UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
475 ALLENDALE ROAD
KING OF PRUSSIA, PENNSYLVANIA 19406-1415

January 6, 2009

Docket No. 03032029 License No. 52-25133-01
EA-08-332

Jennifer O'Neill-Torres
President/Radiation Safety Officer
S&M Testing Laboratory
Valle Santa Barbara
Calle Soto, Solar C
Gurabo, PR 00778

SUBJECT: S&M TESTING LABORATORY, NRC INSPECTION REPORT NO. 03032029/2007001 AND INVESTIGATION REPORT NO. 1-2008-030

Dear Ms. O'Neill-Torres:

This refers to the NRC inspection conducted from May 1, 2007 through September 23, 2008, at Carr H1, KM 30.2, Caguas, PR; 271 Soeno, Urb. College Park, San Juan, PR; and Calle Soto, Solar C, Gurabo, PR. The inspection showed that S&M Testing Laboratory had: terminated all business operations related to use of NRC licensed gauges; moved all licensed gauges to an unauthorized storage location at a private residence located in Gurabo, PR; and was unresponsive to repeated attempts by NRC staff to contact the company to discuss the conduct of licensed activities. In addition, S&M Testing Laboratory failed to pay annual license fees, which prompted NRC to issue Orders revoking S&M Testing Laboratory's NRC license.

On December 6, 2007, our inspector made telephone contact with you, but you were uncooperative and refused to provide any information regarding the licensed gauges possessed by S&M Testing Laboratory including their location or conditions of storage. On August 6, 2008, NRC staff, with assistance from the NRC Office of Investigations (OI) and a representative from the Federal Bureau of Investigations (FBI), successfully contacted you by telephone and subsequently met you at a private residence in Gurabo, PR. You acknowledged that you had received NRC letters and telephone calls, but did not respond to NRC inquiries because: (1) you did not have answers to NRC questions, and (2) you had encountered significant emotional stress, and, therefore, responding to NRC was "not a priority" for you.

On August 6, 2008, you informed the inspector that S&M Testing Laboratory had no further use for the gauges, that the company did not have the resources to dispose of the gauges, and that NRC or its contractor could remove the gauges for disposal. The NRC contacted the Coordinator of the Conference of Radiation Control Program Directors (CRCPD), and the Coordinator agreed to arrange the disposal of the 11 gauges possessed by S&M Testing Laboratory under the Orphan Source Program. On September 23, 2008, the CRCPD's contractor removed the gauges from a private residence in Gurabo, PR, and stored them at an authorized location. In accordance with our letter to you dated October 22, 2008 (ML082960725), we notified you that we planned to dispose of the gauges unless you notified

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the NRC in writing within seven (7) days from the date of that letter. Because we did not hear from you in that time period, on November 19, 2008, the 11 gauges that were possessed by S&M Testing were transferred to a vendor for disposal.

On August 6, 2008, Sattar Lodhi, Ph.D., of this office summarized his inspection findings with you, and on September 23, 2008, Raymond Lorson, Chief, Decommissioning Branch, NRC Region I, summarized the inspection findings including the apparent violations of NRC requirements. The apparent violations included the following: (1) failure to provide NRC an opportunity to inspect byproduct material and the premises where the byproduct material was stored as required by 10 CFR 30.52(a); (2) failure to confine possession of byproduct material to only those locations authorized by NRC license No. 52-25133-01; (3) failure to utilize a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges were not under the control and constant surveillance of the licensee as required by 10 CFR 30.34(i); (4) failure to properly transfer control of licensed activities as required by 10 CFR 30.34(b); (5) possession of byproduct material (i.e., two gauges) that were not authorized by NRC license amendment as required by 10 CFR 30.3; (6) failure to store and transport nuclear gauges with the source rod or the transport container locked as required by License Condition No. 17; (7) failure to ensure by examination or appropriate tests that Class 7 (radioactive) material transport containers are in unimpaired physical condition prior to shipment as required by 49 CFR 173.475; and (8) failure to test sealed sources for leakage and/or contamination at least once every year as required by License Condition No. 15.

Based on the information obtained during the inspection, the NRC Office of Investigations (OI) initiated an investigation on March 7, 2008, to determine if S&M Testing Laboratory deliberately failed to amend NRC License No. 52-25133-01 to authorize storage of the gauges at an alternate location and intentionally failed to provide NRC an opportunity to inspect the gauges. OI found that you, as the President and Radiation Safety Officer of S&M Testing Laboratory, deliberately failed to: (1) amend your NRC license to authorize storage of licensed gauges at an alternate location, and (2) provide the NRC an opportunity to inspect the gauges. The OI findings are described in the enclosed Factual Summary of the OI Investigation Report No. 1-2008-030.

