



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION IV
612 EAST LAMAR BLVD, SUITE 400
ARLINGTON, TEXAS 76011-4125

March 6, 2009

IA-08-055

Mr. Mark M. Ficek
[HOME ADDRESS DELETED
UNDER 10 CFR 2.390(a)]

SUBJECT: CONFIRMATORY ORDER (EFFECTIVELY IMMEDIATELY)
(NRC INVESTIGATION REPORT NO. 4-2008-009)

Dear Mr. Ficek:

The enclosed Confirmatory Order is being issued to you as a result of a successful alternative dispute resolution (ADR) session. The enclosed commitments were made by you as part of a settlement agreement between yourself and the Nuclear Regulatory Commission (NRC) concerning an apparent violation of 10 CFR 30.10.

In a letter dated December 15, 2008, the NRC provided you with the results of an investigation completed by the NRC Office of Investigations. The purpose of the investigation was, in part, to determine if you violated 10 CFR 30.10. Our letter noted that, based on the evidence developed during the investigation, an apparent violation of NRC requirements was identified and was being considered for escalated enforcement action in accordance with the NRC Enforcement Policy. A Factual Summary of the Office of Investigations' investigation was enclosed with our letter.

In addition, our December 15, 2008, letter offered you a choice to (1) attend a Predecisional Enforcement Conference, (2) provide a written response, or (3) request ADR with the NRC in an attempt to resolve any disagreement on whether a violation occurred, the appropriate enforcement action, and the appropriate corrective actions.

In response, you requested ADR to resolve differences you had with the NRC concerning the apparent violation. An ADR mediation session was held on February 5, 2009, at which a preliminary settlement agreement was reached. The elements of the preliminary agreement were formulated and agreed to at the mediation session and are contained within the enclosed Confirmatory Order.

As part of the settlement agreement, you agreed to refrain from engaging in licensed activities for a period of 2 years. In recognition of this action, the NRC agreed not to pursue further enforcement action against you in this matter. The NRC will evaluate the implementation of your commitment in future inspections.

We have enclosed a Confirmatory Order (Effective Immediately) to confirm the commitments made as part of the settlement agreement. As evidenced by your signed "Consent and Hearing

Mr. Mark M. Ficek
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Waiver Form" (copy enclosed) dated March 5, 2009, you agreed to issuance of this letter and Confirmatory Order.

Pursuant to Section 223 of the Atomic Energy Act of 1954, as amended, any person who willfully violates, attempts to violate, or conspires to violate, any provision of this Order shall be subject to criminal prosecution as set forth in that section. Violation of this Order may also subject the person to monetary civil penalties.

You are not required to respond to this letter. However, if you choose to provide a response, please provide it within 30 days to the U.S. Nuclear Regulatory Commission, Regional Administrator, Region IV, 612 East Lamar Blvd., Suite 400, Arlington, Texas 76011-4125. If you have any questions or comments concerning this letter, please contact Mr. Mark Haire of my staff at 817-860-8121.

A copy of this letter and its enclosures will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. The NRC will also include this letter and attached Confirmatory Order on its website for a period of approximately one year at <http://www.nrc.gov/about-nrc/regulatory/enforcement.html>; select Significant Enforcement Actions.

In addition, this letter will be maintained by the Office of Enforcement in a NRC Privacy Act system of records, NRC-3, "Enforcement Actions Against Individuals." The NRC-3 system provides information on individuals that have been considered for or have been issued an enforcement action. Information about this system of records can be accessed from our Web site at www.nrc.gov/reading-rm/foia/privacy-systems.html; then select Republication of Systems of Records Notices, January 6, 2009 (74 FR 574).

Your response, if you choose to provide one, will also be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS).

Sincerely,



Elmo E. Collins
Regional Administrator

Enclosures:

1. Confirmatory Order
2. Consent and Hearing Waiver Form

Mr. Mark M. Ficek
IA-08-055

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RidsOcfoMailCenter Resource;	RidsRgn1MailCenter Resource;
RidsRgn3MailCenter Resource;	OEWEB Resource;

via e-mail:

