



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

March 10, 2009

MEMORANDUM TO: Michael T. Lesar, Chief
Rulemaking, Directives and Editing Branch
Division of Administrative Services
Office of Administration

FROM: Elmo E. Collins /RA/
Regional Administrator

SUBJECT: NOTICE OF CONFIRMATORY ORDER (EFFECTIVE
IMMEDIATELY) - MATTINGLY TESTING SERVICES -
MATERIALS LICENSE 25-21479-01

Attached please find one signed original and four copies of the subject Federal Register Notice for transmittal to the Office of the Federal Register for publication.

ADM/DAS/RDB has been given owner's rights to the Notice in ADAMS ML090700278. Publicly available NRC documents referenced in the Notice have been finalized in ADAMS and profiled for public release.

Information about this Confirmatory Order has been forwarded to the OCIO staff at WEBWORK.Resource@nrc.gov for posting to the NRC public Web site.

Docket No.: 030-20836
License No.: 25-21479-01

Staff Contact: Lynn Berger
Phone No.: (817) 860-8160

Attachments:
One original and four copies

cc:
WEBWORK.Resource@nrc.gov w/one copy

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	Docket No. 030-20836
Mattingly Testing Services, Inc.)	License No. 25-21479-01
Molt, Montana)	EA-08-271

CONFIRMATORY ORDER MODIFYING LICENSE
(EFFECTIVE IMMEDIATELY)

I

Mattingly Testing Services, Inc. (Mattingly or licensee) 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.

II

On November 5, 2007, the NRC Office of Investigations (OI) began an investigation (OI Case No. 4-2008-009) into Mattingly's activities. Based on the evidence developed during

its investigation and associated inspection, nine apparent violations were identified. In addition, the NRC was concerned that willfulness may have been associated with five of those apparent violations. The results of the investigation and inspection, completed on November 19, 2008, were sent to Mattingly in a letter dated December 15, 2008. In response to NRC's December 15, 2008, letter, Mattingly requested ADR to resolve these issues.

On February 5, 2009, the NRC and Mattingly 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

During the February 5, 2009, 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 Mattingly and the NRC relating to Inspection Report No. 030-20836/2007-003 issued by the NRC to Mattingly on December 15, 2008.

Whereas, NRC's inspection and investigation conducted between November 5, 2007, and November 19, 2008, identified nine apparent violations of NRC requirements;

Whereas, the nine apparent violations involved were:

- 1) The failure to provide complete and accurate information to the Commission;
- 2) A radiographer's assistant performing radiographic operations without wearing a personnel dosimeter;
- 3) A radiographer's assistant using a radiographic exposure device without being under the personal supervision of a radiographer;
- 4) The failure to secure a radiographic exposure device containing radioactive material with a minimum of two independent physical controls when the device was not under constant surveillance by the licensee;
- 5) The failure to remove from service a radiographic exposure device after it had sustained damage to the locking mechanism and no longer operated correctly;
- 6) The failure to notify NRC within 24 hours after the discovery of an event involving damage to the locking mechanism of a radiographic exposure device;
- 7) Permitting an individual to act as a radiographer's assistant without completion of a practical examination on the use of radiographic equipment;
- 8) Using pocket dosimeters during radiographic operations that had not been checked for correct response to radiation every 12 months as required; and,
- 9) The failure to have a functional alarm system to allow the licensee to monitor, detect, assess, and respond to unauthorized access to radioactive material when left unattended in a portable darkroom;

Whereas, NRC acknowledges the extensive corrective actions Mattingly has already implemented associated with the apparent violations, which include:

- 1) Hiring three new office employees to assume various management duties;
- 2) Implementing an electronic document storage system;
- 3) Reviewing current practical exam records for accuracy;
- 4) RSO and assistant RSO performing quality reviews of paperwork;
- 5) RSO and assistant RSO performing unannounced inspections at jobsites;
- 6) Requiring self and peer-checking for proper dosimetry;
- 7) Requiring radiographer or assistant remain with the truck when the radiographic exposure device is within;
- 8) Requiring regular truck inspections and alarm testing;
- 9) Implementing a safety checklist;
- 10) Preparing notification forms to help ensure NRC notifications are made;
- 11) Purchasing additional dosimetry devices;
- 12) Requiring practical exams to take place within Mattingly's shop;
- 13) Improving the Mattingly continuing education program;
- 14) Sending assistant RSO to the Radiation Safety Academy;
- 15) Establishing a company library and encouraging self-study;
- 16) Submitting a license amendment request to replace the current RSO; and
- 17) Implementing a tracking system for dosimetry calibration;

