



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

June 28, 2004

EA-04-103

Soil Consultants, Inc.
ATTN: Mr. Joseph W. Dixon, President
9303 Center Street
Manassas, VA 20110-5547

SUBJECT: APPARENT VIOLATION OF EMPLOYEE PROTECTION REQUIREMENTS
(OFFICE OF INVESTIGATIONS REPORT NO. 2-2003-061)

Dear Mr. Dixon:

This letter refers to an investigation conducted at Soil Consultants, Inc. (SCI) by the U.S. Nuclear Regulatory Commission (NRC) Office of Investigations (OI). The purpose of the investigation was to determine if a former dispatcher, employed by SCI, was the subject of employment discrimination for engaging in protected activities in accordance with 10 CFR 30.7. This issue was discussed during a June 8, 2004, telephone conversation with you. The enclosed Report of Investigation (ROI) No. 2-2003-061 provides an overview of the evidence gathered during this investigation. The ROI provides the Office of Investigation's (OI) conclusion regarding the investigation, not necessarily the staff's final conclusion. This ROI is only being provided to predecisional enforcement conference (PEC) participants. Further release of this information is not permitted.

The NRC has determined that the dispatcher engaged in protected activity when he reported a nuclear safety concern (potential radiation exposure from a damaged nuclear gauge) to an individual who he believed to be his immediate supervisor and to a laboratory manager. SCI also apparently believed that the dispatcher had contacted the NRC with his concerns resulting in an NRC inspection at the SCI facility. An SCI evaluation report dated August 14, 2003, indicated that the dispatcher was terminated, in part, because he "did not follow company policy by going to a supervisor to report an alleged nuclear incident." While the NRC expects that employees will normally raise safety concerns to their employer, the NRC also encourages employees to come to the NRC at any time they believe the NRC should be aware of their concerns. Whether or not the dispatcher followed company policy in reporting concerns to his supervisor, Federal law specifically prohibits discrimination against employees for raising safety issues to the NRC or otherwise engaging in protected activities.

Based on the staff's review of this investigation, an apparent violation was identified and is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. A copy of the Enforcement Policy is attached and can also be found on the NRC's Web site at www.nrc.gov; select *What We Do, Enforcement*, then *Enforcement Policy*. The apparent violation of 10 CFR 30.7, "Employee protection," involves the termination of a dispatcher, for engaging in a protective activity (expressing concerns regarding potential radiation exposure from a damaged nuclear gauge).

Before the NRC makes its enforcement decision, we are providing you an opportunity to attend a closed, transcribed PEC to discuss the apparent violation. We will provide you with the time, date, and location of the PEC when it is scheduled.

The NRC's Enforcement Policy permits the individual who is the subject of the alleged employment discrimination to participate in the conference. Accordingly, the dispatcher will be invited to attend the PEC. The dispatcher may participate by observing the conference and, following the presentation by SCI, s/he may, if desired, present his/her views on why s/he believes discrimination occurred and comment on the SCI presentation. SCI will then be afforded an opportunity to respond and the NRC may ask some clarifying questions. Under no circumstances will the NRC staff permit SCI or the dispatcher to cross-examine or question each other.

The decision to hold a PEC does not mean that the NRC has made a final determination regarding whether a violation occurred or whether an enforcement action will be taken. PECs are held to obtain information to enable the NRC to make an enforcement decision, such as to obtain a common understanding of the facts, root cause, significance of the issue, and your plans for lasting and effective corrective action. In addition, this is an opportunity for you to point out any errors and for you to provide any information concerning your perspectives on: (1) the severity of the violation; (2) the application of the factors that the NRC considers when assessing a violation (see the NRC Enforcement Policy); and (3) any other application of the Enforcement Policy to this case.

Please be advised that the number and characterization of apparent violation(s) may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter.

The NRC is also concerned that events such as those associated with this case could have caused a chilling effect on other SCI personnel. Knowledge of these events could deter other personnel from identifying and reporting their own nuclear safety related concerns. On November 26, 2003, the NRC issued a letter to SCI regarding employees' rights to contact the NRC. You subsequently responded, in a letter dated December 15, 2003, with actions that you have taken to ensure that employees at SCI understand their rights and responsibilities regarding safety violations and their rights to contact the NRC. As such, please address at the PEC, the actions you have taken or plan to take to assure that employees are willing to raise safety and compliance concerns within your organization and to the NRC. It would be helpful if SCI provided examples, if they exist, which demonstrate successful implementation of such actions.

The enclosed copy of the ROI is only being provided to PEC participants at this time. After a full review of the circumstances, the NRC may conclude that no enforcement action is warranted. Therefore, this ROI should not be release to any members of the public. The dispatcher will also be provided a copy of the ROI prior to the PEC. Please note that assisting in an OI investigation in any manner is considered a protected activity. Any adverse action taken against individuals in retaliation for assisting the investigation will be considered a violation of the NRC's employee protection regulation.

In addition, be advised that the NRC is still evaluating the apparent violations identified during the August 2003 NRC inspection. You will be notified of our findings in these matters by

separate correspondence. Please note, that the PEC is being held to discuss the apparent discrimination of a former employee, not to discuss the apparent violations identified during the August 2003 NRC inspection. Those apparent violations will be discussed under separate correspondence.

For questions concerning the PEC, please contact Mr. Russell Arrighi, NRC, Office of Enforcement at 301-415-3936 or via e-mail at RJA1@nrc.gov

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, without enclosure (3), will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. 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.

Sincerely,

/RA/

Frank J. Congel, Director
Office of Enforcement

Docket No.: 030-33635
License No.: 45-15200-04

Enclosures:

1. Copy of *Code of Federal Regulations* 10 CFR 30.7, "Employee protection."
2. Copy of NUREG-1600, "General Statement of Policy and Procedures for NRC Enforcement Actions." (ADAMS Accession No. ML 041750026)
3. Redacted Copy of the Office of Investigations Report of Investigation No. 2-2003-061
(EXEMPT FROM PUBLIC DISCLOSURE)

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30.7 Employee protection

(a) Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor. The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraphs (a), (e), or (f) of this section by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant may be grounds for--

(1) Denial, revocation, or suspension of the license.

(2) Imposition of a civil penalty on the licensee or applicant.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement

in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each specific licensee, each applicant for a specific license, and each general licensee subject to part 19 shall prominently post the revision of NRC Form 3, "Notice to Employees," referenced in 10 CFR 19.11(c).

(2) The posting of NRC Form 3 must be at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.

(3) Copies of NRC Form 3 may be obtained by writing to the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter, by calling (301) 415-5877, via e-mail to forms@nrc.gov, or by visiting the NRC's Web site at <http://www.nrc.gov> and selecting forms from the index found on the home page.

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the NRC or to his or her employer on potential violations or other matters within NRC's regulatory responsibilities. [58 FR 52408, Oct. 8, 1993, as amended at 60 FR 24551, May 9, 1995; 61 FR 6764, Feb. 22, 1996; 68 FR 58803, Oct. 10, 2003]

Enclosure 2

NUREG-1600, General Statement of Policy and Procedures for NRC Enforcement
Actions

Enclosure 3

Redacted Copy of the Office of Investigations Report No. 2-2003-061