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<u>Art.Howell@nrc.gov;</u>	<u>Chuck.Cain@nrc.gov;</u>	<u>S.Woods@nrc.gov;</u>
<u>Karla.Fuller@nrc.gov;</u>	<u>Vivian.Campbell@nrc.gov;</u>	<u>Leelavathi.Sreenivas@nrc.gov;</u>
<u>William.Jones@nrc.gov;</u>	<u>Michael.Vasquez@nrc.gov;</u>	<u>Sally.Merchant@nrc.gov;</u>
<u>Mark.Haire@nrc.gov ;</u>	<u>Jack.Whitten@nrc.gov;</u>	<u>Nicole.Coleman@nrc.gov;</u>
<u>Christi.Maier@nrc.gov;</u>	<u>Blair.Spitzberg@nrc.gov;</u>	<u>Michele.Burgess@nrc.gov;</u>
<u>Bill.Maier@nrc.gov;</u>	<u>Randy.Erickson@nrc.gov;</u>	<u>Angela.McIntosh@nrc.gov;</u>
<u>Victor.Dricks@nrc.gov;</u>	<u>Linda.Mclean@nrc.gov;</u>	<u>Glenda.Villamar@nrc.gov;</u>
<u>Marisa.Herrera@nrc.gov;</u>	<u>Christian.Einberg@nrc.gov;</u>	<u>Kerstun.Day@nrc.gov;</u>
RIV Materials Docket File (5th Floor)		<u>James.Thompson@nrc.gov;</u>
R4ALLEGATION.resource@nrc.gov;		<u>Russell.Arrighi@nrc.gov;</u>
<u>Crystal.Holland@nrc.gov;</u>		

SUNSI Review Completed: MSH ADAMS: Yes No Initials: MSH
 Publicly Available Non-Publicly Available Sensitive Non-Sensitive

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 Testing_Ficek ADR.doc

RIV/ACES/ES	BC:NMSB-A	RC	D:DNMS	
MSHaire	GMVasquez	KSFuller	ATHowell	
<i>/RA/</i>	<i>/RA/ ADG for</i>	<i>/RA/</i>	<i>/RA/Whitten for</i>	
02/07/2009	02/11/2009	02/11/2009	02/11/2009	
RA/DRA	FSME	OGC	OE	Signature
EECollins	J Luehman	MClark	NHilton	EECollins
<i>/RA/ Casto for</i>	<i>/RA/</i>	<i>/RA/</i>	<i>/RA/</i>	
02/12/2009	02/27/2009	02/19/2009	03/04/2009	03/6/2009

OFFICIAL RECORD COPY

T=Telephone

E=E-mail

F=Fax

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
Mr. Mark M. Ficek

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IA-08-055

CONFIRMATORY ORDER
(EFFECTIVE IMMEDIATELY)

I

Mr. Mark M. Ficek is the President of Mattingly Testing Services, Inc., (Mattingly) in Molt, Montana. Mattingly is the holder of Materials License No. 25-21479-01 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 34, last amended on September 11, 2008, and due to expire on February 28, 2016. The license authorizes Mattingly to possess and use byproduct material for industrial radiographic operations in NRC jurisdiction, and in areas of exclusive Federal jurisdiction within Agreement States. Mattingly's main office is located in Molt, Montana.

This Confirmatory Order is the result of an agreement reached during an alternative dispute resolution (ADR) mediation session conducted on February 5, 2009, at the NRC Region IV offices in Arlington, Texas.

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II

On November 5, 2007, the NRC Office of Investigations began an investigation (Office of Investigations Case No. 4-2008-009) to determine, in part, if Mr. Ficek violated 10 CFR 30.10. Based on the evidence developed during its investigation, one apparent violation was identified. The results of the investigation, completed on September 12, 2008, were sent to Mr. Ficek in a letter dated December 15, 2008. In response to NRC's December 15, 2008, letter, Mr. Ficek requested ADR to resolve this issue.

On February 5, 2009, the NRC and Mr. Ficek met in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement on resolving any differences regarding the dispute. This confirmatory order is issued pursuant to the agreement reached during the ADR process.

III

In response to the NRC's offer, Mr. Ficek requested use of the NRC ADR process to resolve differences he had with the NRC. During that ADR session, a preliminary settlement agreement was reached. The elements of the agreement consisted of the following:

Pursuant to the Nuclear Regulatory Commission Office of Enforcement's ADR process, the following are the terms and conditions agreed upon in principle by Mr. Mark M. Ficek, and the

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NRC relating to NRC Investigation Report No. 4-2008-009 (IA-08-055) characterized by the NRC to Mr. Ficek in a letter dated December 15, 2008.