Whereas, during a subsequent inspection in June 2008, the NRC reviewed the effectiveness of these actions and found no safety-significant violations;

Whereas, the NRC is concerned that willfulness may be associated with apparent violations 1, 3, 5, 7, and 8 above;

Whereas, Mattingly agrees that apparent violations 2, 4, 6, 8, and 9 did occur, but denies any willfulness was involved;

Whereas, Mattingly denies that apparent violations 1, 3, 5, and 7 occurred and denies that any willfulness was involved;

Whereas, NRC and Mattingly disagree on the number of violations that occurred and whether willfulness was involved;

Whereas, these terms and conditions shall not be binding on either party until memorialized in a confirmatory order issued by the NRC to Mattingly relating to this matter;

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

1. Mattingly shall contract with an independent consultant to evaluate the effectiveness of its radiation safety and compliance programs.
 - a) Within 60 days of the date of this Order, Mattingly will submit to the NRC for approval, the name(s) and qualifications of an independent

consultant(s) to review and evaluate Mattingly's radiation safety program and compliance program.

- b) Within 30 days of NRC approval of the consultant, the consultant will commence an assessment of Mattingly's radiation safety program.
- c) The consultant shall review Mattingly's training program and provide recommendations for improvement.
- d) The consultant shall review Mattingly's Operating and Emergency Procedures and provide recommendations for improvement.
- e) Within 30 days following completion of his reviews, the consultant will provide Mattingly a report discussing its findings and recommendations for program improvements. At the same time the consultant provides its report to Mattingly, the consultant will send a copy to the Director, Division of Nuclear Materials Safety, US NRC Region IV.
- f) Within 30 days of receiving the consultant's report, Mattingly will provide the NRC, in writing, its position on how it will address the consultant's findings. In its correspondence to the NRC, Mattingly will identify which of the consultant's recommendations it will implement and the time frame in which it will implement the recommendations. For those recommendations Mattingly does not accept, Mattingly will provide the NRC with its justification.
- g) Within 60 days of receiving the consultant's report, Mattingly shall submit a license amendment request incorporating updated procedures based on Mattingly's implementation of the consultant's recommendations.

- h) The consultant shall perform an annual audit of Mattingly's radiation safety program through calendar year 2012, starting with an audit of calendar year 2009 (this will result in 4 annual audits). This audit shall be performed in accordance with the suggested audit format in NUREG 1556, Volume 2, "Program-Specific Guidance About Industrial Radiography Licenses," Appendix I. The consultant will send a copy of his annual audit results to the Director, Division of Nuclear Materials Safety, U. S. NRC Region IV.
- i) The consultant shall perform field audits of the performance of radiography at temporary jobsites, and these field audits shall be performed in accordance with NUREG 1556, Volume 2, Appendix H. The field audits shall be unannounced and the auditor shall observe Mattingly radiographers actually performing radiographic operations. The auditor must make these observations in a manner such that the radiographers are unaware of his presence. After observing the radiographers perform work, the auditor may announce himself to the radiographers in order to continue the audit. These audits shall be conducted at least every six months through calendar year 2012, beginning within 30 days of NRC approval of the consultant. The consultant shall provide NRC with a copy of these audits within one week after the audit is completed.

2. Mattingly shall contract with an independent consultant to provide training.

- a) Within 60 days of the date of this Order, Mattingly will submit to the NRC for approval, the name(s) and qualifications of an independent consultant(s) to provide training;
- b) Within 30 days of NRC approval of the consultant, the consultant will provide training to the licensee's personnel who engage in licensed activities. The training shall include:
 - (1) A review of radiation mishaps involving radiography devices or gauges;
 - (2) A review of the consequences of and the potential actions that NRC may take against an individual for deliberate violations of NRC requirements;
 - (3) A review of NRC requirements and Mattingly's license conditions;
 - (4) A review of Mattingly's Operating and Emergency Procedures;
 - (5) Lessons learned from the circumstances surrounding each of the violations and apparent violations identified by the NRC in its December 15, 2008, letter;
 - (6) Reporting requirements of 10 CFR 30.50 and 10 CFR 34.101; and
 - (7) NRC's employee protection requirements contained in 10 CFR 30.7.

- 3. Mattingly may, during the effective period of this order, choose to change consultants to fulfill the requirements above after Mattingly submits the name(s) and qualifications of the new independent consultant(s) and receives NRC approval for the change.

