All Tech Corporation (ATC), an NRC licensee, deliberately failed to provide accurate and complete information to an NRC inspector regarding the possession of radioactive materials. ATC is authorized to possess and use licensed material in Boart Longyear Company (formerly Campbell Pacific Nuclear Company) and Troxler Electronic Laboratories, Inc., gauging devices that have been registered either with the NRC or with an Agreement State.

During an inspection on February 11, 2002, two NRC inspectors reviewed licensed activities at ATC's facilities in Pocatello, Idaho. During that inspection, the licensee's RSO informed the inspectors that he had only two gauges onsite at the time. When the inspectors observed four wooden boxes that were previously approved as transport containers for older model Troxler Electronic Laboratories, Inc., gauges, the RSO told the inspectors that the boxes contained no Troxler Electronic Laboratories, Inc., gauges. The RSO informed the inspector that he had "come across" the boxes and was planning to refinish them. The RSO also provided the inspector with records of the inventories of the gauges in the licensee's possession.

Several months later, on about October 13, 2002, two Troxler Electronic Laboratories, Inc., gauges were recovered from the Portneuf River near Pocatello, Idaho. On October 15, 2002, ATC reported to the NRC and the Pocatello Police Department that two Troxler Electronic Laboratories, Inc., gauges were missing/stolen. Within days, it was determined that the gauges recovered from the Portneuf River were the two gauges that ATC reported as missing/stolen.

The investigation determined that on about June 28, 2001, ATC took possession of about 4 Troxler Electronic Laboratories, Inc., gauges and one Campbell Pacific Nuclear Company gauge. ATC took possession of the Troxler Electronic Laboratories, Inc., gauges in their wooden transport boxes. When confronted about his February 2002 statements to the NRC inspector that the wooden boxes were empty and the fact the inventory records did not indicate these four Troxler Electronic Laboratories, Inc., gauges, the RSO admitted that he "misrepresented and lied" to the inspector. The RSO stated that he lied about the wooden boxes being empty because the gauges were not carried on his inventory at the time, and he knew that. The RSO stated that, although some of the gauges may have been at a vendor's facility being serviced, some of the gauges were present during the inspection. The RSO admitted that he told the inspector that all the boxes were empty to avoid having the inspector look in all of them.

It appears the RSO deliberately failed to provide complete and accurate information to the NRC inspector during the February 11, 2002 inspection in his statements and the records he provided to the inspector.

ENCLOSURE 2

10 CFR 30.10 - Deliberate misconduct.

(a) Any licensee, certificate of registration holder, applicant for a license or certificate of registration, employee of a licensee, certificate of registration holder or applicant; or any contractor (including a supplier or consultant), subcontractor, employee of a contractor or subcontractor of any licensee or certificate of registration holder or applicant for a license or certificate of registration, who knowingly provides to any licensee, applicant, certificate holder, contractor, or subcontractor, any components, equipment, materials, or other goods or services that relate to a licensee's, certificate holder's or applicant's activities in this part, may not:

(1) Engage in deliberate misconduct that causes or would have caused, if not detected, a licensee, certificate of registration holder, or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission; or

(2) Deliberately submit to the NRC, a licensee, certificate of registration holder, an applicant, or a licensee's, certificate holder's or applicant's, contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR Part 2, Subpart B.

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee, certificate of registration holder or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation, of any license issued by the Commission; or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, certificate of registration holder, applicant, contractor, or subcontractor.