Based on the results of the inspection and the OI investigation, eight (8) apparent violations of NRC requirements were identified. Three of the apparent violations are being considered for escalated enforcement action in accordance with the current NRC Enforcement Policy. The NRC Enforcement Policy is included on the NRC's Website at www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html. The three apparent violations involved the failures to: (1) provide NRC an opportunity to inspect byproduct material and the premises where the byproduct material was stored as required by 10 CFR 30.52(a); (2) confine possession of byproduct material to only those locations authorized by NRC License No. 52-25133-01; and (3) utilize a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges were not under the control and constant surveillance of the licensee as required by 10 CFR 30.34(i). Because the NRC has not made a final determination in this matter, no Notice of Violation is being issued at this time. In addition, please be advised that the number and characterization of apparent violations described in the enclosed inspection report may change as a result of further NRC review.

Before the NRC makes its enforcement decision, the NRC would like to discuss these apparent violations with you at a Predecisional Enforcement Conference (PEC) at the NRC Region I office. The decision to hold a PEC does not mean that the NRC has determined that a violation has occurred or that enforcement action will be taken. This conference is being held to obtain information to assist the NRC in making an enforcement decision. This may include information to determine whether a violation occurred, information to determine the significance of a violation, information related to the identification of a violation, and information related to any corrective actions taken or planned. The conference will provide an opportunity for you to provide your perspective on these matters and any other information that you believe the NRC should take into consideration in making an enforcement decision. In presenting your corrective actions, you should be aware that the promptness and comprehensiveness of your actions will be considered in assessing any civil penalty for the apparent violations. The guidance in the enclosed excerpt from NRC Information Notice 96-28, "Suggested Guidance Relating to Development and Implementation of Corrective Action," may be helpful.

Instead of a PEC, S&M Testing may request Alternative Dispute Resolution (ADR) with the NRC. ADR is a general term encompassing various techniques for resolving conflict outside of court using a neutral third party. The technique that the NRC has decided to employ is mediation. In mediation, a neutral mediator with no decision-making authority helps parties clarify issues, explore settlement options, and evaluate how best to advance their respective interests. The mediator's responsibility is to assist the parties in reaching an agreement. However, the mediator has no authority to impose a resolution upon the parties. Mediation is a confidential and voluntary process. If the parties (the NRC and S&M Testing Laboratory) agree to use ADR, they select a mutually agreeable neutral mediator and share equally the cost of the mediator's services. Additional information concerning the NRC's ADR process can be obtained at www.nrc.gov/about-nrc/regulatory/enforcement/adr.html. The Institute on Conflict Resolution (ICR) at Cornell University has agreed to facilitate the NRC's program as an intake neutral. Intake neutrals perform several functions, including: assisting the parties in determining ADR potential for their case, advising parties regarding the ADR process, aiding the parties in selecting an appropriate mediator, explaining the extent of confidentiality, and providing other logistic assistance as necessary. Please contact ICR at Cornell University at (877) 733-9415 within **10** days of the date of this letter if you are interested in pursuing resolution of these issues through ADR.

Regardless of whether you choose a PEC or ADR, please be prepared to summarize your corrective actions and discuss your oversight and implementation of a program that ensures for consistent, continued safe storage of radioactive material.

Please contact Marie Miller at (610) 337-5205 within **10** days of the date of this letter to notify the NRC of your decision to either participate in a PEC or pursue ADR. A PEC or an ADR session should be held within 30 days of the date of this letter. If a PEC is held, it will be transcribed and will be closed to public observation; however, the time and date of the conference will be announced.

If you do not contact us regarding your participation in either a PEC or ADR within the time period specified, and an extension of time has not been granted by the NRC, we will make an enforcement decision based on available information.

No written response regarding the apparent violations is required at this time. You will be advised by separate correspondence of the results of our deliberations on this matter.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter will be 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.

Sincerely,

/RA/

John D. Kinneman, Director
Division of Nuclear Materials Safety

Enclosures:
1. Inspection Report No. 03032029/2007001
2. Factual Summary of OI Investigation Report No. 1-2008-030
3. Excerpt from NRC Information Notice 96-28
4. Brochure NUREG/BR-0317

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Sincerely,

/RA/

John D. Kinneman, Director
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