4. Within 30 days of the date of this order, Mattingly shall submit a license amendment request incorporating updated procedures which:
 - a) Require a radiographer or assistant must remain with the radiographic exposure device unless the device is properly secured in the truck or an approved storage location;
 - b) Require the truck alarm system must be tested immediately prior to leaving the truck unattended if the truck is serving as secure storage for the radiographic exposure device;
 - c) Include a pre-job safety checklist assuring:
 - (1) The radiographer and assistant check each other to assure each is wearing properly calibrated, tested, and functioning dosimetry as required;
 - (2) Radiographers must have, on their person, their certification card while at a job site;
 - d) Require the RSO or his assistant to review each document required by NRC regulations for accuracy and completeness within 10 days of creation of said document, indicating such review by initialing and dating the document;
 - e) Require the RSO or his assistant to review all training records, exams, and certifications of each employee and sign a statement that the person is authorized to work with licensed material prior to the person functioning in the position of a radiographer or radiographer's assistant;
 - f) Provide additional guidance on the reporting requirements contained in 10 CFR 30.50 and 10 CFR 34.101;

- g) Provide guidance on when a radiographic exposure device is considered damaged such that it must not be used; and
 - h) Provide employees with a policy statement regarding the requirements of 10 CFR 30.7.
- 5. Within 30 days from the date of this order, Mattingly will develop and implement a disciplinary program with a graded approach for infractions. This disciplinary program will consider minor infractions up to willful failures to follow the regulations. The disciplinary program will emphasize individual responsibility for radiation safety and radioactive material security, and will encourage reporting safety and security concerns.
- 6. In consideration of the above actions on the part of Mattingly, NRC agrees to limit the civil penalty amount in this enforcement action to \$8,000. Accordingly, within 1 year of the date of this order, Mattingly shall pay the civil penalty in the amount of \$8,000 in accordance with NUREG/BR-0254 and submit to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, a statement indicating when and by what method payment was made.
- 7. The NRC agrees not to pursue any further enforcement action against Mattingly in connection with the apparent violations identified in the NRC's December 15, 2008, letter to Mattingly and will not count this matter as previous enforcement for the purposes of assessing potential future enforcement action in accordance with Section VI.C of the Enforcement Policy.

8. The license which is the subject of this order is modified in accordance with the requirements of the order. As such, in the event of the transfer of the NRC license for Mattingly, by virtue of sale, merger, bankruptcy, agreement or otherwise, the requirements of this confirmatory order shall survive any such transfer and shall be binding on the new license holder.

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

IV

Since the licensee 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 the Licensee'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 the Licensee's commitments be confirmed by this Order. Based on the above and the Licensee's consent, this Order is immediately effective upon issuance.

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 Part 34, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT LICENSE NO. 25-21479-01 IS MODIFIED AS FOLLOWS:

1. Mattingly shall contract with an independent consultant to evaluate the effectiveness of its radiation safety and compliance programs.
 - a) Within 60 days of the date of this Order, Mattingly will submit to the NRC for approval, the name(s) and qualifications of an independent consultant(s) to review and evaluate Mattingly's radiation safety program and compliance program.
 - b) Within 30 days of NRC approval of the consultant, the consultant will commence an assessment of Mattingly's radiation safety program.
 - c) The consultant shall review Mattingly's training program and provide recommendations for improvement.
 - d) The consultant shall review Mattingly's Operating and Emergency Procedures and provide recommendations for improvement.
 - e) Within 30 days following completion of his reviews, the consultant will provide Mattingly a report discussing its findings and recommendations for program improvements. At the same time the consultant provides its report to Mattingly, the consultant will send a copy to the Director, Division of Nuclear Materials Safety, US NRC Region IV.

- f) Within 30 days of receiving the consultant's report, Mattingly will provide the NRC, in writing, its position on how it will address the consultant's findings. In its correspondence to the NRC, Mattingly will identify which of the consultant's recommendations it will implement and the time frame in which it will implement the recommendations. For those recommendations Mattingly does not accept, Mattingly will provide the NRC with its justification.
- g) Within 60 days of receiving the consultant's report, Mattingly shall submit a license amendment request incorporating updated procedures based on Mattingly's implementation of the consultant's recommendations.
- h) The consultant shall perform an annual audit of Mattingly's radiation safety program through calendar year 2012, starting with an audit of calendar year 2009 (this will result in 4 annual audits). This audit shall be performed in accordance with the suggested audit format in NUREG 1556, Volume 2 "Program-Specific Guidance About Industrial Radiography Licenses," Appendix I. The consultant will send a copy of his annual audit results to the Director, Division of Nuclear Materials Safety, US NRC Region IV.
- i) The consultant shall perform field audits of the performance of radiography at temporary jobsites, and these field audits should be performed in accordance with NUREG 1556, Volume 2, Appendix H. The field audits shall be unannounced and the auditor shall observe Mattingly radiographers actually performing radiographic operations. The auditor must make these observations in a manner such that the radiographers are unaware of his presence. After observing the radiographers perform work, the auditor may announce himself to the radiographers in order to continue the audit. These audits shall be conducted at least every six months

