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ADMITTED IN VIRGINIA  
AND THE DISTRICT OF  
COLUMBIA

OF COUNSEL TO  
HAAS & ANDERSON, P.C.

MAILING ADDRESS:  
P.O. BOX 1853  
ANNANDALE, VA 22003

November 5, 2004

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

Via Facsimile & U.S. Mail:

Re: Soil Consultants, Inc.  
Reply to Notice of Violation  
EA-04-103

Dear Mr. Congel:

As you may be aware, I am counsel for Soil Consultants, Inc. ("SCI"). I have been requested by my client to *Reply* to the above referenced *Notice of Violation*.

As such, it is my understanding that what is required are responses to the following:

- 1.) admission or denial of the alleged violation,
- 2.) the reasons for the violation if admitted, and if denied, the reasons why,
- 3.) the corrective steps that have been taken and the results achieved,
- 4.) the corrective steps that will be taken to avoid further violations, and
- 5.) the date when full compliance will be achieved.

Some of the above criteria appears better to lend itself to 'materials' violation, but SCI will attempt to formulate our response based upon the above predicate.

1. SCI denies the alleged violation.
2. We deny the violation because although the subjective conclusion reached by the Commission was that Mr. Clark was terminated, at least in part, because SCI believed that he notified the NRC regarding possible violations of NRC requirements, this in fact was not among the considerations that entered into SCI's decision to let stand Mr.

3. SCI does not claim 'error' in the notice other than to say SCI contests the determination related to the underlying violation.

4. While the matter is pending the Respondent herein seeks abeyance of the proposed civil penalty subject to a further determination on the underlying violation.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul C. Miller". The signature is written in a cursive style with a large, sweeping initial "P".

Paul C. Miller  
Counsel for Soil Consultants, Inc.

cc: Regional Administrator, U.S. Nuclear Regulatory Commission,  
Region 1 (*via U.S. mail only*).  
J. Dixon (*via U.S. mail only*).

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Via Facsimile & U.S. Mail:

Re: Soil Consultants, Inc.  
Answer to Notice of Violation  
EA-04-103

Dear Mr. Congel:

As you may be aware, I am counsel for Soil Consultants, Inc. ("SCI"). I have been requested by my client to file this *Answer to a Notice of Violation*.

As such, it is my understanding that what is required are responses to the following:

- 1.) deny the violation listed in this Notice, in whole or in part,
- 2.) demonstrate extenuating circumstances,
- 3.) show error in this notice,
- 4.) show other reasons why the penalty should not be imposed.

In Answer, SCI states as follows:

1. SCI denies the alleged violation in its entirety.
2. SCI has filed, in conjunction with this *Answer*, a *Reply to a Notice of Violation* seeking to have the subject determination overturned, reconsidered or appealed.

Clark's self-termination. In support of our position in this regard we rely, in part, on this Commission's own Office of Investigations, Region II, Report of February 11, 2004. Additionally, we rely on a U.S. Department of Labor investigatory finding of March 17, 2004 which was consistent with the Commission's Region II, Office of Investigations finding in which both investigative teams reached similar conclusions that Mr. Clark was not discriminated against by SCI.

The Commission's finding of a violation appears to discount other testimony and inferences that support the proposition that SCI's inquiry with employees as to who may have called in an NRC safety concern was incidental to the larger concern of SCI that being that a series of emergency measures put in place to safeguard the welfare of employees had apparently broken down.

In our opinion the Commission's findings do not take into account the complete set of facts surrounding SCI's subject inquiry, including but not limited to, having failed to interview either Steve Nichols, Scott Brown, or Ron Ray concerning details of the circumstances that occurred from approximately August 4, 2003 through August 14, 2003. While a 'protected activity' would include both an employee reporting health or safety concerns to his employer or the NRC, SCI has specifically been cited for a violation of the latter. A detailed evaluation of the facts when all those persons having firsthand knowledge of the circumstances surrounding this matter are evaluated lead to the more likely conclusion that Clark's engagement in a protected activity was not a factor considered by SCI in his eventual disassociation with SCI. SCI had ample grounds for terminating Mr. Clark on and prior to August 14, 2003. SCI had insufficient facts available to them on August 14, 2003 to reach the conclusion that Mr. Clark had *notified the NRC*. The only significant facts known to SCI at the time was a report originating with Clark that an employee had called the NRC and that an NRC inspection occurred a short time thereafter. While it appears SCI acted at least in part on that information more particularly for identifying an emergency procedure breakdown, the Commission's conclusion that it was for the purpose of identifying an informant and ultimately terminating the relationship is extreme and unsupported. It is equally plausible that Mr. Clark's relationship was already strained based upon a number of passed issues that are of record including chronic tardiness, purchasing a substantial sum of unauthorized equipment, and delegating work to others that was his to perform. Clark initially reported that a rod fell out of a nuclear device and came into contact with him on August 4, 2003. Clark was not at SCI on that day, nor the day after for that matter. Apparently, not until August 7, 2003 did Clark report the incident to anyone else. He did on August 7, 2003 report the August 4, 2003 incident to one Nevel who later that day confirmed it was not