Whereas, NRC's investigation completed September 12, 2008, identified one apparent violation of 10 CFR 30.10;

Whereas, NRC acknowledges that this is the first apparent violation identified by the NRC concerning Mr. Ficek during his tenure as RSO and President of Mattingly Testing Services, Inc;

Whereas, Mr. Ficek does not agree that a violation of 10 CFR 30.10 occurred;

Whereas, Mr. Ficek and the NRC agree to disagree on whether a violation of 10 CFR 30.10 occurred;

Whereas, these terms and conditions shall not be binding on either party until memorialized in a confirmatory order issued by the Nuclear Regulatory Commission to Mr. Ficek relating to this matter;

Therefore, the parties agree to the following terms and conditions:

1. Mr. Mark Ficek agrees to refrain from engaging in licensed activities for a period of two years. Therefore, Mr. Mark Ficek is prohibited for two years from the date of this Order

Enclosure 1

from engaging in NRC-licensed activities. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC, including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 CFR 150.20.

2. For a period of one year after the two year period of prohibition has expired, Mr. Ficek shall, within 20 days of his becoming involved in NRC-licensed activities, as defined in Paragraph 1 above, provide notice to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities. In the notification, Mr. Ficek shall include a statement of his commitment to compliance with regulatory requirements and the basis why the Commission should have confidence that he will now comply with applicable NRC requirements.
3. The NRC agrees not to pursue any further enforcement action against Mr. Ficek in connection with the apparent violation identified in the NRC's December 15, 2008, letter to him.

On March 5, 2009, Mr. Ficek consented to issuing this Order with the commitments, as described in Section V below. Mr. Ficek further agreed that this Order is to be effective upon issuance and that he has waived his right to a hearing.

IV

Since Mr. Ficek has agreed to take additional actions to address NRC concerns, as set forth in Item III above, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that Mr. Ficek's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that public health and safety require that Mr. Ficek's commitments be confirmed by this Order. Based on the above and Mr. Ficek's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Parts 30 and 34, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT:

1. Mr. Mark Ficek agrees to refrain from engaging in licensed activities for a period of two years. Therefore, Mr. Mark Ficek is prohibited for two years from the date of this Order from engaging in NRC-licensed activities. NRC-licensed activities are those activities that are conducted pursuant to a specific or general license issued by the NRC,

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including, but not limited to, those activities of Agreement State licensees conducted pursuant to the authority granted by 10 CFR 150.20.

2. For a period of one year after the two year period of prohibition has expired, Mr. Ficek shall, within 20 days of his becoming involved in NRC-licensed activities, as defined in Paragraph 1 above, provide notice to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities. In the notification, Mr. Ficek shall include a statement of his commitment to compliance with regulatory requirements and the basis why the Commission should have confidence that he will now comply with applicable NRC requirements.

The Regional Administrator, NRC Region IV, may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Ficek of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than Mr. Ficek, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and include a statement of good cause for the extension.

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A request for a hearing must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007, 72 Fed. Reg. 49,139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve documents over the internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five (5) days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate also is available on NRC's public website at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC

public website at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC website at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 C.F.R. 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and

Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the

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Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested to not include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their works.

If a person other than Mr. Ficek requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 C.F.R. 2.309(d) and (f).

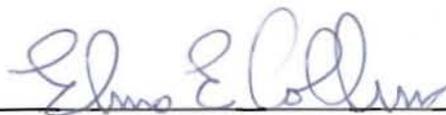
If the hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

Mr. Mark M. Ficek
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In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires if a hearing request has not been received. A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

FOR THE NUCLEAR REGULATORY COMMISSION

A handwritten signature in blue ink, appearing to read "Elmo E. Collins", is written over a solid horizontal line.

Elmo E. Collins, Regional Administrator

Dated this 6th day of March 2009

Enclosure 1

CONSENT AND HEARING WAIVER FORM

Mr. Mark M. Ficek hereby agrees to comply with the terms and conditions of the Confirmatory Order to be issued relating to enforcement action number IA-08-055, which will be immediately effective upon its issuance. By signing below, Mr. Ficek consents to the issuance of the referenced Confirmatory Order, effective immediately upon its issuance and, by doing so, agrees to waive the right to request a hearing on all or any part of the Confirmatory Order pursuant to 10 CFR 2.202.


Mr. Mark M. Ficek

3/5/09
Date