through calendar year 2012, beginning within 30 days of NRC approval of the consultant. The consultant shall provide NRC with a copy of these audits within one week after the audit is completed.

2. Mattingly shall contract with an independent consultant to provide training.
 - a) Within 60 days of the date of this Order, Mattingly will submit to the NRC for approval, the name(s) and qualifications of an independent consultant(s) to provide training;
 - b) Within 30 days of NRC approval of the consultant, the consultant will provide training to the licensee's personnel who engage in licensed activities. The training shall include:
 - (1) A review of radiation mishaps involving radiography devices or gauges;
 - (2) A review of the consequences of and the potential actions that NRC may take against an individual for deliberate violations of NRC requirements;
 - (3) A review of NRC requirements and Mattingly's license conditions;
 - (4) A review of Mattingly's Operating and Emergency Procedures;
 - (5) Lessons learned from the circumstances surrounding each of the violations and apparent violations identified by the NRC in its December 15, 2008, letter;
 - (6) Reporting requirements of 10 CFR 30.50 and 10 CFR 34.101; and
 - (7) NRC's employee protection requirements contained in 10 CFR 30.7.
3. Mattingly may, during the effective period of this order, choose to change consultants to fulfill the requirements above after Mattingly submits the name(s) and qualifications of the new independent consultant(s) and receives NRC approval for the change.

4. Within 30 days of the date of this order, Mattingly shall submit a license amendment request incorporating updated procedures which:
- a) Require a radiographer or assistant must remain with the radiographic exposure device unless the device is properly secured in the truck or an approved storage location;
 - b) Require the truck alarm system must be tested immediately prior to leaving the truck unattended if the truck is serving as secure storage for the radiographic exposure device;
 - c) Include a pre-job safety checklist assuring:
 - (1) The radiographer and assistant check each other to assure each is wearing properly calibrated, tested, and functioning dosimetry as required;
 - (2) Radiographers must have, on their person, their certification card while at a job site;
 - d) Require the RSO or his assistant to review each document required by NRC regulations for accuracy and completeness within 10 days of creation of said document, indicating such review by initialing and dating the document;
 - e) Require the RSO or his assistant to review all training records, exams, and certifications of each employee and sign a statement that the person is authorized to work with licensed material prior to the person functioning in the position of a radiographer or radiographer's assistant;
 - f) Provide additional guidance on the reporting requirements contained in 10 CFR 30.50 and 10 CFR 34.101;

- g) Provide guidance on when a radiographic exposure device is considered damaged such that it must not be used; and
- h) Provide employees with a policy statement regarding the requirements of 10 CFR 30.7.

5. Within 30 days from the date of this order, Mattingly will develop and implement a disciplinary program with a graded approach for infractions. This disciplinary program will consider minor infractions up to willful failures to follow the regulations. The disciplinary program will emphasize individual responsibility for radiation safety and radioactive material security, and will encourage reporting safety and security concerns.
6. In consideration of the above actions on the part of Mattingly, NRC agrees to limit the civil penalty amount in this enforcement action to \$8,000. Accordingly, within 1 year of the date of this order, Mattingly shall pay the civil penalty in the amount of \$8,000 in accordance with NUREG/BR-0254 and submit to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, a statement indicating when and by what method payment was made.
7. The license which is the subject of this order is modified in accordance with the requirements of the order. As such, in the event of the transfer of the NRC license for Mattingly, by virtue of sale, merger, bankruptcy, agreement or otherwise, the requirements of this confirmatory order shall survive any such transfer and shall be binding on the new license holder.

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

VI

Any person adversely affected by this Confirmatory Order, other than the Licensee, 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.

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 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 not to 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 Mattingly 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. 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 horizontal line.

Elmo E. Collins, Regional Administrator

Dated this 6th day of March 2009