the dangerous condition that Clark had suspected. Clark's report of having prior reported it to one Ray has been denied by Ray. No further action was apparently taken by anyone for SCI. The period of time from the alleged nuclear incident until the time a radiation safety officer ("RSO") was advised of the incident was an internal emergency breakdown within SCI. This would prove to be of significant concern to management. Clark's announcement on a Saturday afternoon to a co-worker of an apparent call to the NRC having occurred on August 8, 2003 while in an apparent impaired state was initially dismissed by that employee. It was not until Tuesday, August 12, 2003 that SCI management personnel who had the ability to input into Clark's continued employment had any knowledge concerning the then current NRC inspection as having possibly originated from an employee report. Initially it was believed that the NRC inspection was routine. The apparently employee initiated report was of an apparent health concern that management personnel concluded SCI had failed to respond to adequately. Their inquiry, while in hindsight being less than tactful, required them to query all employees having knowledge of the apparent August 4, 2003 incident and the surrounding circumstances, not to find and punish 'informants' but, rather, to have all facts available to them in order to address an alarming breakdown in SCI's emergency management procedures. Again, it is acknowledged, yet innocent, that the inquiry was less than precise. Clark's self-termination occurring the same week was coincidental and related to past performance coupled with his four (4) day unexcused absence of the same week.

The evidence, when viewed as a whole, is clear and convincing that a decision to terminate Clark by SCI had been reached as early as July 15, 2003 with the publication of an inter-office Memorandum seeking someone to replace Arthur Clark. (Agent V. Selewski received a copy of this transmission on 12-22-03). Further, Mr. Steve Nichols (an SCI employee) was being trained for Mr. Clark's position well before the subject incident and would have testified that he was promised the position. Mr. Nichols did, subsequent to Clark's employment, assume the position of dispatcher. The investigative report cites the 'nuclear incident' by Clark's account as having occurred on August 4, 2003, a date that Clark was not even at work. That Clark was missing without SCI having any knowledge of his whereabouts, or any reasonable excuse, for a four (4) day period would in and of itself offer sufficient reason not to rehire him following his own self-termination. When there are two (2) equally plausible conclusions to be reached by a given set of facts speculation should not be supplied by this Commission in order tip the scales in favor of Mr. Clark. The requisite burden of proof is Clark's to bear. Clark's required showing of facts to support his claim by a *preponderance of the evidence* standard can only lead to the conclusion that Mr. Clark's claim is lacking, and therefore unsubstantiated. Speculation should not be supplied to bridge the gap. SCI respectfully

requests the Commission reconsider its decision based on the forgoing, or in the alternative, advise SCI of its appeal rights in this cause.

3. Notwithstanding SCI's denial of the violation, the matter has caused us to evaluate and put into place the following measures to help insure that there will not be any recurrence of complaints such as the instant action. These measures include the following:

- Increase our Radiation Safety Officer ("RSO") count from 2 to 4 RSO's. This will allow for better coverage and scrutiny of our program as well as giving our employees a larger audience in which to voice concerns about nuclear safety.
- The appointment of Mr. Ron Ray as the company safety manager.
- We have increased the frequency of our managers' meetings - with certain managers meeting with staff weekly; project managers now have to complete at least one team meeting per month; Company wide meetings are now held once a month; senior management meets every other Wednesday. Of the 220 workdays per year, this is approximately 100 meetings per year in which nuclear safety will be discussed. Employees at all levels may express their concerns to be acted upon my middle and upper management. Employees are advised that they may at any time express their safety concerns on any matter at anytime to the NRC.
- In terms of formal training for filed personnel, we have implemented an in-house program that encompasses a yearly recap of NRC and DOT regulations with each employee on the date of his/her employment anniversary. In the above mentioned meetings, twice a year we hold a Nuclear Safety class for technicians. We have loaded "Hazmat Transportation Security Awareness Training Module" onto a technician workstation computer and annually the technicians complete the training and exam via the computer. (This is only required every three (3) years by DOT, but we have reduced our internal requirement to one year.).
- Our dispatchers no longer issue dosimetry badges; it is a function of one of our RSO's during his/her monthly inspections.
- We have brought to the employees' attention that we possess a Suggestion Box for any concerns.
- We have revised our Safety Policy to bring Nuclear Safety to the forefront of the administrative staff as well as the field personnel. Once a quarter our office

manager will have one of our RSO's conduct a nuclear safety class in the administrative assistant meetings.

- We had an outside evaluation performed by Garth Jones, P.E., from one of our branch offices. Mr. Jones is a radiation safety officer and has a background in nuclear gauge radiation safety.

4. 'Corrective steps' that SCI recognizes should be taken in the future are not so much corrective measure, rather, a continuing due diligence compliance program focused on the recognition that it is through employee input that SCI safeguards against potential catastrophic safety and health dangers in the workplace. It is incumbent on us to foster employee input and let employees know that their input will be taken seriously. This includes instilling within our employees the confidence that SCI will act on employee concerns. They must know that their concerns are constructively received and no retaliatory action will be considered against an expression of concern. Implementing such Company policy requires a 'grassroots' approach so that upper management's 'intentions' are understood and implemented at the middle management level. The forgoing actions in ¶3, above, will help insure these considerations are not only implemented, but acted upon. In addition, we have initiated a non-management counsel of employees with the ability to meet and collectively discuss any concerns without involvement of middle management, and a direct voice to the President.

5. *Achievement of full compliance ..*

SCI denies it perpetrated any discriminatory act toward Clark, and therefore was not in a state of non-compliance at any time..

Sincerely,



Paul C. Miller  
Counsel for Soil Consultants, Inc.

cc: Regional Administrator, U.S. Nuclear Regulatory Commission,  
Region 1 (via U.S. mail only).  
J. Dixon (via U.S. mail only).